NATIONAL TREATY LAW AND PRACTICE

Studies on the Law of Treaties

VOLUME 1

Monroe Leigh

National Treaty Law and Practice

Dedicated to the Memory of Monroe Leigh

edited by

Duncan B. Hollis, Merritt R. Blakeslee
& L. Benjamin Ederington

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Suyderhoef, Jonas, after Gerard ter Borch
The 'swearing of the oath of ratification' of the peace of Münster,
in the main hall of the town hall of Münster, 1648.
Frederik Muller 1941, engraving and etching
Rijksmuseum-Stichting Amsterdam

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DEDICATION

> [T]he agenda was to try to elicit from each of the participants a clearer indication as to how they make their decisions internally . . . in asking us questions "is this clause an international agreement or is it not" and whether they are asking [the legislature] to approve [it], I had thought that it would contribute greatly to international understanding if we understood individual practices of individual countries . . . in that way you have a better notion of what to expect in the long run.
>
> Monroe Leigh, August 6, 1977
> Bellagio Conference on
> National Treaty Law and Procedure

Monroe Leigh passed away on November 27, 2001 at the age of 82. This compendium is dedicated to his memory. For nearly a quarter of a century, Mr. Leigh promoted the idea that treaties should be studied not simply as a subject of international law, but also carefully examined from a "national" perspective. Mr. Leigh wanted to look beyond *pacta sunt servanda* to ask what texts states actually considered to constitute treaties; who states authorized to negotiate them; what roles the various branches of a state's government had in the formation and conclusion of such treaties; and what steps states took under their domestic laws to implement them. The present volume hopes to represent the culmination of his efforts.

In 1977 and 1979, Mr. Leigh participated in two conferences in Bellagio, Italy, sponsored by the American Society of International Law with support from the U.S. Department of State and the Rockefeller Foundation. Bringing together government legal advisers and treaty experts from some 15 nations, the conferences sought to explore the similarities and differences in how states addressed treaty issues as a matter of domestic law.[1] Following the conferences, Mr. Leigh promoted the idea of publishing a book on national treaty law and practice. Although the project stalled for some time, Mr. Leigh was unwavering in his support for it. In 1995, Mr. Leigh co-edited a collection of essays published by the American Society of International Law on the treaty law and practice

[1] Among the countries represented at these conferences were Austria, Belgium, Canada, Germany, India, Israel, Italy, Japan, the Netherlands, Nigeria, Sweden, Switzerland, the United Kingdom, and the United States. In addition Australia, Brazil, and the former Union of Soviet Socialist Republics provided papers responsive to the conference's agenda.

of France, Germany, India, Switzerland, Thailand and the United Kingdom.[2] Two more volumes followed in 1999 and 2003.[3] It was always Mr. Leigh's intention, however, that these collections be consolidated into a single compendium, as a reference manual illustrating the complex questions facing nation states in negotiating, concluding, implementing and applying treaties. The present volume accomplishes this. It contains updated and revised versions of all the previously published 18 country studies, along with a new chapter on China's treaty law and practice and an introductory chapter that offers some initial insights on looking at these essays collectively. In this sense, then, the present work is not simply one dedicated to Mr. Leigh's memory, but constitutes a very real fulfillment of his own conception of a lasting reference work on the subject of national treaty law and practice.

Of course, Monroe Leigh's contributions to the law of treaties, significant as they are, present only one aspect of his lasting influence on the study and practice of international law and U.S. foreign policy.[4] In awarding him the Theberge Medal in 1989, the American Bar Association highlighted how Mr. Leigh "ha[d] done more than any single individual in this country to shape international law [and] influence the role of the United States in its development."[5] A review of Mr. Leigh's professional, academic and personal accomplishments affirms this conclusion.

For six decades, Monroe Leigh enjoyed a distinguished career as a prominent international lawyer, equally accomplished in both private and public practice. Born in Virginia in 1919, he was a *magna cum laude* graduate of Hampden-Sydney College in 1940. His initial foray into the study of law at the University of Virginia Law School was interrupted by World War II and his decision to join the Army Air Corps in 1942. He eventually served as a Captain in the Ninth Air Force in Europe. Upon resuming his studies at Virginia after completing his service, he was elected editor-in-chief of the *Virginia Law Review*.

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[2] Monroe Leigh and Merritt R. Blakeslee, eds., *National Treaty Law and Practice, Vol. I: France, Germany, India, Switzerland, Thailand, United Kingdom*, Studies in Transnational Legal Policy No. 27 (American Society of International Law, 1995).

[3] Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington, eds., *National Treaty Law and Practice, Vol. II: Austria, Chile, Colombia, Japan, Netherlands, United States*, Studies in Transnational Legal Policy No. 30 (American Society of International Law, 1999); Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington, eds., *National Treaty Law and Practice, Vol. III: Canada, Egypt, Israel, Mexico, Russia, South Africa*, Studies in Transnational Legal Policy No. 33 (American Society of International Law, 2003).

[4] *See generally* L. Benjamin Ederington, *In Memoriam: Monroe Leigh (1919–2001)*, 43 *Va. J. Int'l L. 589* (2003); Stephen M. Schwebel, *Monroe Leigh*, 96 *Am. J. Int'l L.* 159 (2002).

[5] *Monroe Leigh Awarded 1989 Theberge Medal*, 18 *Law News*, Summer 1989, at 1, 6.

Mr. Leigh began his legal career in Washington, D.C. at the firm of Covington and Burling in 1947 but left in 1951 to begin one of several terms of public service, taking a position at the U.S. Mission to the North Atlantic Council of NATO at a time when that organization was still in its formative stages. Upon returning to Washington in 1953, he joined the Department of Defense's Office of General Counsel, eventually serving as the assistant general counsel for international affairs. While at the Defense Department he negotiated many of the basing and status of forces agreements for U.S. forces stationed around the globe. To this day, the United States continues to negotiate similar treaties using the framework employed by Mr. Leigh in the 1950s.

In 1959, Mr. Leigh returned to private practice, joining the Washington, D.C. law firm of Steptoe and Johnson, where he became managing partner of the firm's international law department. For the next two decades, Mr. Leigh established himself as a preeminent authority in public international law and international trade law, representing foreign state investors such as those deprived of property during the Cuban revolution as well as the majority of U.S. oil companies in their dealings with foreign oil-producing states.

In 1975, Mr. Leigh was again called into public service, tapped by Secretary of State Henry Kissinger to be the Department of State's Legal Adviser. Over the next two years, he played a key role in international crises such as the seizure of the USS *Mayaguez* off the coast of Cambodia and in the Middle East "Shuttle Diplomacy" that led to the negotiated disengagement of Egyptian and Israeli forces in the Sinai Peninsula. Mr. Leigh also played a key role in constitutional law debates of the day, representing the Executive Branch in discussions with the Senate over the proper scope of the Treaty Power and the War Powers Act. He served as a principal architect of the Foreign Sovereign Immunities Act, a statute that not only changed how the United States addressed issues of immunity for foreign states in U.S. courts, but had a substantial influence on the practice of countries around the globe.

Monroe Leigh returned to Steptoe and Johnson in 1977 where he resumed his practice as a leading international law expert, representing clients in diverse fora from the United States-Iran Claims Tribunal in The Hague to the United Nations Compensation Commission in Geneva. He advised on the intractable question of Cyprus' sovereignty in the middle of hostilities between the island's Greek and Turkish communities. He served as an expert witness in the British legal proceedings concerning the extradition of former Chilean dictator Augusto Pinochet. In his later years, Mr. Leigh was an influential figure in developing a more effective

humanitarian law regime for addressing genocide, war crimes and crimes against humanity, and he was a strong advocate of U.S. participation in the International Criminal Court.

Throughout his career, Monroe Leigh also demonstrated an abiding commitment to service in the legal community. He was president of the American Society of International Law from 1980 to 1982 and served as a member of the American Journal of International Law's Board of Editors from 1981 to 2001. He was on the Advisory Committee for both the second and third editions of the *Restatement of the Foreign Relations Law of the United States*. He also served as chairman of the American Bar Association (ABA) Task Force on War Crimes in the former Yugoslavia and was a member of the ABA's Working Group on the International Criminal Court.

As his involvement in the current project demonstrates, Mr. Leigh was not simply a practitioner, but also a prolific scholar. On subjects as wide-ranging as the *Sabbatino* doctrine to witness anonymity in international criminal tribunals, his work was widely read and influential. He spent more than 20 years as an adjunct faculty member at the University of Virginia School of Law, where he taught international trade law.

Monroe Leigh's professional and academic achievements thus ensure him a lasting legacy in the field of international and U.S. foreign relations law. But one cannot speak of the legacy of Monroe Leigh without mentioning his personality and character. Unfailingly, those who had the good fortune to make Monroe Leigh's acquaintance came face to face with a true gentleman. He had a rare gift for communicating with people; combining his substantial experience and expertise with an extraordinarily courteous and kind manner. Even with all his many other commitments, he always had time—or made it—when one needed advice or counsel. His mentoring abilities are legendary and one can safely say that he inspired generations of lawyers from the United States and abroad to pursue careers in international law.

Each of the editors may be counted among those who personally felt the influence of Monroe Leigh's character on our careers and our lives. Each of us had the privilege and the honor to work for him at one time or another. In the end, we are all pleased to be able to participate in finishing a project on which Monroe spent so much time and effort. At the same time, it is but one small tribute to a gentleman who leaves a long shadow over the practice of international law in the United States today. We will miss him.

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A work of this length and magnitude only finds its way into print with many helping hands. The editors wish to thank first and foremost, Mary Leigh, for supporting the publication of the present compendium in dedication to her late husband, Monroe Leigh. The editors are also deeply indebted to Charlotte Ku, Executive Director of the American Society of International Law for her patience and perseverance with this project. Quite simply, without Charlotte egging us on and offering the Society's services at every turn, we would never have been able to complete this compendium.

We also wish to thank Mr. Leigh's former secretary, Barbara Stone, for her willingness to cull through old files and materials to lay the groundwork for the current text. Professor Hollis' research assistants, Melissa Chappell Burns, Adaline Kaser and Jamie Kelly warrant special mention for their slavish attention to detail and their ability to deal with sundry "technical difficulties" in preparing the chapters for publication. Professor Hollis also wishes to acknowledge the proofreading skills and substantial patience demonstrated by his wife, Emily Lentz Hollis, throughout the drafting and editing process. The editors also gratefully acknowledge Annebeth Rosenboom of Martinus Nijhoff for waiting so patiently while we collected all the authors' chapters into the final product. The editors wish to extend their gratitude to Joeri Coppejans as well for soldiering through the myriad changes required as the manuscript moved into its final form.

Finally, we wish to emphasize our extraordinary gratitude to the contributing authors. As noted in the "About the Contributors" section, they are all distinguished experts in international law as well as the laws and practices of their respective states. This volume would not exist but for the time, dedication, and extensive expertise they brought to bear on this project. They have provided authoritative treatments of great relevance, interest and insight. We appreciate their patience and hard work over the last few years, and, in some cases, decades. Of course, we should emphasize that the authors are writing in their individual capacities. These chapters do not represent the views of any government with which an author may currently or previously have an association.

CHAPTER ONE

A COMPARATIVE APPROACH TO TREATY LAW AND PRACTICE

Duncan B. Hollis

I. Introduction

Treaties have long served as one of the several sources of international law.[1] Increasingly, they have come to serve as the dominant source. The last hundred years have witnessed a dramatic growth in the number of treaties concluded by states and other subjects of international law.[2] From 1946 to 2003, the United Nations received registrations for over 50,000 treaties.[3] The United States alone is presently bound by some 10,000 treaties and international agreements.[4] Japan has a similar number of international legal commitments.[5] France is party to 6,730 international agreements while China has concluded more than 6,000 bilateral agreements and is party to another 273 multilateral agreements.[6] South Africa has roughly 1,800 treaties in force, and Colombia has more than 860 of its own international agreements.[7]

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[1] *See, e.g.*, ICJ Statute, Art. 38(1)(a). Treaties have achieved this status notwithstanding the trenchant criticism of scholars such as Fitzmaurice who noted the difficulty of referring to treaties as a source of law when they only bind the parties to the treaty. *See* Gerald G. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law," *in Symbolae Verzijil* 153, 157 (1958). Their designation as a source of law has survived such criticism, however, out of recognition for the fact that they undeniably do create rights and obligations for states that are binding as a matter of international law.

[2] *See, e.g.*, Jose E. Alvarez, "The New Treaty Makers," 25 *B.C. Int'l & Comp. L. Rev.* 213 (2002) (noting that from 1970 to 1997 the number of treaties tripled).

[3] United Nations Treaty Collection, *available at* http://untreaty.un.org/English/overview.asp. A 2,100 volume set of the series is published separately. *Id.* Although the majority of these treaties are bilateral, the United Nations serves as the depositary for over 500 multilateral agreements. *Id.*

[4] *See generally Treaties in Force* (U.S. Department of State, 2004). Records of the Treaty Affairs Office at the U.S. Department of State indicate that between 1946 and 2003, the United States concluded 16,272 treaties and other international agreements, although obviously not all of these remain in force.

[5] *See infra* Chapter 12, Annex F.

[6] *See infra* Chapter 5, Annex M (China); Chapter 8, Section I (France).

[7] *See infra* Chapter 6, Section III.C (Colombia); Chapter 16, Section III.C (South Africa). As of January 2005, Switzerland reported being bound by roughly 3,300 treaties: 2,546

Nor is the growing predominance of treaties among the sources of international law a mere matter of numbers. As international law has expanded its coverage from traditional areas of interstate relations such as commerce and navigation to cover virtually every area of human endeavor, treaties have paved the way. From tobacco to chemical weapons, from the rights of children to desertification, from registration of trademarks to cybercrime, treaties have become *the* preferred vehicle by which states structure their rights and obligations under international law.[8] Chances are that when a lawyer confronts a question of international law today, whether or not there is a custom or general principle involved, there will in all likelihood be one or more treaty provisions that speak to the issue.

The study of treaties, therefore, is of increasing importance. Traditionally, most scholars and practitioners have viewed the study of treaties primarily through the lens of international law – considering how treaties constitute a source of law or obligation and analyzing the formation, interpretation, and application of such laws/obligations as between the various subjects of international law.[9] At the same time, others have taken a more national approach, examining how a particular state's domestic legal system and practice regards treaty obligations assumed by that state.[10]

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bilateral and 787 multilateral agreements. *See infra* Chapter 17, Section II.A; *see also infra* Chapter 9, Section II.3 note 17 (6,800 international agreements in force for Germany).

[8] *See, e.g.*, U.N. Convention Against Corruption, adopted October 31, 2003, 43 *ILM* 37 (2004); WHO Framework Convention on Tobacco Control, done at Geneva May 21, 2003, 42 *ILM* 518 (2003); U.N. Convention to Combat Desertification, done at Paris June 17, 1994, 33 *ILM* 1328 (1994); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris January 13, 1993, 1974 *UNTS* 45, 32 *ILM* 800 (1993); U.N. Convention on the Rights of the Child, adopted November 20, 1989, 1577 *UNTS* 3, 28 *ILM* 1448 (1989); Protocol Relating to the Madrid Agreement Concerning the International Regulation of Marks, done at Madrid June 28, 1989, 1989 U.S.T. LEXIS 241, *available at* http://www.wipo.int/madrid/en/legal_texts/madrid-protocol.htm.

[9] *See, e.g.*, Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000); Paul Reuter, *Introduction au Droit des Traites* (Presses Universitaires de France, 2d ed., 1985); Ian Sinclair, *Vienna Convention on the Law of Treaties* (Manchester University Press, 2d ed., 1984); A. McNair, *The Law of Treaties* (Oxford Press, 1961). Of course, these scholars have not ignored the question of treaties and domestic law entirely. Aust, for example, has a chapter on treaties and domestic law. *See* Aust, *supra*, Chapter 10. Overall, however, these scholars have largely focused on exploring how treaties operate as a matter of international law, in lieu of examining their operation from one or more national perspectives.

[10] *See, e.g.*, Congressional Research Service, Library of Congress, *Treaties and other International Agreements: The Role of the United States Senate* (Government Printing Office, 2001); Louis Henkin, "Treaties, the Treaty Power, and Executive Agreements," *in Foreign Affairs and the Constitution* (Oxford University Press, 2d ed., 1987); William E. Butler, *The Russian Law of Treaties* (Simmonds & Hill Publishing, Ltd., 1997).

The present volume results from a nearly 30-year effort to devise a third, comparative perspective on both treaty law and practice.[11] In developing this perspective, it seeks to further the study of treaties by way of comparison – by examining the different laws and practices nation states have put in place to deal with treaties. Ultimately, every state must decide for itself how to define what instruments qualify as treaties, who will have authority to negotiate treaties on its behalf, whose approval is required before the state can consent to a treaty, and how to incorporate such treaties into its national law. What the comparative approach suggests, however, is that we can all benefit from comparing the answers different states give to these questions. As treaties proliferate in both numbers and subjects, a comparative view offers alternative insights, experiences, legislative approaches and practices for dealing with treaties. Whether due to their similarity to, or difference from, a single state's own approach, these alternatives may offer that state new avenues for further developing, improving, or even modifying its system of treaty law and practice.

Beyond its inherent value, the comparative approach will also contribute to our understanding of treaties when viewed from either the national or international perspectives. On the national front, the comparative approach by definition incorporates individual studies of how various states make treaties. Although done for comparative purposes, each of these studies provides details, experiences, and documentation as to how a specific state deals with treaties in ways that will improve our understanding of that state's national approach to treaty law and practice.[12]

More importantly, the comparative approach can inform the international law of treaties. By examining similarities and differences among

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[11] In 1977 and 1979, treaty officials and experts from more than a dozen states gathered in Bellagio, Italy to compare and contrast their respective legal systems and practices with respect to treaties, including how treaties were defined, who had authority to negotiate them, what role the legislature, the courts, sub-national bodies, and the public had in the negotiation and approval processes, and how treaty obligations were implemented. Continuing with the same theme, the American Society of International Law (ASIL) published three studies of how various nation states dealt with these issues in 1995, 1999 and 2003. *See* Monroe Leigh and Merritt R. Blakeslee, eds., *National Treaty Law and Practice, Vol. I: France, Germany, India, Switzerland, Thailand, United Kingdom*, Studies in Transnational Legal Policy No. 27 (ASIL, 1995); Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington, eds., *National Treaty Law and Practice, Vol. II: Austria, Chile, Colombia, Japan, Netherlands, United States*, Studies in Transnational Legal Policy No. 30 (ASIL, 1999); Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington, eds., *National Treaty Law and Practice, Vol. III: Canada, Egypt, Israel, Mexico, Russia, South Africa*, Studies in Transnational Legal Policy No. 33 (ASIL, 2003).

[12] For example, unlike many national studies of treaties that focus on how the legal system reacts to treaty obligations once formed, the present study also considers how a state authorizes the formation of those obligations in the first place.

a representative group of states' laws and practices, we can obtain evidence of state practice generally. We can then use this evidence to assess how well state practice conforms to accepted rules of international law such as those in the 1969 Vienna Convention on the Law of Treaties. Thus, on issues such as the definition of treaties or the authority to bind states by treaty, the comparative approach can demonstrate the existence (or absence) of the general and uniform practice of states accepted as law, which can confirm (or undermine) the accepted customary international law on these matters.

The purpose of this chapter is twofold. First, it outlines the details of the comparative methodology employed in this study, reviewing the states that participated and the common framework adopted by the authors in explaining the treaty law and practice of each participating state. Second, this chapter offers some initial comparisons and insights on national treaty law and practice by considering the various national contributions in this volume collectively. Given the contributing authors' comprehensive explanations and the array of accompanying documentation, listing all possible comparisons and insights is not feasible. Instead, this chapter addresses four common themes that flow throughout all of the national reports on treaty law and practice:

- How do states define treaties as a matter of domestic law and practice?
- What is the scope of the executive's authority over treaty making?
- What role does the legislature play in treaty making?
- How are treaties incorporated into national law?

These issues are central to any state's treaty law and practice. All states must determine what instruments they will view as treaties and distinguish them from other arrangements states may wish to conclude. Once they have an idea of what texts will constitute treaties, states must also determine how they will allocate responsibility within their governments to negotiate and conclude such agreements; allocations that most often involve the executive and the legislature. Finally, after states have actually become party to a treaty, they face the question of what effect, if any, that treaty will have on their domestic legal orders. This chapter analyzes how states address these issues from a comparative perspective and the implications of this research for the international law of treaties.

Ultimately, however, this chapter must serve as a mere introduction. A reading of the subsequent chapters will undoubtedly encourage further analyses and provide a basis for future treaty research.[13]

[13] For example, this volume presents data that could support comparative analyses of

II. A Word On Method

A. *Participating States*

This study analyzes the treaty laws and practices of nineteen states: Austria, Canada, Chile, China, Colombia, Egypt, France, Germany, India, Israel, Japan, Mexico, the Netherlands, Russia, South Africa, Switzerland, Thailand, the United Kingdom, and the United States. In many respects, these states serve as representatives of the larger, international community of sovereign states.

Geographically, the participating states hail from five of the six inhabited continents, and include representatives of the so-called "North" and "South." They represent a majority of the world's total population (56%) and exercise sovereignty over more than 43% of its landmass. Politically, they include some of the most influential states from both global and regional perspectives (e.g., all five permanent members of the United Nations Security Council). The participating states are also economically diverse. Although collectively their gross national product exceeds 75% of the world's total GNP, individually they are roughly divided between representatives of the developed and developing worlds.[14]

As Table 1 indicates, the governments of these states take various forms. Eight of the nineteen are federal in structure. Ten states have a parliament or parliamentary structure, electing executive officials by decision of the legislative body. Eight of the states follow the presidential model, electing executive officials directly from the populace.[15] One state (China) maintains a communist/socialist approach.

A similar diversity emerges when considering the various legal traditions underpinning the states' governmental structures. As Table 1 indicates, ten states generally adhere to the civil law tradition, while China is transitioning to that system. Six states follow the common law method, while the remaining two states (Mexico and Egypt) mix approaches, with Egypt including elements from Islamic law.

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the participating states' national laws and practices concerning reservations, legally binding decisions of international organizations, depositary functions, publication and transmittal requirements, implementation of multilateral treaties, and sub-state treaty making.

[14] For the data used to calculate these percentages, see *infra* Annex A (Participating States' Statistics).

[15] Canada, Germany, India, Israel, Japan, the Netherlands, South Africa, Switzerland, Thailand and the United Kingdom all follow a parliamentary structure. Austria, Chile, Colombia, Egypt, France, Mexico, Russia and the United States rely on a more presidential model. Of these, Egypt actually has the President first nominated by the People's Assembly, but his selection must be validated by national referendum.

Table 1 Participating States – Governments and Legal Structures[16]

State	Form of Government	Legal Tradition	Head of State/ Head of Government	Legislative Branch
Austria	Federal Republic	Civil Law	President/ Chancellor	Bicameral Federal Assembly (Federal Council and National Assembly)
Canada	Confederation/ Parliamentary Democracy	Common Law (except for Quebec's civil law system)	Queen (represented by Governor General)/ Prime Minster	Bicameral Parliament (Senate and House of Commons)
Chile	Presidential Republic	Civil Law	President/President	Bicameral National Congress (Senate and House of Representatives)
China	Communist/ Socialist State	Transitioning to Civil Law	President/Premier	Unicameral National People's Congress
Colombia	Presidential Republic	Civil Law with Common Law elements	President/President	Bicameral Congress (Senate and Chamber of Representatives)
Egypt	Presidential Republic	Elements of Common, Islamic, and Civil Law	President/Prime Minster	Bicameral System (People's Assembly and Advisory Council)
France	Presidential Republic	Civil Law	President/ Prime Minister	Bicameral Parliament (Senate and National Assembly)
Germany	Federal Republic	Civil Law	President/ Chancellor	Bicameral Parliament (Federal Assembly and Federal Council)
India	Federal Union of States	Common Law	President/ Prime Minister	Bicameral Parliament (Council of States and the House of the People)
Israel	Parliamentary Democracy	Common Law	President/ Prime Minister	Unicameral Parliament (Knesset)
Japan	Constitutional Monarchy	Civil Law	Emperor/ Prime Minister	Bicameral Diet (House of Councillors and House of Representatives)
Mexico	Federal Republic	Mix of Civil and Common Law	President/ President	Bicameral National Congress (Chamber of Deputies and Chamber of Senators)

[16] Supporting data drawn from contributing authors' descriptions or, where no description was provided, the CIA World Fact Book 2004, *available at* http://www.cia.gov/cia/publications/factbook.

Table 1 (*cont.*)

State	Form of Government	Legal Tradition	Head of State/ Head of Government	Legislative Branch
Netherlands	Constitutional Monarchy	Civil Law	Queen/ Prime Minister	Bicameral States General (First Chamber and Second Chamber)
Russia	Federation	Civil Law	President/Premier	Bicameral Federal Assembly (Federal Assembly and State Duma)
South Africa	Republic	Common Law	President/ President	Bicameral Parliament (National Assembly and National Council of Provinces)
Switzerland	Federal Republic	Civil Law	Federal Council/ Federal Council	Bicameral Federal Assembly (Council of States and National Council)
Thailand	Constitutional Monarchy	Civil Law, with Common Law influences	King/Prime Minister	Bicameral National Assembly (Senate and House of Representatives)
United Kingdom	Constitutional Monarchy	Common Law	Queen/Prime Minister	Bicameral Parliament (House of Lords and House of Commons)
United States	Federal Republic	Common Law	President/ President	Bicameral Congress (Senate and House of Representatives)

Each of these participating states' treaty law and practice may make an important contribution to understanding how states address treaties at the national level. Thus, we can draw important conclusions just by considering the nineteen participating states themselves. At the same time, however, the geographic, economic, political, and legal diversity of these states may offer a window onto the views and practices of similarly situated states not included in the chapters. In that sense, this study suggests conclusions that reflect state treaty practice more generally.

B. *Common Outline of Approach*

Each of the chapters that follow contains a description of the treaty law and practice of a particular state, authored by one or more treaty experts

from that state. The experience and expertise of these authors means that their contributions do not simply describe the formal domestic distributions of legal authorities concerning treaties, but also offer real insights into the actual treaty practices of these states. At the same time, the chapters also provide more than a recitation of the authors' views; each chapter includes primary source materials and reference aids to assist in further original treaty research and analysis.

For ease of reference, each of the chapters tracks a common outline of approach (*see infra* Annex B) and may be broken down into four general sections:

- an introduction to the constitutional framework for the state's legal system;
- a discussion of the state's treaty law and practice;
- documentary annexes that contain relevant constitutional, statutory, and legal texts concerning the state's treaty laws as well as instruments used by that state in its treaty practice; and
- a bibliography of works relevant to the treaty law and practice of that state.

More specifically, authors were asked to address their state's treaty law and practice with respect to fourteen specific and diverse issues (e.g., how it defines treaties, the need for legislative approval, legal bases of agreements not formally approved by the legislature, reservations practice, publication and transmittal requirements, status of legally binding decisions of international organizations, and treaty termination authority). Within each of these areas, additional questions were posed to elicit more detailed information. Of course, authors retained the freedom to discuss additional issues or to refrain from addressing all of the outlined areas of inquiry. Indeed, not all of the issues required comprehensive responses from each state. For example, the role of sub-national entities certainly had less relevance to states without semi-autonomous political subdivisions.

In the end, to the extent the authors provided information on an outlined issue, the participating states' studies provide an extraordinarily useful basis of comparison. To be sure, diversity can be expected in national responses to treaty issues, particularly the more detailed the level of inquiry. As discussed below, however, states show surprisingly similar approaches in defining treaties, allocating authority to the executive to negotiate and conclude such instruments, providing for legislative oversight of executive treaty-making activities and, to a lesser extent, giving treaties legal effect within national legal systems.

III. Initial Comparisons and Insights

A. *Defining "treaties" as a matter of national law and practice*

Treaty making by states dates back hundreds, if not thousands, of years. Egypt's King Ramses II concluded one of the earliest known treaties in 1272 B.C. while two of the other states participating in this study, Thailand and China, had their own treaty relations as early as 1257 A.D.[17] Over time, international law has provided rules to accompany such treaty making (e.g., the principle *pacta sunt servanda*) and specified which criteria constitute a treaty. Presently, Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties (VCLT) defines a "treaty" as:

> an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[18]

The narrow scope of this definition – it excludes oral agreements and agreements involving subjects of international law other than states – originally proved slightly controversial.[19] The 1986 Vienna Convention sought to resolve some of that controversy by defining treaties to include international agreements between states and international organizations as well as between international organizations.[20] As a result, some have suggested that these criteria now provide a definition for treaties that reflects customary international law.[21]

A review of national treaty law and practice confirms this assertion. Irrespective of separate constitutional or statutory usages of the terms "treaty" or "international agreement," virtually every state surveyed in the present study has accepted and incorporated the VCLT's definition of treaties into its national legal system or practice.

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[17] *See* Chapter 7, Section I (Egypt); Chapter 18, Section I.B (Thailand).

[18] Convention on the Law of Treaties, done at Vienna May 23, 1969, 1155 *U.N.T.S.* 331, 8 *ILM* 679 (1969) (entered into force Jan. 27, 1980).

[19] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* 131 (7th ed., 1997); Malcolm N. Shaw, *International Law* 634 (4th ed., 1997); Sinclair, *supra* note 9, at 6. Article 3 of the 1969 Vienna Convention itself acknowledged that its failure to consider agreements not in written form or agreements involving other subjects of international law did not affect the legal force of such agreements. *See supra* note 18 (Art. 3).

[20] Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, done at Vienna March 21, 1986, U.N. Doc. A/CONF.129/15, 25 *ILM* 543 (1986) (not yet in force) (hereinafter "1986 Vienna Convention"). Neither the VCLT nor the 1986 Vienna Convention defines treaties to include agreements between states or international organizations and some other subject of international law (e.g., the Holy See or the International Committee of the Red Cross).

[21] *See* Aust, *supra* note 9, at 14.

That result should come as no surprise for the thirteen states that are parties to the VCLT.[22] In Austria, Canada, Chile, China, Colombia, Egypt, Germany, Japan, Mexico, the Netherlands, Russia, Switzerland, and the United Kingdom, domestic definitions exist that are largely compatible with the VCLT definition.[23] There are, of course, some ambiguities. For example, although China's 1990 Law on the Procedures for the Conclusion of Treaties does not define the term "treaty," it does implicitly require that treaties establish, revise, or terminate rights and obligations.[24] This could be construed as narrower than the VCLT requirement that a treaty text be "governed by international law." China's 1997 accession to the VCLT "to complement the domestic Procedures Law" would, however, militate against such a conclusion. Similarly, there is some question whether the Dutch Constitution's approach to defining treaties as "binding under public international law" coincides with the "governed by international law" approach adopted in the VCLT.[25] On the whole, however, states that are parties to the VCLT have either enacted laws that expressly incorporate its definition of treaties or have given that definition direct effect as a matter of practice.[26]

Even those states not party to the VCLT have tended to incorporate its definition of treaties into their domestic practice. South Africa and the United States rely on it specifically, while France, India, and Israel all generally regard the VCLT's provisions as binding to the extent they

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[22] *See* Multilateral Treaties Deposited with the Secretary General, United Nations Treaty Collection, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp (Chapter XXII).

[23] Although Chile is a party to the Vienna Convention, Chapter 4 does not address whether its law or practice is compatible with the Convention's definition of "treaty." The fact that Chilean practice recognizes that international treaties subject to Congressional approval and other agreements concluded solely by the executive possess the same international legal effect, however, suggests that its practice is consistent with the Vienna Convention. *See infra* Chapter 4, Section II.A.

[24] *Infra* Chapter 5, Section II.C.1. Specifically, the Treaty Procedures Law is viewed as requiring a treaty to have four characteristics: (i) a contracting party that is a subject of international law (e.g., a state or international organization); (ii) a purpose to establish, revise, or terminate rights and obligations between contracting parties; (iii) a written agreement concluded through consultations by the contracting parties; and (iv) content that is in compliance with fundamental principles of international law and the free will of the parties. *Id.*

[25] *See infra* Chapter 14, Section II.B.

[26] *See, e.g., infra* Chapter 2, Section II.A.1 (since the VCLT has been incorporated into the Austrian legal order, Austrian authorities are to apply its definition of treaties); Chapter 12, Section II.A.1 and n. 2 (Article 4 of Japan's Law for the Establishment of the Ministry of Foreign Affairs tracks the VCLT definition); Chapter 15, Section II.A (1995 Federal Law on International Treaties of the Russian Federation incorporates verbatim the VCLT definition); Chapter 19, Section II.A.1 (United Kingdom internal procedures relating to treaties follow the VCLT definition).

are based on customary rules.[27] Meanwhile, Thai practice follows the customary international law of treaties, which it defines in terms compatible with the VCLT.[28] Thus, the present study supports the viability of the VCLT treaty definition not just from an international law perspective, but also as a matter of national law and practice.

At the same time, however, the uniformity of state practice in endorsing the VCLT definition does not mean that states have limited themselves to utilizing that definition alone at the national level.[29] In fact, whether as a matter of law or practice, states have identified additional categories of instruments worthy of the title "treaty" or "international agreement," while delineating other types of arrangements to which that label would not apply.

First, in terms beyond the inter-state agreements defined in the VCLT, the participating states also generally accept that international agreements concluded by subjects of international law other than states constitute treaties. Seven of the states surveyed – Austria, Egypt, Germany, Japan, Mexico, Switzerland, and the United Kingdom – have ratified the 1986 Vienna Convention.[30] These states have, in turn, generally defined treaties domestically to include agreements with or between international organizations.[31] Several other states (e.g., China, the Netherlands, Thailand,

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[27] *See, e.g., infra* Chapter 8, Section II.B.1 (French President's power over ratification of treaties consistent with the VCLT); Chapter 10, Section II.B (Although India has not yet joined the VCLT, it follows the Convention's provisions as guidelines in actual practice); Chapter 11, Section I (to the extent VCLT provisions are based on customary rules, they are incorporated into Israeli law); Chapter 16, Section II.A (in determining whether a specific agreement qualifies as a treaty, the general criteria laid down in the VCLT apply, even though South Africa is not a party); Chapter 20, Section II.A and note 2 (citing VCLT definition and noting the United States accepts the Convention, in most respects, as declaratory of customary international law).

[28] *See, e.g., infra* Chapter 18, Section II.A.1 (criteria for a treaty under Thai practice is an international agreement in writing, between states and/or international organizations, binding on those states and/or organizations under international law). Presumably, the Thai focus on "binding" instead of "governed" under international law raises similar questions posed in the Dutch context. *See supra* note 25 and accompanying text.

[29] Although discussed individually in the chapters that follow, this chapter does not attempt a collective analysis of how states define and categorize the international instruments concluded by various sub-national units. *See, e.g., infra* Chapter 2, Section II.N (Austrian Länder); Chapter 3, Section II.M (Canadian provinces); Chapter 9, Section II.D (German Länder); Chapter 13, Section II.D (Mexican state and municipal inter-institutional agreements); Chapter 15, Section II.P (subjects of the Russian Federation); Chapter 16, Section II.I (South African provinces); Chapter 17, Section III.I (Swiss cantons); Chapter 19, Section II.O (British overseas territories); Chapter 20, Section II.N (U.S. states). Similarly, the present analysis does not address how certain states coordinate treaty making with respect to, or on behalf of, certain sub-national units. *See, e.g., infra* Chapter 5, Section IV (Hong Kong and Macao); Chapter 8, Section II.B.3.b (French overseas territories); Chapter 14, Section II.E (Netherlands Antilles and Aruba).

[30] *See supra* note 22.

[31] *See, e.g.*, 1986 Vienna Convention, *supra* note 20, Art. 2(1); *see also infra* Chapter 7,

and the United States) also have domestic definitions of treaties that encompass agreements with international organizations.[32] As such, we find that these states' national approaches coincide with the international law view that international organizations have the power to negotiate and conclude treaties.

The surveyed states have not, however, acted so uniformly on a separate question left open by the VCLT: whether oral agreements constitute treaties.[33] Although not part of the VCLT definition, the Permanent International Court of Justice had previously viewed oral agreements as legally binding obligations under international law when made by representatives with a capacity to commit their respective states.[34] In contrast, the participating states have little to no practice that confirms the continued viability of such a custom. True, nearly half of the states (Canada, Germany, Israel, Japan, the Netherlands, Switzerland, the United Kingdom, and the United States) recognize that, although rare, there remains a theoretical possibility of concluding oral agreements binding under international law.[35] The United States goes so far as to have procedures in

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Section II.A.I (Egypt perceives the 1986 Vienna Convention as an authoritative statement of international law); Chapter 12, Section II.A.I (in Japan, "treaties and international agreements are understood to include those to which international organizations are party"); Chapter 13, Section II.A (Mexico's statutory definition of the term treaty is compatible with the 1986 Vienna Convention).

[32] *See, e.g., infra* Chapter 5, Section II.C.1 (treaties require contracting parties with China be states or inter-governmental international organizations); Chapter 14, Section II.B (noting "Dutch constitutional law proceeds on the assumption that both states and international organizations have the capacity to conclude treaties"); Chapter 18, Section II.A.1 (Thai practice defines treaties as between states and/or international organizations); Chapter 20, Section II.A (defining a treaty, for international law purposes, as an international agreement between two or more states or international organizations). None of the other states surveyed indicate any hostility to the concept of linking treaties not simply to states, but to the subjects of international law more generally.

[33] *See* VCLT, *supra* note 18 (VCLT Article 3 specifically provides that its definition of treaties does not affect the legal force of unwritten agreements).

[34] *See Legal Status of Eastern Greenland (Denmark v. Norway)*, P.C.I.J., Ser. A/B, No. 53 (1933) at 22–23, 69–73. Lord McNair traces the history of oral agreements, rare as they are, back to the Silesian Loan affair where the British government acknowledged the need to give legal force to assurances made between the British Secretary of State and the Prussian Minister in London. *See* McNair, *supra* note 9, at 8–9.

[35] *See, e.g., infra* Chapter 3, Section II.A.3 (Canada does not view international law as requiring treaties be in written form, but there are no cases of Canada recognizing an oral commitment as a treaty); Chapter 9, Section I.A note 1 (for Germany, oral agreements occur only in exceptional circumstances); Chapter 12, Section II.A.3 (although theoretically possible, oral agreements are not normal practice as far as Japan is concerned); Chapter 17, Section III.A (although oral agreements probably are international agreements, there are no cases of one coming before the Swiss government); Chapter 19, Section II.A.3 (although rare, the United Kingdom does not exclude the possibility of oral agreements, but British internal procedures would not apply as such to oral agreements).

place for committing such oral agreements, once made, to writing.[36]

In practice, however, none of these states records any actual experience with oral agreements.[37] Some of them even indicate government opposition to viewing oral agreements as treaties.[38] At the same time, Colombia, India, South Africa, and Thailand report that they either have no practice of concluding oral agreements, that they distinguish them from their domestic conception of a "treaty," or that they would actually deny domestic legal effect to such agreements.[39] Thus, participating states clearly have contrasting views at the national level on the practice of equating oral agreements to treaties under international law. Such contrasting views may, in turn, suggest that the international custom favoring legal effect for oral agreements is on the wane.

Second, apart from identifying additional arrangements that qualify as treaties, the participating states' practices have delineated other categories of acts and instruments that do not qualify as treaties. States have set out to distinguish treaties from unilateral acts, municipal law contracts and non-binding agreements.

In terms of unilateral acts, the states surveyed (with the notable exception of Japan) accept that they have legal force under international law.[40] Although a number of the states report that they do not resort to unilateral

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[36] *See infra* Chapter 20, Section II.A (U.S. law requires oral agreements be reduced to writing and reported to Congress).

[37] Although no state practice is evidenced by the current study, Aust cites a 1992 oral agreement between Finland and Denmark settling their dispute over the construction of a Danish Bridge across the Great Belt. *See* Aust, *supra* note 9, at 7. Few other recent examples of oral agreements exist.

[38] *See, e.g., infra* Chapter 14, Section II.B (Netherlands believes oral agreements are rare and the Dutch government opposed such a practice in 1983); Chapter 11, Section II.B.1 (although Israel's existing Attorney General Directives' procedures are not limited to agreements in written form, the new version of these Directives will probably apply only to written agreements).

[39] Chapter 6, Section II.A.5 (Colombia not bound by verbal agreements because of the obligation that rules be promulgated in print by the *Official Journal*); Chapter 10, Section II.A (oral agreements are not resorted to in Indian practice); Chapter 16, Section II.A (neither South African law or practice makes any provision for oral agreements; as such, they are without official sanction); Chapter 18, Section II.A.1 (Thai usage of term "treaty" distinct from agreements not reduced to writing). The discussions on the treaty law and practice of Austria, Chile, China, Egypt, France, and Russia do not address the question of oral agreements.

[40] *See, e.g., infra* Chapter 6, Section II.A.6 ("Colombia follows the customary norms of international law as to the binding effect of unilateral acts by the state"); Chapter 9, Section I.A note 1 (in Germany, unilateral acts may generate international obligations although they are not considered international agreements); *but see infra* Chapter 12, Section II.A.4 (in Japan, unilateral acts are to be distinguished from international agreements in the sense that they are not legally binding).

acts in their national practice, two states do provide concrete examples.[41] Egypt cites its 1957 declaration on future operations of the Suez Canal, while Israel invokes its declaration to abide by the humanitarian provisions of the Fourth Geneva Convention, irrespective of whether the Convention was legally applicable.[42]

A majority of the states surveyed, however, clearly distinguish unilateral acts from treaties, given the absence of bilateral or multilateral commitments.[43] Only Austria expressly treats unilateral acts intended to have international legal effect as treaties for purposes of its domestic procedures.[44] As such, even if it is a separate category of international legal obligation, the national practice of the participating states reflects the view that unilateral acts do not qualify as treaties.

A similar distinction prevails between treaties and contracts under domestic (or municipal) law, even if one or more of the parties is a state. Each of the studies generally presumes that, just as states can conclude treaties to be governed by international law, they can also make contracts to be governed by domestic law. Thus, Austria, Colombia, the Netherlands, Russia, and Thailand view their state's contracts, even when done with other states, as regulated by one of the state's domestic laws, not international law.[45] Several others follow the same approach, but emphasize that states can always decide that an inter-state agreement should be governed by international law.[46] This may explain some of the ambiguity

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[41] India and South Africa, for example, do not resort to unilateral acts. *See, e.g., infra* Chapter 10, Section II.A (India); Chapter 16, Section II.A (South Africa).

[42] *See, e.g., infra* Chapter 7, Section II.A.3.b (Egypt); Chapter 11, Section II.B.1 (Israel). The Egyptian declaration was registered with the U.N. and published in the *United Nations Treaty Series*. *Infra* Chapter 7, Section II.A.3.b.

[43] *See, e.g., infra* Chapter 17, Section III.A (for Switzerland, "unilateral acts are, by definition, not international agreements"); Chapter 19, Section II.A.4 (United Kingdom does not regard unilateral acts as being treaties for purposes of its internal procedures); Chapter 20, Section II.A (United States does not consider unilateral acts to constitute international agreements).

[44] *See infra* Chapter 2, Section II.A.3. Canada and the Netherlands will also treat an exchange of reciprocal unilateral declarations as a treaty, but there are no cited precedents for them having done so. *See infra* Chapter 3, Section II.A.4 (Canada); Chapter 14, Section II.B (Netherlands). In Switzerland, one example is cited where an exchange of identical, unilateral declarations was ruled by the Federal Tribunal to constitute an international agreement. The precedential value of this example is unclear, however, where the parties were a Swiss Canton and an Italian municipality. Seal Chapter 17, Section III.A; *supra* note 29.

[45] *See, e.g., infra* Chapter 2, Section II.A.4 (Austria); Chapter 6, Section II.A.7 (Colombia); Chapter 14, Section II.B (Netherlands); Chapter 15, Section II.B (Russia distinguishes civil-law contracts from treaties, notwithstanding Russian's use of the same word to describe both categories); Chapter 18, Section II.A.1 (Thailand).

[46] *See, e.g., infra* Chapter 3, Section II.A.5 (Canada); Chapter 9, Section I.A note 1 (Germany); Chapter 10, Section II.A. (India); Chapter 17, Section III.A (Switzerland); Chapter 19, Section II.A.5 (United Kingdom). The studies of Chile, China, Egypt,

created when states conclude an agreement that could be characterized as either governmental or commercial in nature. German and Israeli practices resolve this tension by occasionally concluding inter-state umbrella agreements governed by international law that are implemented through contracts governed by domestic law.[47] Ultimately, therefore, the states that address this issue clearly view treaties as a category separate and distinct from domestic law contracts.

Several of the surveys also emphasize how state practice distinguishes between instruments that the state intends to be governed by international law (i.e., treaties) and those where that intention is absent.[48] Former U.S. Secretary of State Henry Kissinger characterized the latter as "important statements of diplomatic policy [which] engage the good faith of the United States so long as the circumstances that gave rise to them continue. But they are not binding commitments of the United States."[49] Examples of such non-binding instruments include the Helsinki Accord, the U.S./U.K. Memorandum of Understanding on British Participation in the Strategic Defense Initiative (SDI), and the 1999 Trade and Investment Cooperation Agreement between Canada and the Andean Community.[50]

The nomenclature used in these examples highlights another facet of national treaty law and practice. Most states do not determine the legal or non-legal character of instruments by their title, relying rather on the actual intention of the parties. Thus, in addition to the states referred to above, China, Egypt, and India all make their domestic assessment of what texts constitute a treaty without giving any determinative weight to its title.[51] Instead, these states appear, as Switzerland does, to look to

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France, Japan, Mexico, South Africa, and the United States do not address this issue specifically.

[47] *See infra* Chapter 9, Section I.A note 1 (Germany); Chapter 11, Section II.B.1 (Israel).

[48] Canada, France, the Netherlands, Switzerland, Thailand, the United Kingdom, and the United States all have practices that distinguish between agreements concluded by the state intended to be treaties versus other instruments to which they assign a non-binding character. *See infra* Chapter 3, Section II.A.2 (Canada); Chapter 8, Section II.B.1 (France); Chapter 14, Section II.B (Netherlands); Chapter 17, Section III.A (Switzerland); Chapter 18, Section II.A.1 (Thailand); Chapter 19, Section II.A.1 (United Kingdom); Chapter 20, Section II.A (United States).

[49] *Department of State Bulletin*, Oct. 27, 1975 at 609, 612–13; *see also infra* Chapter 20, Section II.A. Canadian practice echoes this perspective by emphasizing that these instruments, while without legal force, are entitled to significant moral or political weight. *See infra* Chapter 3, Section II.A.2.

[50] *See* Chapter 3, Section II.A.2 note 7 (citing Canada-Andean Community Agreement); Chapter 18, Section II.A.1 (citing Helsinki Accord); Chapter 19, Section II.A.1 (citing U.S./U.K. Memorandum of Understanding).

[51] *See infra* Chapter 5, Section II.C.2 (China); Chapter 7, Section II.A.2 (Egypt); Chapter 10, Section II.A (India). This approach comports with the VCLT definition, which defines "treaty" based on the parties and governing law, "whatever its particular designation." *See* VCLT, *supra* note 18, Art. 2(1)(a).

"the will of the parties as expressed in the treaty text or accompanying understandings."[52]

This practice of deemphasizing titles as a means for assessing an instrument's legal character is not entirely uniform. Both Canada and the United Kingdom describe practices by which they use certain document titles, especially "memorandum of understanding" (MOU), to identify a text as non-binding (i.e., not a treaty).[53] Other states, particularly the United States, dispute this practice and view some MOUs as reflecting an intention to be governed by international law. Of course, the extent of the dispute should not be exaggerated. All the concerned states agree that it is the intention of the parties that determines the text's legal character; thus, such differences of opinion should simply serve to emphasize the importance of states' confirming their respective views of an instrument's legal (or non-legal) character prior to its conclusion.

Finally, simply because states have incorporated the VCLT and 1986 Vienna Convention treaty definitions into their national legal systems does not preclude them from differentiating domestically among different categories of instruments, each of which meets the international law criteria for a treaty. On the contrary, with a few notable exceptions (e.g., Thailand) most states have several different sets of domestic procedures for varying types of "treaties" or "international agreements," but which, in the end, all satisfy the VCLT or 1986 Vienna Convention definitions.[54]

The United States Constitution, for example, uses the term "treaty" to mean only those international agreements where the U.S. President has signed the instrument of ratification or accession following the agreement's approval by the U.S. Senate. At the same time, however, U.S. laws and practices have devised alternative domestic procedures that authorize other categories of "international agreements." Taken together, U.S. treaties (in the Constitutional sense) and these other international agreements demonstrate a U.S. practice that utilizes the broader criteria of treaties in the international law sense of the term per the VCLT and the 1986 Vienna Convention.[55] Similarly, France characterizes treaties (*traités*) as instruments receiving Presidential ratification while it defines international agreements (*accords internationaux*) as instruments receiving

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[52] *Infra* Chapter 17, Section III.A.

[53] *See infra* Chapter 3, Section II.A.2 (Canada); Chapter 19, Section II.A.1 (United Kingdom). Australia evidently follows a similar practice. *See infra* Chapter 3, Section II.A.2.

[54] *See, e.g., infra* Chapter 17, Section III.C (differentiating which Swiss treaties require legislative approval); Chapter 18, Section II.A.1 (The use of the term "treaty" in Thailand generally coincides with international usage and international law, although on occasion other terms are used, all of which fall under the heading of "treaties").

[55] *See infra* Chapter 20, Section II.A.

parliamentary approval; it regards both as qualifying as treaties in the VCLT sense of the term.[56] Chile, the Netherlands, and South Africa have similar domestic distinctions.[57]

Instead of dividing up their treaties based on the procedural requirements for approval, some states differentiate among their treaties based on the level at which they are concluded. For example, Austria, China, Germany, India, and Russia each recognize three distinct categories of treaties – treaties concluded in the name of the state, treaties concluded in the name of the government, and treaties concluded in the name of a government department or ministry.[58] Regardless of the level at which the agreement is concluded, the practice of these states is to treat them as agreements of the "State" for purposes of satisfying the VCLT "treaty" criteria. Several other states have a similar practice of authorizing government agencies to conclude international agreements that they recognize as treaties.[59]

Not all states, however, permit their government agencies to conclude treaties; Egypt, for example, requires presidential ratification of all Egyptian treaties.[60] Some states only authorize their agencies to conclude treaties

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[56] *See infra* Chapter 8, Section II.A. (The international legal consequences are the same for both categories).

[57] *See, e.g., infra* Chapter 4, Section II.A (Chilean Constitution identifies an "international treaty" as an agreement approved by Congress prior to ratification and distinct from other "agreements" entered into under the sole authority of the executive); Chapter 14, Section II.B (the Netherlands distinguishes between "treaties" that must be submitted for parliamentary approval and "administrative agreements," some of which may also qualify as treaties in the international law sense of the term); Chapter 16, Section II.B.1 (South Africa distinguishes between international agreements requiring parliamentary approval and other international agreements of a technical administrative or executive nature or those that do not require ratification or accession).

[58] *See infra* Chapter 2, Section II.A.2 (notwithstanding a Constitutional reference only to "State Treaty," in practice, Austria differentiates among treaties concluded by the President, the Government, and a Federal Minister); Chapter 5, Section II.C.2 (China concludes treaties in the name of the People's Republic of China, the Government of the People's Republic of China, and the governmental departments of the People's Republic of China); Chapter 9, Section II.A.1 (Germany has a practice of formal (state) treaties, inter-governmental agreements and ministerial agreements); Chapter 10, Section II.A (international agreements to which India is a party include inter-state "treaties," inter-governmental "agreements," and inter-agency "arrangements"); Chapter 15, Section II.C (Russian legislation distinguishes among inter-State treaties, intergovernmental treaties and interdepartmental treaties to which different internal approval procedures apply). Different domestic procedures may, however, apply, depending on the level at which the treaty was concluded.

[59] *See infra* Chapter 17, Section III.A (Switzerland regards agency-to-agency agreements as international agreements); Chapter 19, Section II.A.2 (the United Kingdom recognizes that agency-to-agency agreements may be regarded as international agreements, but, in reality, they frequently do not qualify as such); Chapter 20, Section II.A (United States).

[60] *See infra* Chapter 7, Section II.B.2. South Africa generally does not authorize its

in order to implement an existing treaty or if the agency is expressly authorized to do so (i.e., by legislation).[61] Moreover, other states, while admitting the practice of agency-level agreements or arrangements, do not regard them as treaties binding on the state under international law. France has a practice of *arrangements administratifs* (i.e., government agency agreements to implement existing treaties or to deal with matters within the scope of the agency's jurisdiction), which it views as binding only the agency, not the state of France itself.[62] In 1991, Mexico enacted a Treaty Law that, *inter alia*, permitted Government agencies at all levels (federal, state and municipal) to conclude agreements governed by international law, but which only bind those agencies, not Mexico.[63]

In sum, the surveyed states' approaches to definitional issues reveals much uniformity; they all define treaties as a matter of national law and practice in ways that accord with the international law definitions of the VCLT and the 1986 Vienna Convention. Similar consistency exists among these states in categorizing other instruments and acts that do not qualify as treaties. To the extent differences exist (i.e., with respect to oral agreements, differentiation among treaties for domestic approval procedures, or agency-level agreements), such differences do not appear to correlate with variations among the states in terms of geographic, political, economic, or legal conditions. As such, this volume has general utility for states considering how to address such definitional issues. States wrestling with whether to allow agency-level treaty making, for example, may benefit from the experiences of those states that already allow it, including the approach of certain states that assign legal responsibility for such treaties to the government agency alone rather than to the state as a whole. Moreover, the discussion of definitional issues in these chapters contains evidence of how states reflect international law at the national

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agencies to conclude treaties. *See infra* Chapter 16, Section II.A. Although the Colombian constitution only envisions "treaties" as agreements subject to Congressional approval, Colombia has an extra-constitutional practice of agency-to-agency agreements. *See infra* Chapter 6, Section II.A.2. The legal status of agency-to-agency agreements in the Netherlands is unclear. *See infra* Chapter 14, Section II.B.

[61] In Japan, ministries other than the Ministry of Foreign Affairs have no authority to conclude international agreements on behalf of the Japanese Government, except in some exceptional cases, where arrangements fall within the agency's jurisdiction and are duly authorized by existing treaties or domestic laws. *See infra* Chapter 12, Section II.A.2; *see also infra* Chapter 11, Section II.B.1 (in Israel, agency-to-agency agreements may only be concluded to implement existing umbrella agreements or if expressly authorized to do so by legislation).

[62] *See infra* Chapter 8, Section II.A. These instruments are not registered with the United Nations under the U.N. Charter. *Id.*

[63] *See infra* Chapter 13, Section II.D.1–2.

level. In this sense, these studies offer a perspective on the current state of the international law of treaties, with state practice confirming the conventional definitions of treaties and the customary distinctions, but raising issues with respect to the continued viability of oral agreements and responsibility for agency-level agreements.

B. *The Scope of Executive Authority over Treaty Making*

Just as states face the question of what instruments they will regard as treaties, so too do they face the question of whom to authorize to represent the state in negotiating and concluding such treaties. International law purports to answer this question for states through VCLT Article 7. It provides, for example, that Heads of State, Heads of Government, and Ministers for Foreign Affairs may represent the state for purposes "of performing all acts relating to the conclusion of a treaty."[64] Such clarity at the international law level, however, introduces a potential tension with how states distribute treaty-making authority at the national level; the VCLT appears designed to grant these office-holders authority to bind the state as a matter of international law, irrespective of whether the state's national law empowers them to do so.[65] The present study, therefore, offers an opportunity to explore the extent of this tension by examining how individual states have answered the question of whom they authorize to negotiate and conclude treaties and how, if at all, they condition the exercise of such authority.

1. *The Executive's Exclusive Treaty-Making Power*

Generally speaking, states demonstrate remarkable uniformity in distributing their treaty-making authority internally. In every case, the states surveyed assign the power to negotiate and conclude treaties to the executive.[66] In most states operating on the presidential model (e.g., Chile, Colombia,

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[64] *See* VCLT, *supra* note 18, Art. 7(2). Other persons may represent the state in adopting, authenticating, or concluding a treaty if they possess full powers or if the states concerned agree, expressly or implicitly, to dispense with requiring full powers. *Id.* at Art. 7(1). Similarly, heads of diplomatic missions can adopt treaties between their sending state and their host state, as can representatives to international conferences or organizations with respect to treaties adopted in the conference or organization. *Id.* at Art. 7(2)(b), (c).

[65] Thus, even if a Minister of Foreign Affairs concludes a treaty without the necessary internal authorization, the state would be unable to cite such a failure as a manifest violation of its internal procedures for purposes of avoiding the ensuing treaty obligations under VCLT Article 46. *See* Sinclair, *supra* note 9, at 32–33 (citing VCLT negotiating history and the International Law Commission to support such a reading).

[66] *See, e.g., infra* Chapter 5, Section II.A (in China, the State Council, i.e., the Central People's Government of the PRC, concludes treaties).

Egypt, Mexico, and the United States), the President possesses the authority to negotiate, sign, and consent to be bound by a treaty on behalf of the state.[67] A President in these states may, of course, delegate this power.[68] In Austria, France, and Russia, the President possesses a treaty-making power, but shares it with the Government, which may negotiate, sign, and consent to be bound by treaties in its own right.[69]

In many states using a parliamentary method of governance (e.g., Canada, India, South Africa, Thailand, and the United Kingdom), the Head of State retains the treaty-making power, but may exercise it only through the Government or with its concurrence.[70] In Germany, the President's power is similarly limited, while the Government may negotiate and, through its signature, consent to certain treaties directly.[71] In the Netherlands, the Monarch's treaty-making power has largely been delegated directly to the Minister for Foreign Affairs. This has left the Prime Minister, notwithstanding his status as Head of Government, without the authority to sign treaties.[72] In other parliamentary model states such as Israel, Japan, and Switzerland, the treaty-making power has devolved directly to the Government.[73] As such, their respective Heads of State have no independent treaty-making power.

Although all the states may agree on the executive's authority to represent the state for treaty purposes, less similarity exists among them in terms of how closely their laws or practices coordinate the exercise of that authority among the various agencies and organs within the executive. Some states keep the treaty-making power quite centralized. Colombia's Constitution, for example, authorizes only the President or someone to

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[67] *See, e.g., infra* Chapter 4, Section II.B (Chile); Chapter 6, Section II.B.1 (Colombia); Chapter 7, Section II.B.1 (Egypt); Chapter 13, Section II.B (Mexico).

[68] *See infra* Chapter 6, Section II.B.1 (Colombian President may appoint representatives to adopt treaties on his behalf); *see also* Chapter 20, Section II.B (U.S. President's authorities delegated to the Secretary of State).

[69] *See infra* Chapter 2, Section I.A (both Austria's Federal President and Federal Government are competent to conclude treaties, although the President only does so upon a proposal from the Federal Government); *see also infra* Chapter 8, Section II.B (France); Chapter 15, Section II.D (Russia).

[70] *See infra* Chapter 3, Sections I and II.B.1 (Canada); Chapter 10, Section I (India); Chapter 16, Section II.B (South Africa); Chapter 18, Section II.A.3 (Thailand); Chapter 19, Section I (United Kingdom).

[71] *See infra* Chapter 9, Section II.A.1.

[72] *See infra* Chapter 14, Section II.A.

[73] *See, e.g., infra* Chapter 11, Section I (Israel). Although Japan's Emperor still co-signs full powers and instruments of ratification, Japan's Constitution assigns the treaty-making power to the Cabinet. *See* Chapter 12, Section I and Annexes C and D. In Switzerland, the treaty-making power actually resides in the seven-member Federal Council as a whole. Chapter 17, Section II.C (Switzerland).

whom he has given full powers to adopt treaties; other officials (including presumably the Minister of Foreign Affairs) lack such authority.[74]

For the vast majority of the states surveyed, however, the Ministry of Foreign Affairs plays some role in the executive's exercise of its treaty-making power.[75] It may actually employ the power on the executive's behalf. Japanese law, for example, assigns to the Ministry of Foreign Affairs (MOFA) the exercise of the Cabinet's treaty-making powers; other Government agencies generally have no independent authority to negotiate or conclude agreements.[76] Alternatively, a state's Ministry for Foreign Affairs may authorize or approve the negotiation and signature of treaties, but allow other government ministries or agencies to actually engage in such actions. In the United States, for example, the "Circular 175" (C-175) process implements a provision of U.S. law restricting U.S. Government agencies from signing or otherwise concluding international agreements unless they have first consulted with the U.S. Secretary of State.[77] Although not so formalized, the United Kingdom has a similar practice.[78] Government agencies in the Netherlands have a large measure of latitude to initiate negotiations on a treaty, provided they inform the Ministry of Foreign Affairs.[79] In other cases, whether the Ministry of Foreign Affairs exercises any oversight role turns on the relative importance of the treaty. In Austria, China, Germany, India, and Russia, for example, the Ministry of Foreign Affairs oversees the negotiation and conclusion of most treaties, but leaves to individual ministries limited powers to negotiate or conclude treaties within their respective spheres of authority.[80]

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[74] *See infra* Chapter 6, Section II.B.1.

[75] *See, e.g., infra* Chapter 11, Section II.B.2 (by delegation from the Government, Israel's Ministry of Foreign Affairs directs, monitors, and registers all treaty-making activity).

[76] *See infra* Chapter 12, Section II.A.2 and II.B.1.

[77] *See infra* Chapter 20, Section II.B; *see also* The Case-Zablocki Act, 1 U.S.C. 112b(c) ("Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State."). The C-175 process itself involves the Secretary of State authorizing the negotiation and/or conclusion of one or more international agreements by the State Department or another U.S. government agency. *See infra* Chapter 20, Section II.B.

[78] In the United Kingdom, government departments primarily concerned with the execution of a treaty are able to negotiate it, provided the Foreign and Commonwealth Office has no foreign policy objections. *See infra* Chapter 19, Section II.B.1.

[79] *See infra* Chapter 14, Section II.C.1. The conclusion of the actual treaty, however, remains a decision of the Council of Ministers. *Id.*

[80] *See, e.g., infra* Chapter 2, Section II.B.1 (Austria gives its Ministry for Foreign Affairs prevailing competence to negotiate treaties, but allows other Ministries to conclude treaties within their special competence and where the treaty's conclusion is not reserved to either the Federal President or Government); Chapter 5, Section II.A and II.C.3 (China's Ministry of Foreign Affairs administers the conclusion of treaties for the State Council,

In a number of instances, the Ministry of Foreign Affairs' centralized control operates more in theory than in practice. In France, for example, although the Ministry of Foreign Affairs has a two-century-old monopoly on the control of foreign relations, it has not stopped other French Government agencies from concluding *arrangements administratifs*.[81] In Chile, various Government agencies have taken over from the Ministry of Foreign Affairs the negotiation or conclusion of certain treaties.[82] Meanwhile, in South Africa, negotiation of agreements falls to the minister within whose portfolio the subject of the treaty falls.[83]

Two states – Egypt and Thailand – have devised an entirely different approach, using committees to coordinate the executive's exercise of its treaty power. Thus, Egypt has an inter-agency Permanent Committee for Drafting and Revision of Treaties that reviews all proposed treaties prior to signature.[84] In Thailand, a Treaty Review Committee, composed of Government officials, jurists and academics, meets weekly to address, *inter alia*, draft treaties proposed for Thailand's signature, ratification, or accession.[85]

In all of these cases, it is the executive's acts – be it negotiation, signature, deposit of an instrument of ratification, etc. – that represent the state for treaty purposes. As these case studies demonstrate, however, states differ on who within the executive can engage in such acts. These variations often mean that the state's national distributions of treaty-making powers do not coincide with those assumed to exist by international law. For example, in one case – the Netherlands – the power to sign treaties is denied to the Head of Government, notwithstanding VCLT

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but may leave it up to a government department to decide whether to negotiate a treaty on matters within the mandate of that department); Chapter 9, Section II.A.1 (German Federal Foreign Minister plays a leading and coordinating role with regard to treaty relations, but federal ministers may conclude ministerial agreements within their exclusive sphere of competence, provided the Federal Foreign Office consents); Chapter 15, Section II.D (Russian Ministry of Foreign Affairs serves as central agency in treaty matters, but by agreements with other federal agencies, allows them to negotiate draft treaties for submission to the President or the Government for approval). In Mexico, the Department of Foreign Relations (SRE) coordinates treaty making, but federal agencies may conclude inter-institutional agreements on their own. *See supra* note 63.

[81] *See infra* Chapter 8, Section II.B.2; *see also supra* note 62 and accompanying text.

[82] *See infra* Chapter 4, Section II.B. For example, the Ministry of Finance has responsibility for negotiating Chile's entry into NAFTA. *Id.*

[83] *See infra* Chapter 16, Section II.B.2.

[84] *See infra* Chapter 7, Section II.C.1.d. The United States contemplates a similar inter-agency standing committee to coordinate the conclusion of its treaties and international agreements (often in the trade context), but only as an alternative to the "Circular 175 process." *See infra* Chapter 20, Section II.B.

[85] *See infra* Chapter 18, Section II.D.

Article 7. Similar questions exists about the Head of State's treaty-making authority in Israel, Japan, and Switzerland, while Colombia's Constitution suggests the Minister of Foreign Affairs has no authority to bind Colombia by treaty. Moreover, states have widely distributed the treaty-making power among Government agencies and departments within the executive, with varying levels of oversight from the Ministry of Foreign Affairs.

2. *Unencumbered Exercises of the Executive Treaty-Making Power*

The fact that states empower only their executives to make treaties binding on the state does not mean that they exercise such power unencumbered. In fact, all of the states surveyed reported limitations on the exercise of this power. Whether as a matter of national law or practice, states authorize various actors outside of the executive (e.g., the legislature, the courts, sub-national units, or even the populace at large) to restrict when or how the executive may exercise its treaty authorities.

These restrictions primarily apply to the executive's ability to actually consent to a treaty on behalf of the state. However, limitations on the executive's capacity may also operate more generally. For example, Germany has agreed to transfer in whole or in part its treaty-making competence on certain subjects (e.g., customs and trade as well as environmental policy) to the European Community as part of its commitments under the Treaty on European Union.[86] Presumably, the same restrictions apply to the other European Union Member States surveyed – Austria, France, the Netherlands, and the United Kingdom.[87]

In most cases, the restrictions on the executive's treaty-making power condition the executive's capacity to actually consent to or join a treaty. As discussed in Section C below, frequently these conditions involve the state's legislature but, more rarely, they may involve the national population. Several of the states also require or permit judicial review of a proposed treaty prior to the exercise of executive consent. In Colombia, for example, the President may only ratify a treaty if it is approved by the Constitutional Court, and he must follow any reservations suggested by that Court.[88] In Chile, France, and Russia, although judicial review

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[86] *See infra* Chapter 9, Section I.C.

[87] Given the focus of the current study on "national" treaty law and practice, discussions of how these EU Member States have transferred certain treaty-making competences to the European Community (and perhaps now to the European Union itself) are understandably absent. Future comparative studies of treaty law and practice would, however, benefit from considering and comparing not simply national laws and practices, but also the internal regulation of treaty making by supranational organizations such as the EU, and perhaps even international organizations more generally.

[88] *See infra* Chapter 6, Section I.

is not automatic, it can, if invoked, constrain the executive's ability to join a treaty.[89]

Even with such various limitations and restrictions on the executive's treaty-making power, most states allow unencumbered executive treaty making in certain areas. Table 2 provides a summary of the most common areas of "executive treaties" identified by the participating states.[90]

Table 2 Executive Treaties

State	None	Treaties not requiring legislative implementation	Treaties the conclusion of which are authorized by a prior law or treaty	Treaties falling outside of categories that require the legislature's approval	Treaties within the executive's sole authority	Minor, technical or administrative treaties	Other
Austria				X			
Canada		X	X		X		
Chile			X				
China				X			
Colombia	X						
Egypt			X				
France				X			
Germany				X		X	
India		X					
Israel		X					
Japan			X	X			
Mexico							X
Netherlands			X			X	X
Russia				X			
So. Africa						X	X
Switzerland			X		X	X	X
Thailand				X			
U.K.		X	X		X		
U.S.A.			X		X	X	X

[89] In Chile, depending on the circumstances, the President, either House of Congress, or a specified number of Congressional members can require review of a treaty by the Constitutional Court. If the Court rules that any part of the treaty is unconstitutional, the executive is effectively barred from consenting to it. *See infra* Chapter 4, Section II.F.1. Similar mechanisms operate for involving France's *Conseil constitutionnel* and Russia's Constitutional Court. *See infra* Chapter 8, Section II.D.1 (France); Chapter 15, Section II.G (Russia).

[90] These categories are derived from the reports on the law and practice of the participating states. As a result, some overlap exists among the listed categories. For example, Table 2 includes a category where a state's law or practice only identifies treaties that require legislative approval, leaving other treaties to the executive. This is quite similar to those states that specifically assign the executive treaty making authority in those areas where the executive has competence.

At one end of the spectrum lies Colombia. In Colombia, Congress must approve any treaty before the President can indicate Colombia's adherence to it. In other words, Colombia has no executive treaties.[91]

By contrast, India and other states with a "Commonwealth" history characterize all treaties as "executive" in nature. Although India's Constitution assigns exclusive power to legislate over treaties to its Parliament, the Parliament has never exercised this power. Accordingly, in the absence of legislation on the subject, India's executive treaty-making power "remains unfettered by any 'internal constitutional restrictions.'"[92] Like India, the United Kingdom and Canada also vest absolute power in the executive to consent to treaties free from any outside influence.

All three states distinguish, however, between the power to form treaties by consent and the power to implement them. In many cases, before the executive can implement a treaty, it will require some parliamentary action. As such, although in theory the Indian, U.K., or Canadian executive could consent to be bound by any treaty at any time, in practice all three refrain from joining treaties that require implementing legislation until after its enactment.[93] Conversely, where implementation measures already exist as a matter of law or under the executive's own authorities, no barriers stand in the way of the executive's consent.[94] For its part, Israel generally follows the same approach, with one exception. The Israeli Government has occasionally submitted important political treaties to the Knesset before ratification as a matter of political expediency, even though the Supreme Court has ruled it has no obligation to do so.[95] In each of these states, therefore, we see that the executive's theoretical freedom to consent to treaties is restrained in practice by the need to ensure the state can legally (or politically) implement the treaty's obligations.

In other quarters, a legal framework establishes which treaties may be joined under the executive's sole purview and which require pre-approval

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[91] *See infra* Chapter 6, Section II.C.1 Colombia does allow the President to provisionally accept international agreements of an economic nature in the framework of an international organization, provided he immediately submits the treaty for Congressional approval. *Id.* Mexico's Constitution takes a similar approach, but under its Treaty Law federal agencies have authority to conclude inter-institutional agreements binding only on the agency. *See infra* Chapter 13, Sections II.C.1, II.D.

[92] *See infra* Chapter 10, Section II.C.

[93] *See infra* Chapter 3, Sections I, II.C.2 (Canada); Chapter 10, Section I (India); Chapter 19, Sections I, II.C.2 (United Kingdom).

[94] *See, e.g., infra* Chapter 3, Sections I, II.C.1 (Canada); Chapter 19, Sections I, II.C.1 (United Kingdom).

[95] *See infra* Chapter 11, Sections II.A, II.B.5. Canada has also submitted more important treaties, such as the U.N. Charter and the North Atlantic Treaty, to the House of Commons for political approval. *See infra* Chapter 3, Section II.C.2.

by the legislature. Certain states do this by establishing a presumption of legislative approval for all treaties, subject to specific constitutional or statutory exceptions where the executive can proceed without such approval.[96] In South Africa, for example, the 1996 Constitution requires parliamentary approval for all treaties, except for those of a "technical, administrative or executive nature" or agreements that do not require "ratification or accession."[97]

Alternatively, a state may simply delineate certain treaties that require parliamentary participation. In Austria, China, Egypt, France, Germany, Japan, Russia, and Thailand, the constitution, laws or practices have identified specific categories of treaties requiring parliamentary approval.[98] In each of these cases, the executive's authority to conclude treaties independently applies by negative implication to those treaties falling outside of the listed categories.[99]

The United States approach is more complicated. On the one hand, the U.S. Constitution requires the Senate to give advice and consent to treaties sent to it by the President.[100] In practice, however, the executive has developed alternative methods by which it concludes treaties without going to the Senate, such as when it seeks Congressional approval through "fast-track" procedures or otherwise.[101] In other instances, such as where

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[96] *See infra* Chapter 4, Section II.A (Chile); Chapter 14, Section II.C.3 (Netherlands); Chapter 16, Section II.B.1 (South Africa); Chapter 17, Section III.C (Switzerland). In the Netherlands and South Africa, the decision on whether or not a treaty falls within one of the exceptions to the parliamentary approval requirement is taken by the executive, without consulting with Parliament. *See infra* Chapter 14, Section II.C.4 (Netherlands); Chapter 16, Section II.B.1 (South Africa).

[97] *See infra* Chapter 16, Section II.B.1.

[98] *See infra* Chapter 2, Section II.C (Article 50 of the Austrian Constitution); Chapter 5, Section II.C.5, Annex B (Article 7 of the Law of the PRC on Procedures for the Conclusion of Treaties); Chapter 7, Section II.B.1 (Article 151 of the Egyptian Constitution); Chapter 8, Section II.C.1.b (Article 53 of the French Constitution); Chapter 9, Section II.B (Article 59(2) of Germany's Basic Law); Chapter 12, Section II.C.1 (Japanese constitutional practice requires formal Diet approval for three categories of treaties); Chapter 15, Section II.E (Article 15 of the Federal Law on Treaties of the Russian Federation); Chapter 18, Section II.C (Article 224 of the Thai Constitution). As in the Netherlands and South Africa, in Germany, Israel, and Japan, the executive takes responsibility on its own for assessing whether a particular treaty falls within the category for which Parliamentary approval is required. *See infra* Chapter 9, Section II.B (Germany); Chapter 11, Section II.B.3 (Israel); Chapter 12, Section II.C.4 (Japan). France had a similar practice, but recent decisions by the *Conseil d'État* have called the executive's authority into question. *See infra* Chapter 8, Section II.C.3. In Russia, the courts may make the decision on parliamentary approval. *See infra* Chapter 15, Section II.E.

[99] In some cases, however, the state may opt as a matter of practice to send more treaties to the legislature than required by law. This is the case, for example, in France. *See infra* Chapter 8, Section II.C.1.b.

[100] *See infra* Chapter 20, Section I.

[101] *See id.* at Section II.C and II.G.

Congress has already pre-authorized the conclusion of a class of treaties or where the President has his own constitutional authorities, the executive may proceed to enter into the agreement without any specific legislative pre-approval.[102]

In all of these cases, similarities appear among these "executive treaties" whether derived by negative implication, a specific constitutional or statutory exception, or through some constitutionally accepted practice. For example, a number of states share South Africa's approach of granting the executive authority to consent to minor or technical agreements.[103] This seems to reflect the notion of a political calculus, assessing when to allow or check unfettered executive authority based on whether the treaty has any policy significance. At the same time, as Table 2 indicates, various states have replicated some aspects of the U.S. approach, allowing the executive to consent to treaties on subjects within the executive's sphere of competence or for which prior laws or treaties already establish a means of implementation. In these cases, as with states in the Commonwealth tradition, legal, rather than political, considerations over the executive's ability to implement a treaty appear to dictate when the executive may consent to a treaty without prior legislative involvement.[104]

Although the executive can conclude these treaties without legislative pre-approval, that does not mean that executives always keep legislatures in the dark on their intentions. A number of states have a practice by which the executive gives the legislature advance notice of its intention to bring a treaty into force for the state. For example, the United Kingdom follows the long-standing "Ponsonby" rule by which any treaty requiring ratification is submitted to Parliament for a period of 21 days before the Secretary of State for the Foreign Commonwealth Office signs the instrument of ratification.[105] Israel follows a similar practice for treaties the terms of which require ratification, although it leaves the treaty before the Knesset for only fourteen days prior to such ratification.[106]

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[102] *See id.*

[103] *See, e.g., infra* Chapter 14, Section II.A note 7 (Netherlands); Chapter 17, Section III.C (Switzerland's Federal Statute on the Organization of the Government and the Administration provides the executive with authority to conclude on its own "petty" agreements" of minor importance).

[104] In Switzerland and the Netherlands, economic, rather than legal or political, criteria also operate to determine when the executive can conclude treaties without legislative approval – in both states, authority exists for executive treaties that do not impose significant financial obligations on the government. *See infra* Chapter 14, Section II.C.3.a (Netherlands); Chapter 17, Section III.C (Switzerland).

[105] *See infra* Chapter 19, Section II.E.

[106] *See infra* Chapter 11, Section II.B.5; *see also* Chapter 16, Section II.B (even for agreements not subject to Parliamentary approval, South Africa requires they be tabled before both houses of Parliament for debate).

Others pursue this practice on a narrower scale.[107] In the United States, certain agreements to be concluded under existing Congressional authority (e.g., nuclear cooperation agreements, fisheries agreements or debt relief agreements) must first be submitted to Congress for a certain period of time before the executive can actually bring them into force.[108]

Finally, the various checks that limit the availability of executive treaties can be contrasted with the executive's ability to exercise the power to terminate treaties. Here, we find a clear majority of the participating states grant the executive a prerogative power. In Canada, Chile, Colombia, France, Germany, India, Israel, Japan, Mexico, Thailand, the United Kingdom, and the United States, the executive can terminate treaties without obtaining legislative approval even where legislative approval was required to join the treaty.[109] That result makes sense for states such as Canada that consider the treaty-terminating power to fall within the executive's plenary treaty-making power.[110] For states that actually limit the exercise of the treaty-making power, however, an explanation for this practice is harder to discern.[111] One explanation might lie in how some of the states that require legislative pre-approval to form a treaty still grant the executive discretion to decide whether or not to join that treaty even after the legislature has approved it.[112] We could assume in those cases that if the legislature cannot complain when the executive fails to join a treaty it approved, the legislature cannot complain when the executive abrogates a treaty, since the executive never had to join the treaty in the first place.

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[107] Dutch law, for example, requires notification for a narrower set of agreements to parliament before executive consent, namely for treaties implementing approved treaties or for treaties extending existing treaties. *See infra* Chapter 14, Section II.C.4.

[108] *See infra* Chapter 20, Section II.C.2. In the case of nuclear cooperation agreements, Congress is even afforded time to decide whether to disapprove the agreement as inconsistent with its pre-authorization. *Id.*

[109] *See infra* Chapter 3, Section II.L (Canada considers the power to make treaties embraces the power to terminate treaties); Chapter 4, Section II.J (In Chile, the termination power lies within the discretionary ambit of Presidential power); Chapter 6, Section L.1 (in Colombia, treaty termination is embraced within the treaty-making power); Chapter 8, Section II.F.2 (France views the executive termination of a treaty as discretionary); *see also infra* Chapter 9, Section II.B (Germany); Chapter 10, Section II.K (India); Chapter 11, Section II.B.11 (Israel); Chapter 12, Section II.L (Japan); Chapter 13, Section II.C.7 (Mexico); Chapter 18, Section II.F (Thailand); Chapter 19, Section II.M (United Kingdom); Chapter 20, Section II.L (United States).

[110] *See infra* Chapter 3, Section II.L.

[111] *See, e.g., infra* Chapter 4, Section II.J (deeming termination authority within the Chilean President's discretionary ambit where neither the Constitution nor any statute addresses it).

[112] *Id.*, at Section II.C.

That conclusion is not free from doubt, however, as a number of states that condition the executive's treaty-making power on legislative approval also require the same level of approval for a treaty's termination.[113] This approach views the treaty-making power as much more a shared executive-legislative power, assuming that if both organs participated in the treaty's formation, both should participate in its denunciation. The notion that the legislature itself possesses some form of the treaty-making power could also help explain how in cases such as Egypt and Switzerland, a practice has emerged where either the executive or the legislature can take steps to terminate a treaty.[114]

Returning to the question of VCLT Article 7, it appears that, just as states have not always distributed the exercise of their treaty-making powers to all of the office-holders assigned such responsibility under international law, so too have they varied in the extent to which those possessing the treaty-making power can exercise it unencumbered. Even though the approaches differ in how states distribute such unencumbered executive treaty-making power, similarities exist in what sorts of treaties are subject to it. As a practical matter, therefore, even if international law does not require it, states may well benefit from a greater understanding of each others' domestic distributions of (and limitations on) treaty-making powers. In doing so, they can minimize the potential for actual conflicts over the exercise of such power under national or international law.

C. *The Legislative Role in Treaty Making*

Answering the question of how states formally distribute the treaty-making power to and within their executive organs, including the competence to conclude certain "executive treaties," does not, however, tell the whole story. As the previous section suggests, the executive may have authority to negotiate, sign, ratify or otherwise adhere to treaties, but it does not do so in a vacuum. States must also decide what role(s), if any, they wish to assign to government organs, such as the legislature, or even the

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[113] *See infra* Chapter 2, Section II.L (Austria); Chapter 5, Section I.B (China): Chapter 14, Section II.C.6 (Netherlands); Chapter 15, Section II.N (Russia). In the Netherlands, the Government must notify the Parliament when it does not join a treaty that Parliament previously approved. *See infra* Chapter 14, Section II.C.4.

[114] *See infra* Chapter 7, Section II.H (Egypt). In Switzerland, although the power to terminate rests solely with the executive, the legislature may oblige it to terminate a treaty by a binding mandate. *See infra* Chapter 17, Section III.G. Russia has a similar practice. *See infra* Chapter 15, Section II.N.

populace at large.[115] In the legislative context, states may, by law or practice, assign the legislature various roles, depending on whether the intention is simply to monitor the executive's exercise of its authority, to check it in some way, or to actually democratize the treaty-making process. Moreover, states also face the question of when to insist on a legislative role, whether during negotiations, prior to executive consent to a treaty, or after the state has already become bound by the treaty. The ensuing chapters offer different answers to these questions, but, once again, in doing so, demonstrate certain similarities in approach among the participating states.

1. *Legislative Participation in Treaty Negotiations*

Legislatures do not, of course, directly negotiate treaties. Nor do they have much say in what treaties the executive decides to negotiate.[116] In a number of states, the executive does not even consult with the legislature on the treaties it has under negotiation.[117] In Colombia, for example, "Congress is not competent to participate in the negotiation of [a] treaty, by way of consultation or otherwise."[118]

For most of the participating states, however, the negotiating process does not exclude the legislature entirely. Indeed, at the executive's invitation, legislative representatives in Germany and the United States may actually serve as part of the executive delegation negotiating a treaty.[119]

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[115] Although not addressed comprehensively in this chapter, in some cases states assign a role in the treaty-making process to the Judiciary or to the public. *See supra* notes 88–89 (concerning judicial oversight of treaty making). In terms of public involvement in treaty making, only a few states have formal consultative mechanisms concerning ongoing negotiations, although a greater number consult with interested stakeholders informally. Similarly, most states do not afford the public a direct role in approving treaties. In Switzerland and France, however, referendum mechanisms exist by which certain treaties can be subject to popular approval. *See infra* Chapter 8, Section II.C.2.b (France); Chapter 17, Section III.B and III.E (Switzerland); *see also infra* Chapter 7, Section II.C.1.c (discussing Egypt's use of a referendum to seek approval of the Treaty of Peace with Israel).

[116] *See, e.g., infra* Chapter 14, Section II.C.1 (in the Netherlands, the initiation and conduct of negotiations is traditionally a matter for the Government). Russian law, however, encompasses a concept of "recommendations" by which either of the legislative chambers or other government organs can propose that the Government negotiate and conclude a treaty. The Government must respond to such recommendations within one month of their receipt. *See infra* Chapter 15, Section II.D.

[117] *See infra* Chapter 8, Section II.B.3 (In France, "Parliament never takes part in the negotiating process, nor does it play an official role in initiating negotiations"); *see also infra* Chapter 12, Section II.E (Japan); Chapter 16, Section II.C (South Africa).

[118] *Infra* Chapter 6, Section II.E.2; *see also id.* at Section II.C.3.

[119] *See infra* Chapter 9, Section II.B (Germany); Chapter 20, Section II.E (United States). Although not detailed in the chapter itself, U.S. senators and their representatives have served on U.S. delegations at the invitation of the State Department. In Switzerland, however, the Swiss executive (the Federal Council) rejected a move to give the Swiss Federal Assembly similar rights. *See infra* Chapter 17, Section II.C.

More often, the executive offers the legislature a more consultative role. For example, in the Netherlands, the Kingdom Act requires the Minister of Foreign Affairs to submit to Parliament a list of draft treaties on which negotiations are proceeding, in order to allow the Parliament to discuss their contents at a stage before they are definitive.[120] Swiss law requires the executive to inform the president of each chamber of the Federal Assembly "regularly, thoroughly, and in good time about all developments, about its intentions and pending negotiations."[121] In both cases, however, the legislature does not obtain any form of co-decision over the negotiations; they remain an executive prerogative.[122]

For others, executive consultation with the legislature turns on the political, economic, social, or military significance of the treaty subject to negotiation; the more important the treaty, the more likely the consultation.[123] Canada reports regular consultations between the Government and Parliament on "important" treaties.[124] In Thailand, consultations may occur when a treaty under negotiation contemplates changes in Thai law.[125]

Even in the absence of formal consultations, informal mechanisms or the legislative practice of posing questions to the executive can function to ensure the executive keeps the legislature abreast of on-going negotiations.[126] In the United States, the U.S. Senate can require Executive Branch testimony or reports on ongoing treaty negotiations as well as pass resolutions indicating what provisions the Senate believes a treaty should (or should not) contain.[127] Thus, although the executive may have the prerogative to determine when and what treaties to negotiate, the states surveyed generally favor mechanisms by which the executive keeps the legislature aware of its more important negotiating activities.

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[120] *See infra* Chapter 14, Section II.C.1.

[121] *Infra* Chapter 17, Section II.C.

[122] *See id.; infra* Chapter 14, Section II.C.1.

[123] *See, e.g., infra* Chapter 13, Section II.B (Mexico's Government Ministries consult with Congress on negotiations of treaties of "great relevance for their social, economical or political implications for the nation" such as GATT and NAFTA); Chapter 19, Section II.E (United Kingdom).

[124] *See infra* Chapter 3, Section II.C.2.

[125] *See infra* Chapter 18, Section II.C.

[126] *See infra* Chapter 2, Section II.E (informal channels keep Austrian parliament informed about treaties); Chapter 12, Section II.E (Japanese Diet retains right to question Government Ministers about treaty negotiations); Chapter 8, Section II.C.1 (Members of French Parliament have right to submit questions to the Government on treaties under negotiation).

[127] *See infra* Chapter 20, Section II.E.

2. *Legislative Participation in the Decision to Consent to a Treaty*

In examining executive treaties, the discussion focused on the ways in which state law or practice left the executive free to consent to certain treaties without the need for legislative pre-approval or implementation. By contrast, we can also look at those areas where, as a matter of law or practice, the legislature approves or implements certain treaties prior to executive consent. Table 3 lists categories of treaties for which the participating states were reported to require legislative approval or implementation before the executive could bring the text into force.[128]

Despite the diversity of approaches, several common themes emerge in looking at these reported categories. First and foremost, each of the states actually assigns the legislature approval or implementation responsibilities for at least some of the treaties concluded by that state. In other words, no matter how great the executive prerogative for treaty making, no state has a situation where the executive operates entirely without legislative limitation on the exercise of its authority. Moreover, all of the states agree on the need for legislative involvement in one area – i.e., those treaties that require a change to existing laws or the exercise of legislative authority in an area not previously addressed by domestic law.[129]

In some cases, the state's constitutional system requires actual legislative approval of the proposed treaty.[130] As discussed above, in other cases (e.g., in the states with a Commonwealth history) the executive does not need legislative approval *per se*, but will seek and obtain implementing legislation for treaties that need it *before* the state actually joins the treaty.[131] Accordingly, at least in principle, the case studies presented support a

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[128] The categories used in Table 3 are drawn from the descriptions provided in this compendium. Accordingly, certain categories may actually overlap in whole or in part. Some states, for example, might view their "political" treaty category to cover territorial and peace treaties. Similarly, states that require legislative approval for all treaties would likely require legislative approval in most of the listed categories. Here, however, a state is listed under a category only where the chapter on that state clearly allows for that delineation.

[129] *See, e.g., infra* Chapter 2, Section II.C (Austria). Even though Colombia, Mexico, and the Netherlands do not specifically identify treaties that require a change in law or new legislative authorities as requiring legislative approval, the categorization used by those states for legislative approval would likely encompass such treaties. *See infra* Chapter 6, Section II.C.1 (Colombia requires all treaties to receive Congressional approval); Chapter 13, Sections II.C.1, II.D (Mexico requires all treaties to receive Senate approval, but inter-institutional agreements are not considered treaties); Chapter 14, Section II.C.3 (the Netherlands requires prior approval of all treaties unless exempted by an Act of Parliament).

[130] *See, e.g., infra* Chapter 7, Section II.B.1 (Egypt); Chapter 17, Section III.B (Switzerland); Chapter 18, Section II.C (Thailand).

[131] *See supra* notes 92–95 and accompanying text (discussing Canada, India, Israel and the United Kingdom).

Table 3 Treaties Requiring Legislative Approval or Implementation Prior to Entry into Force

State	All	All treaties not subject to a specific exemption	Treaties requiring new legislation or changes to existing laws	Treaties labeled as "Political"	Treaties involving territory	Peace treaties	Treaties of alliance or collective security	Treaties requiring ratification	Commerce or maritime treaties	Treaties involving new burdens on the State budget	Treaties involving private rights	Other
Austria			X	X								
Canada			X	X							X	
Chile		X	X									
China			X	X	X	X		X				X
Colombia	X											
Egypt			X		X	X	X		X	X		
France			X		X	X			X	X	X	
Germany			X		X							X
India			X		X					X	X	
Israel				X								
Japan			X	X		X		X	X	X		X
Mexico	X											
Netherlands		X										
Russia			X		X	X	X	X			X	X
So. Africa		X	X							X		
Switzerland		X	X							X		
Thailand			X		X					X		X
U.K.			X		X					X	X	X
U.S.A.			X	X					X			X

practice by which states join treaties only after they have established the domestic legal means to comply with the treaty's obligations.[132]

In terms of the frameworks used by states to determine which treaties require legislative involvement, a mirror image of the executive treaties context appears. As suggested in the discussion of executive treaties, certain states (e.g., Colombia and Mexico) require that all treaties receive legislative approval before the executive can bring them into force.[133] Closely aligned to these states are those that establish a presumption in favor of legislative approval for all treaties, but with specific exemptions spelled out in the national law.[134] By contrast, a majority of states require legislative approval only for one or more specific categories of treaties. Table 3 gives an indication of some of the most common categories reported by states. Looking at these categories, it appears states may require legislative pre-approval as a reflection of the treaty's political, economic, or social significance.

Although all treaties are in some sense political, the legislature's involvement in certain categories turns specifically on the treaty's political significance. Thus, a number of the states favoring the civil law tradition

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[132] *See, e.g., infra* Chapter 2, Section II.H (Austrian implementing legislation normally enacted simultaneously with legislative approval of the treaty); Chapter 10, Section II.D (before bringing a treaty into force, the Indian Government ensures that it has the necessary statutory power to enable it to give effect to the provisions of the treaty); Chapter 11, Section II.B.8 (Israel endeavors to transform treaties into internal law by legislation before the treaty is concluded, although sometimes it occurs after the fact or not at all); Chapter 12, Section II.I (Japanese government policy seeks Diet approval of any domestic legislation at the same time as the Diet considers whether to approve the treaty); Chapter 14, Section II.F.5 (Dutch Government required to enact implementing legislation to make treaty applicable, to repeal inconsistent municipal law and to appropriate funds to execute the treaty by the time it enters into force for the Netherlands); Chapter 20, Section II.I.1 (U.S. practice is to delay deposit of instrument of ratification until enactment of any necessary implementing legislation). This state practice is not, however, uniform. *See, e.g., infra* Chapter 4, Section II.H (Chile's Ministry of Foreign Affairs generally ratifies treaties before they are incorporated into domestic law by means of enactment and publication).

[133] *See infra* Chapter 6, Section II.C.1 (Colombia); Chapter 13, Section II.C.1 (Mexico).

[134] *See infra* Chapter 4, Section II.A (in Chile, all treaties require congressional approval prior to ratification, but an exception exists for agreements under the Executive's authority); Chapter 14, Section II.C.3.a (the Netherlands requires parliamentary approval for all treaties except for (a) treaties authorized by Parliament; (b) treaties solely concerned with the implementation of an approved treaty; (c) treaties involving no substantial financial obligations; (d) secret or confidential treaties; (e) treaties extending expiring treaties; and (f) treaties amending an existing approved treaty's annex); Chapter 16, Section II.B.1 (South Africa requires Parliamentary approval of all treaties except for those of a "technical, administrative or executive nature" or agreements that do not require "ratification or accession"); Chapter 17, Section III.C (Switzerland's Constitution requires the Federal Assembly to approve international treaties, with the exception of those which, by statute or treaty, are within the powers of the Federal Government).

have constitutional provisions or practices that require legislative approval whenever a treaty qualifies as "political" in nature.[135] Although Canada and Israel have also occasionally used the significant political nature of a treaty to justify sending it to the legislature for pre-approval, they have not done so because of any legal requirement. For them, the act of seeking legislative approval of a political treaty is itself political in nature.[136]

Similarly, the inherent political nature of state sovereignty and its association with the territory of the state could explain why a number of states such as China require legislative approval of treaties concerning territorial issues.[137] Likewise, states such as Egypt, may regard treaties that regulate inter-state relations in fundamental ways through peace and security as of such political significance as to warrant legislative involvement.[138] Although less obvious, the idea of having the legislature approve treaties subject to ratification makes sense on the grounds that the inclusion of that procedure within the treaty text signals its political importance to the states that negotiated it.[139]

The reason for legislative approval or implementation of several other categories of treaties may require more than an evaluation of its political significance. For example, although commerce and maritime treaties may have political importance, their potential economic impact on the state and its populace can also explain why states such as the United States require legislative oversight over their conclusion and implementation.[140] In the same vein, to the extent a legislature holds the government's purse-strings, it may take an understandable interest in ensuring that treaties that would impose significant new financial burdens do not proceed without its acceptance or approval.[141]

Finally, in addition to categories with political or economic significance, some delineation of legislative oversight may take place based on the treaty's social or humanitarian impact. France, among others, requires legislative

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[135] *See infra* Chapter 2, Section II.C (Austria); Chapter 5, Section II.C.5.a (China); Chapter 9, Section II.B (Germany); Chapter 12, Section II.C.1 (Japan).

[136] *See supra* note 95 and accompanying text.

[137] *See, e.g., infra* Chapter 5, Section II.C.5.a (China); Chapter 8, Section II.C.1.b (France); Chapter 9, Section II.B (Germany); Chapter 18, Section II.C (Thailand); Chapter 19, Section II.C.1 (United Kingdom).

[138] *See, e.g., infra* Chapter 7, Section II.B.1 (Egypt); Chapter 15, Section II.E (Russia).

[139] *See infra* Chapter 5, Section II.C.5.a (China); Chapter 12, Section II.C.1 (Japan); Chapter 15, Section II.E (Russia).

[140] *See, e.g., infra* Chapter 7, Section II.B.1 (Egypt); Chapter 12, Section II.C.2 (Japan); Chapter 20, Section II.C.4 (United States).

[141] *See, e.g., infra* Chapter 7, Section II.B.1 (Egypt); Chapter 8, Section II.C.1.b (France); Chapter 12, Section II.C.1 (Japan); Chapter 17, Section III.C (Switzerland).

approval or implementation of treaties involving private rights before the executive can consent to the treaty.[142]

For treaties within the aforementioned categories, the form by which the legislature considers them varies among four approaches.[143] First, many states require that the entire legislature (i.e., one or both chambers, depending on the state's system) give its approval.[144] For a second group, both chambers of the legislature participate in the approval process, but one does so with greater rights than the other.[145] A third approach involves having only one of the two legislative chambers give its approval, as in the United States or Mexico where the Senate approves some or all treaties, respectively.[146] Fourth and finally, for those states focused on legislative implementation instead of actual approval, the implementing legislation follows normal parliamentary procedures.[147]

In the federal context, both Canada and Germany require either federal or provincial parliamentary involvement depending on whether the treaty obligations assumed impact federal or sub-federal competences. Under the Lindau Arrangement, for example, Germany has agreed to seek the *Länder*'s consent (which would then enact corresponding Land legislation) in advance of concluding all treaties affecting *Land* competences.[148] Canada has a similar practice vis-à-vis its provinces in the aftermath of the *Labour Conventions* case.[149]

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[142] *See, e.g., infra* Chapter 3, Section II.C.1 (Canada); Chapter 8, Section II.C.1 (France); Chapter 10, Section I (India). Of course, Table 3 does not include all categories that states use to identify treaties warranting legislative approval or implementation. In Russia and France, for example, an additional category involves treaties relating to international organizations in the sense of accepting the organization's capacity to issue rules binding on the State. *See infra* Chapter 8, Section II.C.1.b (France); Chapter 15, Section II.E (Russia).

[143] As discussed in Section B *supra*, many states (e.g., Germany, Israel, Japan, the Netherlands, South Africa, and perhaps France as well) actually allow the executive to determine whether a treaty requires legislative approval, without actually involving the legislature in that decision. *See supra* notes 96 and 98.

[144] *See, e.g., infra* Chapter 4, Section II.C (Chile); Chapter 5, Section II.C.5 (China); Chapter 6, Section I (Colombia); Chapter 8, Section II.C.2 (France); Chapter 11, Section I (Israel); Chapter 12, Section I (Japan); Chapter 14, Section II.C.5 (the Netherlands); Chapter 16, Section II.B.2 (South Africa); Chapter 17, Section II.C (Switzerland); Chapter 18, Section II.C (Thailand).

[145] In Austria, the *Nationalrat* must approve all treaties, and the *Bundesrat* has either a suspensive or absolute veto depending on whether the treaty regulates matters falling within the exclusive competence of the Länder. *See infra* Chapter 2, Section II.C. Germany has a similar approach. *See infra* Chapter 9, Section II.B.

[146] *See infra* Chapter 13, Section II.C.1 (Mexico); Chapter 20, Section II.G.2 (United States). In Egypt, certain treaties require approval by the People's Assembly while a subset of these treaties also requires consultation with the Shoura Council. *See infra* Chapter 7, Section II.B.1.

[147] *See, e.g., infra* Chapter 19, Section II.C.1 (United Kingdom).

[148] *See infra* Chapter 9, Section II.D.2.

[149] *See infra* Chapter 3, Section II.C.1.

In terms of the decision-making structure applied by the legislature, some states provided different processes than those used for normal legislation, such as the U.S. use of "fast-track" procedures when seeking Congressional approval.[150] The Dutch process allows treaties to receive either express or tacit Parliamentary approval (the latter involving cases where the Parliament does not indicate that a treaty should receive express approval within a set period of time).[151] Variations also exist in the form of the approval itself. In Japan, a Diet decision does not approve the treaty, but rather approves the Cabinet's decision to endorse the treaty.[152] Meanwhile, in Germany, legislative action takes the form of a "law of approval" or a "law of enactment," depending on whether the treaty requires a change in German domestic law.[153]

3. *Legislative Involvement in Executive Treaties After Entry into Force*

Even if a state opts not to regard a treaty as needing legislative approval or implementation, that does not mean it will disassociate the legislature from the treaty entirely. A number of states have put in place mechanisms to ensure that the executive keeps the legislature apprised of the executive treaty-making process. Under the Case-Zablocki Act, for example, the U.S. State Department must, within 60 days of its entry into force, submit to Congress any international agreement concluded by the United States (other than treaties submitted for Senate advice and consent).[154] In Egypt, the President must communicate all concluded agreements to the National Assembly along with a suitable explanation.[155]

For some states, a more limited category of executive treaties are presented to the legislature. Its treaty-making autonomy notwithstanding, India has on occasion laid on the table before Parliament treaties on "matters of public importance."[156] Japan follows a similar *ad hoc* practice of reporting treaties to the Diet.[157] In Switzerland, the Federal Assembly

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[150] *See infra* Chapter 20, Section II.C.4. Of course, the United States also follows the "single chamber" approach to legislative approval of treaties under the Senate advice and consent procedure. *Id.* at Section I.

[151] *See infra* Chapter 14, Section II.C.5.

[152] *See infra* Chapter 12, Section I.

[153] *See infra* Chapter 9, Section II.B.

[154] *See infra* Chapter 20, Section II.H.

[155] *See infra* Chapter 7, Section II.B.1. Article 13 of the Netherlands' Kingdom Act requires the Government to notify the Parliament as soon as possible of the conclusion of all treaties that were exempted from the general requirement of Parliamentary approval. *See infra* Chapter 14, Section II.C.4. France reports to Parliament a list of all signed agreements every two to three months. *See infra* Chapter 8, Section II.C.1.

[156] *See infra* Chapter 10, Section II.F.

[157] *See infra* Chapter 12, Section II.E.

receives only a few executive treaties such as the so-called "petty agreements."[158]

In sum, the executive's authority to negotiate, sign, and consent to treaties on behalf of a state does not translate into the exclusion of other governmental actors from the treaty-making process. The chapters that follow provide a particularly compelling picture of legislative involvement in many aspects of treaty formation. Although the executive retains much autonomy over negotiations, the majority of states favor informational avenues that keep the legislature apprised of the subjects under negotiation. Similar mechanisms exist in other states to make sure the executive alerts the legislature once it has concluded a treaty without prior legislative approval or implementation. Taken together, a majority of the states surveyed thus provide their legislatures with opportunities to review some or all executive treaties either immediately before or after their entry into force.[159]

More interesting perhaps than the legislature's consultative/informational role is the manner in which legislative authorization or implementation may serve as a precondition for a treaty's actual entry into force. States have generated an array of parallel approaches to the question of which treaties they would like their legislatures to approve or implement in advance of executive consent to the treaty. Many of these approaches reflect a common goal, i.e., ensuring that the executive does not join a treaty until the necessary domestic legislation is in place to allow the state to meet that treaty's obligations. Separately, many of the participating states have clearly used an importance criterion, whether on political, economic, or social grounds, to determine when a treaty warrants legislative attention. One of the most noteworthy byproducts of this attention is how often states have actually identified the same or similar categories of treaties for legislative involvement whether through legislative approval or implementing legislation.

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[158] *See infra* Chapter 17, Section III.C. Petty agreements are those that neither impose new obligations on Switzerland nor abandon existing rights; those that execute previously approved treaties; those that concern matters for which the executive has regulatory power under domestic law and which are appropriate to international agreement; and those that settle questions of an administrative or technical character or do not imply significant financial consequences. *Id.* In addition, the Swiss Federal Council also reports to the Federal Assembly commercial treaties that are only provisionally in force pending legislative action. *Id.*

[159] *See, e.g., supra* notes 105–108 and accompanying text (discussing how in Israel, the Netherlands, South Africa, the United Kingdom, and the United States some or all executive treaties are brought to the legislature's attention prior to their entry into force); *see also supra* notes 154–158 and accompanying text (discussing Dutch, Egyptian, French, Indian, Japanese, Swiss, and U.S. practice of reporting some or all executive treaties to the legislature soon after entry into force).

D. *How are Treaties Incorporated into National Law?*

Even after a state defines what texts it will consider as treaties and the respective roles of its executive and legislative arms in the formation of such treaties, a state must still determine whether and how to place that treaty within its national legal order. Here again, international law offers a simple answer: give the treaty priority over all domestic laws as necessary. The VCLT takes this approach in Article 27: "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[160] When combined with Article 26's reiteration of the principle *pacta sunt servanda*, international law clearly gives treaties a direct legal effect not afforded to domestic laws, even those of a constitutional nature. If anything, international law signals to states that they need to do whatever it takes within their domestic legal orders to ensure treaty compliance.

We might expect, therefore, in reviewing the national treaty law and practice of the participating states, to find that duly ratified treaties become binding under international law and domestic law at the same time and that they take precedence over other domestic laws. In practice, however, although states accept the VCLT rules on treaty priority as a matter of international law, they have not always viewed these rules as requiring specific consequences for the role of treaties as a matter of national law.[161] Indeed, when viewed from a national perspective, treaties derive their force from a state's constitution or its constitutional framework. The constitution, not international law, will dictate whether and when to incorporate treaties into the national legal order. Thus, even when a state's constitution conforms to the VCLT by assigning treaties priority over all domestic laws (perhaps even the constitution itself), it is still the constitution that makes that assignment. Other constitutions may make different assignments where other interests warrant delaying or deflecting a treaty's domestic legal effect (i.e., interests in ensuring greater democratic legitimacy for treaty rules through legislation, enforcing only publicly known rules; ensuring judicially manageable standards, etc.).

As such, unlike the single, simple answer provided by international law to how a state should incorporate treaties into national law, the surveyed

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[160] *See* VCLT, *supra* note 18. The one exception to this rule is where a manifest violation of internal laws in the process of a state's consenting to a treaty occurs, which may serve as a basis for invalidating that state's consent. *Id.* at Art. 46.

[161] *See, e.g., infra* Chapter 3, Section II.I (Canada often encounters a mismatch between its international obligations and the state of its domestic law); Chapter 14, Section II.F.3 (discussing the international legal duty to comply with treaties); Chapter 17, Section III.H (same); Chapter 20, Section II.I.2 (recognition that if a domestic law overrides a treaty obligation as a matter of U.S. law, the international legal obligation remains).

states' responses prove much more complex and (at least on the surface) more varied. Specifically, the discussions separate out the question of whether and when a treaty becomes domestic law from what priority a treaty may have once it achieves that status as well as whether it will be judicially enforceable. The states also acknowledge the issue of what relevance, if any, a treaty has when it does not receive a designation as domestic law.[162]

1. *Treaties as Domestic Law*

First and foremost, a state must determine at what point, if any, a treaty may be regarded as law within its national legal order. Traditionally, states have divided into two camps: those following the incorporation doctrine and those who use a transformation approach. Under the incorporation doctrine, states view a treaty as part of their internal law once it enters into force internationally. States using the transformation doctrine, by contrast, require the completion of additional domestic procedures before a treaty can have domestic legal effect, regardless of whether it already binds the state under international law. We could, therefore, utilize this framework to classify the surveyed states' approaches to the question of how treaties operate on the national level (and, indeed, a number of the chapters make such a designation).[163]

In practice, however, simply asking the question of whether a state incorporates or transforms its treaties to give them legal effect can lead to some confusion. First, the usage of this terminology is not entirely consistent. For example, although French treaty practice is cited for influencing Chile to adopt the transformation doctrine, France itself is portrayed in this survey as following the incorporation doctrine.[164] Second, several states that are claimed to automatically incorporate their treaties (e.g., France and the Netherlands) actually do require one or more additional domestic procedures for the treaty to have domestic legal effect (e.g., publication or promulgation and publication).[165] Third, the two categories may not be as mutually exclusive as they first appear. For example, Germany in some instances requires implementing legislation to

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[162] In one of the few prior "comparative" treaty law studies of U.S. and European states, the surveyed states faced these same issues in considering the role of treaties in domestic law. *See generally*, Francis G. Jacobs and Shelly Roberts, eds., *The Effect of Treaties in Domestic Law* xxiii–xxxi (United Kingdom National Committee of Comparative Law, 1987).

[163] *See infra* Chapter 4, Section II.H (Chile, like France, follows a transformative approach); Chapter 14, Section II.F.4 (Netherlands follows an incorporation methodology).

[164] *See infra* Chapter 4, Section II.H (Chile); Chapter 8, Section II.E.1 (France).

[165] *See infra* Chapter 8, Section II.E.1 (France); Chapter 14, Section II.F.4 (Netherlands).

transform a treaty into German law, which certainly suggests a transformative approach. That implementing legislation, however, is to be enacted before Germany consents to be bound by the treaty, with effect from the day the treaty enters into force for Germany. Thus, the treaty will operate as German law from the time it enters into force internationally – the very characteristic used to identify a state as following the incorporation doctrine.[166]

Such difficulties necessitate a refinement in the categorization of how states relate their treaties to domestic law. Specifically, we can distinguish states that give treaties direct legal effect domestically as law versus those that give it legal effect more indirectly.[167] Within the first "direct effect" category, moreover, we can differentiate among states that convert treaties into domestic law through the treaty-making process from those that require separate domestic procedures for the treaty to operate as law.

1.a. *Direct Effect upon Entry into Force.* Nearly two-thirds of the states surveyed consider treaties to operate directly as domestic law under certain circumstances. For one group of these states, a treaty's status as law turns solely on the completion of the procedures that authorize the executive to join a treaty. The conclusion of a treaty binding the state under international law provides it with attendant and automatic status as law within the national legal system. For example, Mexico treats all treaties receiving Senate approval as the "law of the land."[168] Similarly, Switzerland views all its treaties as domestically applicable upon their international entry into force.[169] In states that have sanctioned more than one procedure for joining a treaty, the completion of any one of the procedures may provide the treaty with its status as domestic law. Thus, the United States regards all its treaties as the supreme law of the land, whether they were concluded through the Senate advice and consent process, Congressional authorization, or pursuant to the President's own executive authorities.[170]

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[166] *See infra* Chapter 9, Sections I.B, II.A.3, and II.B.

[167] Although a term of art in the context of EU law, "direct legal effect" is used here in a more general sense, and refers to the ability of the treaty text itself to serve as law for the courts and other actors charged with the implementation and enforcement of national laws.

[168] *See infra* Chapter 13, Section II.C.1. The only way a Senate-approved treaty would not qualify as the law of the land in Mexico would be if it were deemed unconstitutional. *Id.*

[169] *See infra* Chapter 17, Section III.H.

[170] *See infra* Chapter 20, Section II.G.

Some states within this first group may restrict direct legal status to certain treaties or require the completion of additional procedures before some treaties will be treated as a law. On its face, Article 14 of Russia's constitution suggests a universal approach – "international treaties of the Russian Federation shall be an integral part of its legal system." Russia's Supreme Court, however, has interpreted this provision to apply only to those treaties that have received legislative approval. At present, therefore, executive treaties lack the status of law within the Russian Federation.[171] In Germany, a law of approval will not only authorize the executive to join a treaty, but will also transform the treaty into German law. Alternatively, a law of enactment may be required to give other treaties the same effect, although that law would be enacted prior to the treaty's entry into force.[172]

1.b. *Direct Effect Upon Entry into Force and Completion of Additional Steps*. A second group of states recognizes a treaty's direct legal effect, but only upon the completion of domestic procedures separate from those that authorized the formation of the treaty itself. For a few states, the only additional procedure required is publication. Thus, in Egypt, treaties qualify as law so long as they are in force *and* published.[173] The Netherlands has a similar tradition, regarding published treaties as an integral part of the law of the land.[174] For other states, publication must be associated with domestic promulgation of the treaty by the executive. France and Chile give treaties domestic legal status upon publication via a Presidential Decree.[175] Japan follows a similar practice.[176] A few states require separate legislative procedures to give treaties direct legal effect. Thailand allows publication to effectively incorporate its treaties into the internal laws of the Kingdom, but actual legislative enactment into Thai law is also used to transform treaty obligations into Thai law.[177] South Africa more generally relies on legislative enactment to give any of its treaties

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[171] *See infra* Chapter 15, Section II.K. The Constitutional Court, however, has yet to address this issue. *Id.*

[172] *See infra* Chapter 9, Section II.B. Where Germany does not require treaties to receive parliamentary approval, however, internal application of the treaties may turn on statutory regulations or simply publication of the treaty itself. *Id.* at Section I.B.

[173] *See infra* Chapter 7, Section II.F.

[174] *See infra* Chapter 14, Section II.F.4. To be effective as statutes, Austria requires approval of the treaty by its lower parliamentary house, the *Nationalrat*, and publication of the treaty after the President ratifies it. *See infra* Chapter 2, Section II.H.

[175] *See infra* Chapter 4, Section II.H (Chile); Chapter 8, Section II.E.1 (France).

[176] *See infra* Chapter 12, Section II.I (Japan). Colombia has a similar system with the additional concept of a Presidential "Decree of Implementation," should the treaty require it. *See infra* Chapter 6, Sections II.I, II.K.

[177] *See infra* Chapter 18, Section II.E.

(whether executive treaties or those subject to Parliamentary approval) the status of law.[178]

Requiring the completion of such separate procedures before a treaty can function as domestic law has several implications. First, it may mean that a treaty will bind the state internationally, but lack domestic legal effect pending publication.[179] At the same time, a state with a publication requirement may not publish all its treaties, thereby depriving certain treaties of any direct status as law. France, for example, only publishes treaties the implementation of which affect the rights or duties of individuals.[180] Japan makes its decision to promulgate based on whether the treaty received the Diet's approval.[181]

1.c. *Indirect Effect through Legislation.* For a third group of states, treaties do not operate in and of themselves as domestic law, regardless of what procedures are put in place. The United Kingdom serves as the leading proponent of this approach, although Canada, India, and Israel identify with it to varying extents.[182] These states only give treaties indirect domestic legal effect through existing legislation or the enactment of new laws to enable compliance with the treaty's requirements. The legislation operates as the law, while the treaty itself has no such status. This means that without legislation, a treaty can have no relationship with the state's internal law whatsoever. For example, although it is a party to the Vienna Convention on Diplomatic Relations, Israel never adopted any implementing legislation for that treaty, leaving it outside of Israel's internal law.[183]

In practice, however, indirect application of a treaty does not necessarily alter the actual legal effect of the treaty on the national legal order. True, in some cases, the treaty's legal effect may turn on the content of the implementing legislation, which may read differently than the treaty's actual text. It is possible, however, for the legislation to simply quote treaty provisions *verbatim*, which effectively converts an indirect effect into a direct one. For example, the United Kingdom enacted the provisions of the Vienna Convention on Diplomatic Relations directly

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[178] *See infra* Chapter 16, Section II.H. An exception exists for "self-executing" treaty provisions of those treaties approved by Parliament. *Id.*

[179] This is the case in Chile. *See infra* Chapter 4, Section II.H (Chile). For its part, France reports a good record in keeping up-to-date publishing treaties. *See infra* Chapter 8, Section II.E.1.

[180] *See infra* Chapter 8, Section II.E.1.

[181] *See infra* Chapter 12, Section II.I.

[182] *See infra* Chapter 3, Sections I, II.I (Canada); Chapter 10, Section II.C (India); Chapter 11, Section II.B.8 (Israel); Chapter 19, Section II.I (United Kingdom).

[183] *See infra* Chapter 11, Section II.B.8.d.

into the Diplomatic Privileges Act of 1964.[184] Thus, even if the treaty cannot be referred to as law, the implementing legislation can serve as its functional equivalent. Moreover, as these states have a practice of enacting any necessary implementing legislation prior to the conclusion of the treaty-making process, this indirect approach may actually result in giving internal validity to treaties faster than those states requiring promulgation or publication after entry into force.[185]

To complicate matters further, some states may make use of one of these approaches for some of its treaties while using a different approach for others. Thus, in China, some treaty provisions are directly applicable, while others only have indirect effect through implementing laws or regulations.[186]

Looking at these three approaches collectively, although most states give domestic legal effect to some of their treaties, few states do so for all treaties. Whether following a direct- or indirect-effects approach, most of the surveyed states limit those effects to specific categories of treaties. This categorization may turn on substantive factors (i.e., France giving direct effect via publication only to treaties affecting individual rights or duties) or procedural ones, either in terms of legislative involvement (i.e., Russia's direct integration of only those treaties approved by Parliament or the United Kingdom's indirect application of treaties through implementing legislation) or executive acts (i.e., Chile's use of promulgation and publication to identify treaties as domestic law).

Simply because a state does not give its treaties direct or indirect legal effect does not, however, imply that a state has failed to comply with its treaty obligations. Where a treaty only involves obligations between states such as a treaty of alliance, the domestic legal order may have no role to play. Indeed, at least some of the decision on whether to give a treaty domestic legal effect turns on whether such an effect is required for the state to comply with that treaty. For example, France's publication of treaties affecting individual rights or duties to give them the force of French law makes sense given its domestic legal order's own regulation of those issues. Similarly, for those states pursuing an indirect-effects

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[184] *See infra* Chapter 19, Section II.I (United Kingdom). Similarly, Israel's Knesset has on occasion enacted the provisions of a particular treaty directly into its internal law. *See infra* Chapter 11, Section II.B.8.a.

[185] *See supra* note 132 and accompanying text.

[186] For example, China does not apply the Vienna Convention on Diplomatic Relations directly; it applies instead the Regulations Concerning Diplomatic Privileges and Immunities drafted to implement that treaty. *See infra* Chapter 5, Section III.

approach, the decision to rely on legislation reflects a decision that such legislation is necessary for the state to comply with the treaty.[187]

Such considerations aside, if a treaty has no domestic legal status, directly or indirectly, it may ultimately impact that state's ability to comply with the treaty. In Canada, for example, mismatches between its treaty obligations and the requirements of domestic law have occurred where it failed to enact legislation to implement a treaty.[188] In such circumstances, how the national law approaches the formation and implementation of treaties may operate in tension with the international law approach requiring states to comply with all valid treaties.

2. *Judicial Enforcement of Treaties*

The relationship between treaties and national law and practice becomes even more complicated when we consider the question of judicial enforcement.[189] In part, this issue turns on the larger question of the treaty's domestic legal effect. If the treaty is not part of the domestic law, courts will generally not enforce it. French courts, for example, do not allow parties to invoke unpublished treaties, in effect giving the executive authority to determine whether a treaty warrants judicial enforcement.[190] Similarly, where a state requires implementing legislation to bring a treaty within its national legal order, that legislation forms the rule for the court; absent such legislation, courts are unable to enforce the treaty or even to require enactment of implementing legislation that would allow it to do so.[191]

Even for those states that give certain treaties the status of national law directly, judicial enforcement does not always occur. Looking again at France, its courts will decline to enforce a published treaty, which constitutes part of French law, if the treaty's terms are so ambiguous as to preclude the application of judicially manageable standards in the

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[187] *See, e.g., infra* Chapter 10, Section II.D (India); Chapter 19, Section II.C.2 (United Kingdom).

[188] *See infra* Chapter 3, Section II.I.

[189] As used in this section, judicial enforcement should be distinguished from judicial oversight of the treaty-making process. Judicial oversight goes to the question of whether a treaty was validly concluded under the state's constitutional framework (i.e., whether legislative approval was required, etc.). Judicial enforcement, in contrast, involves the interpretation and application of valid treaty obligations to specific parties in specific cases.

[190] *See infra* Chapter 8, Section II.E.1.

[191] *See, e.g., infra* Chapter 3, Section II.I (noting that, although they may have interpretative value, Canadian courts are reluctant to enforce treaty provisions not expressly incorporated into Canadian domestic law).

absence of further instructions from Parliament.[192] In Switzerland, notwithstanding that all treaties are domestically applicable upon their entry into force, official publication of a treaty is required for courts (and others) to bind individuals to the treaty's terms.[193] Alternatively, treaties may receive the status of domestic law for purposes of providing legal authority for certain executive or legislative acts (e.g., to criminalize certain conduct called for by the treaty), but not necessarily accord courts a role in enforcing the performance of such acts.

To address such discrepancies, many of the states adopting the direct-effects method have developed a gloss limiting judicial enforcement to certain "self-executing" treaties.[194] The United States serves as the paradigmatic example of the self-executing approach. U.S. courts will enforce a treaty as self-executing "if it becomes directly and immediately applicable – i.e., if it requires no implementing legislation or regulations in order to become fully effective."[195] At the same time, U.S. courts may decline to enforce a treaty as "non-self-executing" because it speaks not to the courts, but to the legislature, requiring the enactment of certain provisions into domestic law, or the punishment of certain crimes (which, under U.S. law can only be done through legislation).[196] A similar usage of the term "self-executing" appears in Austrian and Swiss practice to identify which treaties an individual may invoke before the courts.[197] Switzerland's definition of "self-executing" parallels that of the United States; a treaty is self-executing if its terms are sufficiently precise and clear to constitute a basis of decision in concrete cases.[198] In the same vein, Dutch courts give supremacy only to self-executing treaties, which they define as treaty provisions not requiring additional legislation to make them legally effective in the municipal order.[199]

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[192] *See infra* Chapter 8, Section II.E.2.

[193] *See infra* Chapter 17, Section III.H. In practice, Switzerland only publishes those treaties with provisions of a law-making character or which oblige Switzerland to enact new norms. *Id.*

[194] *See, e.g., infra* Chapter 2, Section II.H (Austria); Chapter 8, Section II.E.2 (France); Chapter 12, Section II.I (Japan); Chapter 14, Section II.F.6 (Netherlands); Chapter 16, Section II.H (South Africa); Chapter 17, Section III.H (Switzerland); Chapter 20, Section II.I.1 (United States). Unlike most of the other states giving treaties direct effect as national law, Mexico has not developed a concept of self-executing treaties. Given the language in Article 133 of its Constitution, Mexico views all Senate-approved treaties as the law of the union, irrespective of their content. *See infra* Chapter 13, Section II.E.1.

[195] *Infra* Chapter 20, Section II.I.1.

[196] *See id.* Other reasons U.S. courts may view a treaty as non-self-executing include cases where the treaty's provisions are too vague to allow judicial enforcement or where the executive did not intend the conclusion of the treaty to create a private right of action under the treaty.

[197] *See infra* Chapter 2, Section II.H (Austria); Chapter 17, Section III.H (Switzerland).

[198] *See infra* Chapter 17, Section III.H.

[199] *See infra* Chapter 14, Section II.F.6.

Thus, a treaty's status as domestic law, let alone its status as international law, does not necessarily equate with a right of domestic judicial enforcement. In many of the participating states, courts will only apply treaties that have been notified to the public through publication/promulgation or enacted into law via legislation. Moreover, even for those treaties regarded as domestically effective, some of these states' courts will not give them judicial effect unless the court determines the treaty can speak for itself without the aid of legislative clarification or implementation. In practice, applications of the self-executing concept have proven quite complex and caused much confusion, particularly in the United States where it is not always clear whether a court will enforce any particular treaty provision as "self-executing."

At the same time, however, the use of the self-executing concept dilutes the distinction between states that make treaties directly part of their law and those who only implement treaties through legislation. To the extent states (e.g., the United States, France, and Switzerland) that would otherwise qualify their treaties as domestic law require further legislative (or regulatory) action for their courts to apply such treaties, their practice reflects the same line of thinking employed by states (e.g., the United Kingdom, Canada) who only give treaties indirect effect through legislation. In the end, the primary difference between the two sets of approaches centers on the self-executing treaty itself, which one group enforces directly, but for which the other group requires implementing legislation.

3. *Priority of Treaties within the National Legal Order*

Once a state determines which treaties it will bring into the national legal order, it still must determine what priority such treaties will have within that order. Most of the participating states endorse the U.S. approach of subordinating treaties to the state's constitution; in the event of a conflict between the two, the constitution trumps.[200] In a few instances, however, a state's constitution will contemplate a superior role for treaties, even overriding inconsistent constitutional provisions. The Constitutions of Austria, the Netherlands, and Russia accord treaties priority over all other laws, including those of constitutional rank.[201] In the event a treaty

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[200] *See, e.g., infra* Chapter 20, Section II.A; *see also infra* Chapter 9, Section II.C (Germany); Chapter 13, Section II.E.1 (Mexico).

[201] *See infra* Chapter 2, Section II.H (Austria); Chapter 14, Section II.F.2 (Netherlands); Chapter 15, Section II.K (Russia). In addition, although the matter is not yet settled, certain human rights treaties may have a status equivalent to Chile's Constitution where the Constitution restricts the exercise of state power in light of the obligation to fulfill human rights while also acknowledging the duty of the state to observe these rights in treaties to which Chile is a party. *See infra* Chapter 4, Section II.I.

will have such effect, Austria and the Netherlands both provide for special voting requirements as part of the legislature's approval of the treaty prior to its entry into force.[202] In these instances, therefore, the constitutional provision on treaty priority functions as a method of amending the constitution; treaties done in accordance with this provision operate in lieu of pre-existing constitutional norms.

For those states that do not place treaties above the constitution, the question arises as to how treaties should relate to ordinary national laws. The surveyed states follow one of three different approaches on this point: (i) giving the treaty priority over all laws, (ii) giving it priority over all prior laws, and (iii) giving priority to all laws over the treaty.

Article 55 of the French Constitution illustrates how a treaty can take priority over all other ordinary laws: "[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party."[203] Mexico has an alternative approach that achieves the same result. Pursuant to a 1999 Supreme Court decision, Mexican treaties and federal statutes operate as different types of legal instruments that cannot abrogate each other; however, in the event they both regulate the same subject, the treaty will prevail as the more specific rule.[204] In other cases, a state's law may indicate that particular norms found in treaties override all other statutory provisions. This is the case in Israel, for example, with respect to the legislation implementing tax treaties.[205]

Alternatively, a treaty or its implementing legislation can receive treatment equal to that accorded other laws. This can be the case for states who only reflect treaties in national law through legislation as well as for states that give treaties direct status as domestic law. In both situations, the last-in-time rule (*lex posterior derogate lex priori*) applies. As between a conflicting treaty and statute (or between an implementing statute and another statute), whichever comes into force at a later date will take priority over the earlier instrument. The United States and Egypt follow this approach, as does Austria when the treaty is given a statutory rank.[206]

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[202] *See infra* Chapter 2, Section II.C (Austria); Chapter 14, Section II.F.2 (Netherlands).

[203] *Infra* Chapter 8, Section II.E.1. Switzerland appears to follow a similar approach, although there are some conflicting judicial decisions about whether a new statute can intentionally override earlier treaties. *See infra* Chapter 17, Section III.H.

[204] *See infra* Chapter 13, Section II.E.1. The law remains intact for application in areas not covered by the treaty. *Id.*

[205] *See infra* Chapter 11, Section II.B.8.d.

[206] *See infra* Chapter 2, Section II.H (Austria); Chapter 7, Section II.F (Egypt); Chapter 20, Section II.I.2 (United States). With respect to treaties lacking legislative implementation in the United States, application of the later-in-time principle would also depend

It is also possible, however, that a state may choose to give treaties a subordinate legal status. For example, South Africa's Constitution affords self-executing treaties status as law, but subordinates them to both the Constitution and Acts of Parliament.[207] Such treaties cannot even override existing laws.

With respect to the application of treaties within federations, more often than not, treaties are accorded priority not only over federal but also sub-federal laws. This is the case in India, Mexico, Russia, Switzerland, and the United States.[208] In Germany and Canada, however, treaties or implementing legislation cannot interfere with the exclusive competencies of sub-federal units. As such, both states have developed practices to avoid treaty obligations that would lead to compliance difficulties at the sub-federal level.[209]

Finally, special mention should be made of China's approach to prioritizing treaties. Unlike the other states, China has not established a general rule on the priority treaties should receive within its national legal order. It has focused its attention instead on the national laws themselves. Specifically, China has a practice of including provisions in its statutes that make clear the preemptive power of China's treaties. For example, China's Civil Procedural Law provides that, barring reservations to the treaty, " 'if a provision of an international treaty which China has concluded . . . is different from that of the present law, the treaty provision shall apply.' "[210] Similar provisions can be found in most of China's major legislative regimes.[211] Thus, although treaties do not literally have general priority over statutes, the construction of most Chinese statutes actually accords them such status.

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on whether the treaty is self-executing. In Austria, treaties can take effect as domestic law at different levels; those approved by the *Nationalrat* and published function as statutes, while others may only be implemented at a regulatory level, which have no impact on existing (or future) statutes. *See infra* Chapter 2, Section II.H.

[207] *See infra* Chapter 16, Section II.H.

[208] *See infra* Chapter 10, Section I (India); Chapter 13, Section II.E.1 (Mexico); Chapter 15, Section II.K (Russia); Chapter 17, Section III.H (Switzerland); Chapter 20, Section II.I (United States). Given the ability of treaties in Austria and the Netherlands to amend the Constitution, they would seem to have a similarly superior rank over sub-federal laws as well. *See supra* note 201 and accompanying text.

[209] *See supra* notes 148–149 and accompanying text. Thus, Germany under the Lindau Arrangement takes steps to ensure the *Länders'* compliance with federal treaties, while Canada may make a federal-state reservation to exclude a treaty's application to provinces that have not enacted the necessary implementing legislation. *See infra* Chapter 9, Section II.D.2 (Germany); Chapter 3, Section II.D.2 (Canada).

[210] *Infra* Chapter 5, Section III.

[211] *Id.* (citing similar provisions in China's civil law, civil procedures law, criminal law, criminal procedures law, administrative procedures law, customs law, patent law, maritime law, trademark law and the civil aviation law).

4. *Interpreting Domestic Law via Treaty*

In applying treaties within the domestic legal order and assigning them (or their implementing legislation) a level of priority, states are implicitly signaling how important they regard treaty compliance as compared to other domestic interests such as the maintenance of the constitutional framework or implementing the outcome of legislative processes. At the same time, however, giving treaties direct or indirect domestic legal effect is not the only method by which states can use the national legal order to promote treaty compliance. Regardless of the domestic status of a treaty, states may also seek to ensure that domestic laws conform to treaty obligations by interpreting the two harmoniously whenever possible.

By way of example, even if a treaty has no status as law, Canadian courts will attempt to read domestic law consistently with the treaty. Thus, in a 1999 Canadian Supreme Court decision, the Court found the Convention on the Rights of the Child helped to inform the court's judicial review and statutory interpretation, notwithstanding that it had no direct application within Canadian law.[212] South Africa and the United States have similar canons of statutory construction.[213] Although France has no legal presumption of compatibility, its judges often try to read treaties and statutes consistently as a matter of practice.[214] Not all states, however, are uniform in their support for this practice. In the Netherlands, for example, although courts have used treaties to interpret statutes as part of the self-executing treaty doctrine, they generally do not resort to that practice where the treaty is too imprecise or requires legislative involvement.[215]

Ultimately, statutory interpretation via treaties will not (and should not) function as the primary means by which states implement their treaty obligations; the dangers of unreasonable interpretation that would accompany a practice of finding all statutes consistent with treaties are obvious. Nevertheless, interpreting statues consistently with a state's treaties, where possible, may serve as a suitable subsidiary method by which a state's domestic legal order gives effect to its international legal commitments. This approach may be most useful where a state has not accorded a treaty the status of law or enacted legislation to implement the treaty's obligations. In such circumstances, the practice of some participating states suggests that domestic law may still be interpreted with the treaty in mind.

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[212] *See infra* Chapter 3, Section II.I. Ultimately, however, in the event of a conflict Canada will apply the last-in-time statute, regardless of whether it comports with the treaty obligations. *Id.*

[213] *See infra* Chapter 16, Section II.H.3 (South Africa); Chapter 20, Section II.I.2 (the United States).

[214] *See infra* Chapter 8, Section II.E.3.

[215] *See infra* Chapter 14, Section II.F.6.

IV. Conclusion

This chapter has sought to demonstrate what a comparative approach to treaty law and practice would look like and how the present compendium can serve scholars and practitioners in taking up such an approach. Viewed through the eyes of the contributing authors, the chapters that follow offer a rich and diverse picture of how states distribute formal legal authority to make and apply treaties and, more importantly, the actual practice of states in the exercise of that authority. In examining this picture more closely, this chapter has introduced and highlighted patterns and differences that may assist in better understanding state behavior, alternative approaches to national treaty law and practice, and the current state of treaties as a matter of international law.

The participating states all accept the criteria put forth under international law in the VCLT and the 1986 Vienna Convention when defining treaties for national purposes. States accept this definition whether or not they have joined these conventions and regardless of whether they differentiate domestically among those instruments that qualify as treaties under international law. States demonstrate a similar uniformity in distinguishing treaties from other arrangements such as unilateral acts, domestic law contracts and non-binding agreements. Although traditionally recognized as treaties by international law, there is scarce support for oral agreements in the present volume. The practice of several states also raises questions about how agency-level agreements operate as a matter of international law.

The states surveyed uniformly assign the executive with the authority to negotiate and conclude treaties, although variations exist in where this authority resides within the executive and its consistency with international law. Such uniformity in the executive's treaty-making power is accompanied by uniformity among states in imposing external limitations on the exercise of that power for certain treaties (i.e., legislative pre-approval or implementation). Unencumbered treaty making by the executive does, however, continue to occur, and a number of common categories for such "executive treaties" emerge (e.g., minor, technical and administrative treaties) in reviewing the laws and practices of the various states.

Even if the executive actually negotiates, signs, and consents to treaties on behalf of a state, the legislature still has a substantial role of its own in such treaty making. Various formal and informal mechanisms exist to keep legislatures informed of ongoing treaty negotiations as well as the actual conclusion of executive treaties. Moreover, when it comes time to conclude a treaty, the states show remarkable similarities in requiring legislative pre-approval or implementation for the most politically, economically, and socially significant treaties as well as those that re-

quire changes to domestic law in order for the state to satisfy the treaty's obligations.

Perhaps the most complex issues addressed in the current study involve the manner by which states relate treaties to their domestic laws. The states demonstrate differing approaches to giving treaties domestic legal effects that do not necessarily comport with traditional incorporation/transformation distinctions. Instead, state practice divides according to whether it (i) gives a treaty direct domestic effect as law upon the treaty's entry into force, (ii) gives a treaty direct domestic effect as law upon the treaty's entry into force plus the completion of additional executive or legislative procedures, or (iii) gives a treaty only indirect effects through new or existing implementing legislation. These different approaches do not, however, present entirely different domestic legal roles for treaties since states operating under categories (i) and (ii) frequently limit judicial cognizance of treaties through the doctrine of self-execution. Once a treaty has domestic effect, however, state practice varies with respect to its priority, letting it trump the constitution or laws in some states while subordinating it to the constitution or laws in others. Finally, regardless of their domestic status, several of the states demonstrate how treaties can function as interpretative tools even when they themselves lack the status of law.

Taken together, the data compiled in this chapter and those that follow make the case for utilizing a comparative approach to treaty law and practice. This data has value both to those concerned with how a single state should approach treaty issues as well as those focused on understanding and advancing the international law of treaties. At the national level, the comparative approach favors increasing our comprehension of how and why individual states have certain treaty laws and practices by demonstrating similarities and differences among states in addressing the same topics.

Moreover, the data presented highlights the importance of the comparative perspective to the international law of treaties. As this chapter reveals, if we only examined the VCLT, we would have an incomplete and, at times, inaccurate, account of treaty law and practice. We gain a more complete perspective by also looking at how states themselves define and regulate treaties. Such an approach advances our understanding of state practice, which, in turn, operates as evidence of the rules that make up the customary international law of treaties.

Ultimately, this volume demonstrates the need for further studies of treaties, whether from a national, international, or comparative perspective. The practice of the participating states confirms the ongoing expansion

of treaty making into all subjects at all levels of political, economic, and social importance. Similarly, the array of procedures states have developed to form, implement, and apply treaties reflects the increasing importance of treaties to both international and national legal orders. In such circumstances, scholars, practitioners, and government officials will need to marshal all their resources to ensure a greater understanding of the actual operation of treaties as a vehicle for regulating the behavior of states, international organizations, and individuals. The present compendium is intended to serve as one such resource in that effort.

ANNEX A

Participating States' Statistics[216]

State	Population (millions)	Surface Area (thousand sq. km)	Gross National Product (billions $)	Gross Domestic Product (% Growth 2001–2002)
Austria	8	84	192.1	1.0
Canada	31	9,971	702	3.3
Chile	16	757	66.3	2.1
China	1,280	9,598	1,234.2	8.0
Colombia	44	1,139	79.6	1.6
Egypt	66	1,001	97.6	3
France	59	552	1,362.1	1.2
Germany	82	357	1,876.3	0.2
India	1,049	3,287	494.8	4.6
Israel	7	21	105.2	−0.8
Japan	127	378	4,323.9	0.3
Mexico	101	1,958	597	0.9
Netherlands	16	42	377.6	0.2
Russia	144	17,075	306.6	4.3
So. Africa	45	1,221	113.4	3
Switzerland	7	41	263.7	0.1
Thailand	62	513	123.3	5.4
U.K.	59	243	1,510.8	1.8
U.S.A.	288	9,629	10,207	2.4
Total	**3,491**	**57,867**	**24,033.5**	**–**
World Totals	**6,199**	**133,895**	**31,720.0**	**–**

[216] All data taken from the World Bank, World Development Indicators 2004, *available at* http://www.worldbank.org/data/wdi2004/tables/table1 – 1.pdf. The data quoted are from 2002, unless otherwise noted. The World Bank defines Gross National Product or "Gross National Income" as "the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output plus net receipts of primary income (compensation of employees and property income) from abroad." *Id.* It defines "Gross Domestic Product" as "the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output. Growth in GNP is calculated from constant price GDP data in local currency." *Id.*

ANNEX B

OUTLINE OF APPROACH TO NATIONAL TREATY LAW AND PRACTICE

I. General Approach

- a brief introduction to the state's constitutional structure;
- a discussion of the treaty law and practice of the state;
- a documentary annex, including relevant constitutional, statutory and regulatory texts, as well as exemplary instruments necessary for understanding the treaty law and practice of the state; and
- a bibliography on the treaty law and practice of the state.

II. Discussion Items for the Section on Treaty Law and Practice

A. What is an International Agreement?

- What criteria are applied by the state to identify an international agreement?
- Does the state conclude agency-to-agency and implementing agreements?
- Is there a practice of oral agreements?
- What is the status of unilateral acts?
- How are foreign aid, sales contracts, and agreements governed by municipal law treated?
- Who has authority to make decisions regarding the status of a particular text?

B. Executive Authorization and Approval Procedures

- Is there central coordination, or separate departmental authority, for negotiation and conclusion of international agreements?
- Is the government/agency-level distinction relevant to approval procedures?
- Are detailed regulations, such as those set forth in the U.S. State Department's "Circular 175," used in the governance of these matters?

C. Legislative Approval

- Which agreements require the express approval of the legislature prior to ratification or other form of acceptance?
- How much discretion do the executive organs have in deciding

whether an agreement should receive the approval of the legislature prior to ratification or other form of acceptance? On what basis is the decision made?
- Is the legislature consulted on the matter of whether an agreement should be submitted for its prior approval?
- What consequences, if any, are there in signing executive agreements requiring legislative approval (paralleling the international legal consequences expressed in Article 18 of the Vienna Convention on the Law of Treaties)?

D. Reservations Questions
- Is it the practice on occasion to make reservations a condition of acceptance of bilateral treaties?
- Is the practice different with respect to multilateral treaties?

E. Consultation with the Legislature
- What is the practice of the executive organ with respect to consultation with the legislature on the desirability of a proposed agreement, particularly for an agreement that does not require express legislative approval as a condition of its entry into force?
- What does consultation mean? With whom? On what issues?

F. Consultation with the Public
- Is there any practice with respect to consulting the public on the desirability of a proposed agreement?
- With whom? How is such consultation arranged?

G. Legal Bases for Agreements Not Formally Approved by the Legislature
- Are there legal bases in the Constitution, other treaties, statutes or some combination of the foregoing that provide a legal basis for international agreements?

H. Publication and Transmittal Requirements
- Must all agreements, expressly approved by the legislature or not, be published?
- Are agreements not expressly approved by the legislature nevertheless transmitted to the legislature for its information?
- How are classified agreements made known, if at all, to the legislature or any committee of the legislature?
- Are all binding agreements registered with the United Nations? Is such registration regarded as mandatory in view of the pro-

vision in the Vienna Convention regarding registration as well as the provisions of the United Nations Charter?
- In what physical form are published treaties set out? In a national gazette? In a separate collection? In other forms? Is there a publication that periodically lists and sets out the status of treaties in force?

I. Incorporation into National Law
- How, and at what point, are internationally assumed rights and obligations incorporated in the national legal order?

J. Legally Binding Decisions of International Organizations
- Are such decisions viewed as treaty commitments?
- Are they subject to the same or similar procedures by the executive and legislature as are treaty commitments?

K. Implementation of Multilateral Conventions
- Is implementation of multilateral conventions centralized under the jurisdiction of a single office, or is it decentralized or given over to a particular interested office dealing primarily with the subject matter of the convention?
- What procedures are followed to ensure implementation of multilateral conventions?

L. Treaty Termination
- Are treaties and agreements terminated by the executive alone, or is the approval of the legislature required?
- If by the executive alone, is the legislature consulted?

M. Depositary Problems
- As a depositary, how are reservations treated? Succession to treaties? Non-recognized governments or regimes?

N. International Agreements Concluded by Sub-National Entities
- What is the scope of authority for sub-national entities to conclude international agreements?
- What are the procedures for approval of such agreements by the national government?
- What role, if any, do sub-national entities play in the negotiation, conclusion or implementation of agreements by the national government?

III. Basic Data and Documentation Requested (**where available**)

A. National Legislation

- Constitutional provisions on treaties/international agreements
- Statutory provisions
- Regulations and orders
- Other official pronouncements

B. Examples of Internal Procedural Documents

- Full Powers document
- Instrument of ratification
- Registration certificate
- Depositary circular note
- Message to legislature on a particular treaty
- Official proclamation of treaties

C. Statistical Data (**if any**)

- How many agreements are in force for the state at this time?
- Of that number, how many were expressly approved by the legislature before they entered into force?
- On average, how many agreements does the state conclude per year?

CHAPTER TWO

NATIONAL TREATY LAW AND PRACTICE: REPUBLIC OF AUSTRIA

Franz Cede
Gerhard Hafner

I. Introduction

A. *The General Structure of the State*

The Austrian state order is marked by the separation of powers according to the distinction between legislative, executive and judicial powers. The conclusion of treaties belongs to the executive power although the legislative power is involved therein.

On the level of the Federal State, the organs competent for the conclusion of international treaties are the following:

- The Federal President as the head of state, who, in this as in most other areas, acts only upon proposal by the Federal Government;
- The Federal Government consisting of the Federal Chancellor who, beside his individual competencies, is entitled to coordinate the activities of the Government and the Federal Ministers (the Secretaries of State are not formally part of the government); and
- The individual Federal Ministers.

Certain international treaties require the approval of the Parliament, consisting of the *Nationalrat* (National Assembly) as the representative organ of the Austrian population and the *Bundesrat* (Federal Council) as the representative organ of the constituent parts of Austria, the *Länder* (States).

As to the treaties concluded by the *Länder*, additional organs involved in their conclusion are the *Landeshauptmann* (Governor of the *Land*) as the highest organ of the executive power of a *Land*, and the *Landesregierung* (Government of the *Land*) corresponding to the Federal Government and the *Landtag* (State Parliament) as the democratic organ representing the population of the *Land*.

The Austrian domestic legal order is characterized by a hierarchy of norms: the highest norms are laws of a constitutional nature, including the Austrian Federal Constitution (B–VG), followed by ordinary laws.

The latter must conform to the former; the Constitutional Court is the organ competent to examine the conformity and to declare the nullity of ordinary laws that contradict laws of constitutional rank. As long as their nullity is not declared, the Austrian authorities have to apply the relevant ordinary laws. These two categories of law differ also by the quorum required for approval in the *Nationalrat*: Whereas ordinary laws only require one third of members to be present and the simple majority of present members casting an affirmative vote, constitutional laws require half of the members to be present and the consent of two thirds of present members.

According to the principle of legality,[1] general regulations (*Verordnungen*) have to be based on laws and individual decisions (*Bescheide*) have to be based on general norms. General regulations and individual decisions are issued by administrative authorities (for instance Federal Ministries). Their conformity with law is examined as the case may be by the Constitutional Court or the Administrative Court. Accordingly, the treaties concluded by Austria are divided into those that possess the rank of laws and those that are on the level of general regulations as well as of regulations addressing administrative authorities. A similar system is used with regard to the relevant legal acts issued by authorities of the *Länder* within their competence.

Basically, the competence to conclude a treaty on behalf of the Republic of Austria rests with the Federal President according to B–VG Article 65 paragraph 1 unless the latter confers this right upon other competent bodies according to B–VG Article 66 paragraph 2. The term "conclusion" used in B–VG Article 65 includes not only the formal act through which the consent to be bound internationally is expressed (ratification, accession or any other act expressing the consent of the State and requiring an act of the Federal President), but also the act of signature subject to ratification. Consequently, any negotiation and signature of treaties falling under Article 65 requires the authorization of the Federal President.

B. *Federalism*

Austria is a federal state, where certain legislative powers are reserved to the States (*Länder*). As to the treaty-making power, it was originally within the exclusive competence of the Federal State, but by a 1988

[1] Austrian Federal Constitution, Art. 18 ("B–VG").

amendment to the Constitution, certain very restricted powers were conferred on the *Länder*. Accordingly, they now possess the competence to conclude treaties with neighboring States or their constituent parts in areas where they enjoy exclusive legislative power. This competence is, however, subject to certain rights of the Federal State.

Basically, the power to conclude treaties, even those entered into by the *Länder*, is vested in the Federal President, who has the right to delegate this right under certain circumstances (*see infra* II.N).

II. The Austrian Laws and Practice Regarding International Treaties

A. *The Definition of an International Agreement in the Austrian Legal Order*

1. *The Definition of Treaties*

The Austrian Constitution lacks any definition of treaties under international law. According to a legal opinion of the Office of the Legal Adviser of the Federal Ministry for Foreign Affairs, a treaty is an international instrument by means of which the parties intend to create rights and obligations under international law.

A certain definition can be deduced from the Vienna Convention on the Law of Treaties,[2] to which Austria is party. Article 2 defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[3] By analogy, this definition applies also to treaties with international organizations[4] or other subjects of international law. Since the Vienna Convention on Treaties has been incorporated into the domestic legal order, this definition is to be applied by Austrian authorities.

2. *The Designation of Treaties*

The Constitution exclusively uses the expression Staatsvertrag (State Treaty).[5] This expression does not address specific categories of inter-

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[2] Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969) ("VCT"), *reprinted in* 8 *ILM* 679 (1969) and 63 *Am. J. Int'l L.* 875 (1969).

[3] VCT, Art. 2.

[4] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, U.N. Doc. A/CONF.129/15, *reprinted in* 25 *ILM* 543 (1986) ("VCT 1").

[5] B–VG Arts. 10(1)2, 10(3), 16, 49, 50, 65–66, 89, and 140a.

national agreements but is to be understood as covering all kinds of treaties concluded by Austria. The designation *Staatsvertrag* is also misleading in the sense that it comprises without differentiation treaties concluded both with States and with international organizations. The reason for this terminology is historic since, at the time when the Austrian Constitution was enacted in 1920, treaties with States constituted the principal category of international treaties to which Austria was party.

Notwithstanding the exclusive use of this label in the Constitution, it is only exceptionally referred to in practice.[6] Instead, certain other designations have developed which usually indicate certain particularities of the relevant treaty: *Übereinkommen* is used to denote multilateral treaties; *Abkommen* or *Vertrag* for bilateral treaties.

Other distinctive expressions in the title of a treaty refer to the concluding authority. A treaty concluded by the Federal President is called a "Treaty of the Republic of Austria." A treaty concluded by the Federal Government is called a "Treaty of the Austrian Federal Government." A treaty concluded by a special Federal Minister is called a "Treaty concluded by the (relevant) Federal Minister." In cases where the concluding organs on each side of a bilateral treaty differ, the usage is as follows: If on the Austrian side the Head of State or a Federal Minister act as the concluding organ whereas, on the other side, a government acts as the concluding organ, the treaty is called "Treaty of the Government of the Republic of Austria."

As yet, no practice has been established concerning the designation of treaties concluded by the *Länder*.

3. *Unilateral Acts*

Unilateral acts intended to create binding international legal effect are subject to the same procedures as treaties both with respect to legislative and administrative actions.

4. *Contracts under Domestic (Private) Law*

In conformity with B–VG Article 17, which addresses the economic activities of the Federal State and of the *Länder*, the Federal Republic is also subject to private law and therefore is entitled to enter into contracts under this law. These contracts are concluded by the individual Ministers. The competence to conclude these contracts depends on the relevant special competence of the Federal Ministry concerned. These contracts differ from treaties under international law insofar as they do

[6] *See, e.g.*, State Treaty of St. Germain (1919); State Treaty of Vienna (1955).

not concern imperial powers (*acta iure gestionis*) like the others, but only private rights (*acta iure gestionis*). The same applies to *Länder* contracts.

5. *The Decision on the Categorization*

The decision as to the category in which a treaty would fall or as to whether the instrument is to be qualified as a contract under private law is made by the authority involved in the elaboration of the treaty or contract. As a rule, the Constitutional Service[7] of the Federal Chancellery examines the question as to which rank in the hierarchy of norms a given treaty holds.

B. *Executive Authorization and Approval Procedures*

1. *Coordination*

Theoretically, there is no single, central authority competent to coordinate the elaboration and conclusion of treaties. The negotiation and, sometimes, the conclusion of treaties is not only subject to a vertical division between the Federal State as such (the Federal Government and the Federal Ministries) and the *Länder*, but also, as far as the treaties of the Federal State are concerned, to a horizontal distribution among the different special ministries.

Nevertheless, in practice coordination is achieved by the fact that the prevailing competence to conduct negotiations with foreign countries is vested in the Federal Ministry for Foreign Affairs according to the Act on the Federal Ministries.[8] Other Ministries have almost no competencies for negotiations and they have competence to conclude a treaty only insofar as the treaty falls within their special competence and its conclusion is reserved neither to the Federal President nor to the Federal Government. In these latter cases there is no formal coordination, but in practice the advice of the Federal Ministry for Foreign Affairs is often sought.

As regards those treaties that are subject to the approval of the Parliament and subsequent ratification by the Federal President, a unanimous decision of the Federal Government must precede the signature and submission to the Parliament so that coordination is ultimately assured.

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[7] The main function of the Constitutional Service consists in the examination of all legislative projects as to their uniformity with the Constitution.

[8] *BundesministerienG*, BGB1. Nr. 76 (1986), *as amended.*

2. *Relevance of Levels*

If a treaty is subject to ratification by the Federal President, it must – as has been outlined above – be approved unanimously by the Federal Government which submits it to the Parliament for its approval and then transmits it to the Federal President. As far as treaties to be concluded by the Federal Government are concerned, they also require the unanimous adoption of the Federal Government for this purpose.

If, however, a treaty is concluded by one of the special Ministers, either in conjunction with or without the Foreign Minister, it is subject only to the consent of the relevant Minister and, if the case so requires, of the Minister for Foreign Affairs. There exists no specific detailed regulation on the conclusion of treaties except those derived from the interpretation of the relevant provisions of the Constitution.

C. *Legislative Approval*

The conclusion of treaties is the prerogative of the Federal President,[9] as the highest representative of the executive power of the State, subject to the involvement of the Parliament in certain cases. Whether or not this involvement is required is not a matter of discretion, but is clearly spelled out in B–VG Article 50. According to this provision, treaties that are of a political nature, and others insofar as their contents modify or complement existing laws, require the approval of the Parliament. The distinction between the two modification or complementing categories depends on whether the relevant treaty either regulates a matter that, if it were the subject matter of a domestic regulation, would have to be regulated by a domestic law, or contains provisions that amend already existing domestic law. As to political treaties no clear definition exists. According to Austrian doctrine, however, a treaty of this kind is one that substantially affects Austria's political status in international affairs.

Insofar as a treaty contains provisions addressing matters of domestic regulation that would require a norm of constitutional nature, the relevant treaty provision must be provided with the rank of constitutional law, and the same quorum of presence and voting is required in the Parliament as in the case of constitutional law. This would apply mostly to treaties establishing international organizations that possess the right to take decisions binding upon States. The right to bind the State is deemed to be a sovereign right which is vested only in the organs enu-

[9] B–VG Art. 65.

merated in the Constitution. Since such provisions rather frequently occur, however, the Austrian constitution was amended to the effect that treaties by which individual sovereign rights of the Federal State (not of the *Länder*) are conferred upon international bodies or intergovernmental organizations need not be treated as norms of a constitutional rank but can be adopted by the Parliament as ordinary laws.[10]

Once the *Nationalrat* has approved the treaty, the matter is transferred to the *Bundesrat*, which has the right of a suspensive veto. If, however, the treaty regulates matters falling within the exclusive competence of the *Länder*, the explicit approval of the *Bundesrat* is needed. In such cases the *Bundesrat* in effect has an absolute veto.

The treaties are submitted to the Parliament by the Federal Government which attaches to the text an Explanatory Memorandum and a German translation if this language is not included among the authentic treaty languages. In the Explanatory Memorandum, the motives, the legal qualification and further explanations of the treaty are laid down.

D. *Reservations*

According to Austria's view, reservations can be made only to multilateral treaties; hence, Austria has not formulated any reservation to a bilateral treaty. As to multilateral treaties, which are subject to approval by Parliament, reservations and interpretative declarations are usually formulated by the Federal Government and submitted to the Parliament for approval. However, the *Nationalrat* has on occasion reformulated reservations and converted them into interpretative declarations and vice versa. Consistent with Article 23 of the Vienna Convention on the Law of Treaties, reservations and interpretative declarations are included in the document of ratification issued by the Federal President.

As to treaties not requiring parliamentary approval, reservations, if any, are made by the organ concluding the treaty.

Austria has developed a specialized practice concerning the reaction to reservations lodged by other State Parties. Austria deplored in particular the problem raised by the increasing use of reservations considered as inadmissible. Whereas in the past, Austria declared such reservations devoid of legal effect and insisted that the respective State Parties were bound by the entire treaty, she now first tries to obtain information on the scope of the reservation before deciding what reaction to adopt with respect to such a reservation.

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[10] B–VG Art. 9(2).

If an objection to a reservation is made, it is normally specified that the objection does not preclude the entry into force of the treaty between Austria and the reserving State.

E. *Consultation with Legislature and Public*

Prior to the submission of a treaty to the Parliament for approval, the Parliament is not consulted, although the main representatives are informed through informal channels by the political parties. According to current practice, the spokesmen of the political parties forming the government participate in the Cabinet meetings so that these parties are being kept informed about treaties the conclusion of which is envisaged by the government.

Under the Austrian Constitution the possibility exists that a draft law may be submitted to a referendum. Such a referendum is mandatory if one of the fundamental principles of the Constitution would be affected or amended by a proposed law. It is disputed whether, by way of analogy, the same procedure applies to the conclusion of treaties. The Constitution is silent in this regard.

F. *Legal Bases for Agreements not Formally Approved by the Legislature*

According to B–VG Article 66 paragraph 2, the Federal Presidency is entitled to delegate its competence to conclude treaties to the Federal Government or to individual Federal Ministers if the treaty is not subject to parliamentary approval pursuant to B–VG Article 50. By a decree of 31 December 1920,[11] the Federal President has generally delegated this function as follows:

- with respect to intergovernmental agreements (*Regierungsübereinkommen*), to the Federal Government on behalf of which the Federal Chancellor signs the treaty;
- with respect to ministerial agreements (*Ressortübereinkommen*), to individual Federal Ministers acting in conjunction with the Federal Minister for Foreign Affairs; and
- with respect to administrative agreements (*Verwaltungsübereinkommen*), to individual Federal Ministers acting alone.

The distinction between these categories is very obscure. According to practice, treaties that concern the competence of several ministries are

[11] BGB1. Nr. 49 (1921).

concluded as intergovernmental agreements; treaties falling within the sole competence of the relevant Federal Minister are concluded as ministerial agreements or administrative agreements, the latter addressing only administrative authorities.

G. *Publication and Transmittal Requirements*

The official Austrian instrument of publication of legislative acts is the *Federal Law Gazette* (BGB1). As a general rule, all treaties, together with their German translation and any reservation and declaration related thereto, must be published in the *Federal Law Gazette*. The treaties are reproduced in a special part of the *Federal Law Gazette*, called *Part III*. However, since in recent times treaties have sometimes become very voluminous, the *Nationalrat* can decide according to B–VG Article 49 paragraph 2 that a treaty, submitted to the Parliament for approval, need not be published in the *Federal Law Gazette* in its entirety or in all of its language versions, but are to be made public in a different manner. In this case, B–VG Article 49 paragraph 2 requires that that different manner is to be indicated in the *Federal Law Gazette*. A similar decision can be made by the Federal Chancellor concerning the publication of treaties that are not to be submitted to Parliament (see Section 5 paragraph 3 of the Federal Law on the *Federal Law Gazette* of 2004), if full publication in the *Federal Law Gazette* would not be justified economically.

The central authority for the documentation relating to international treaties concluded by Austria is the State Notary within the Office of the Legal Adviser of the Federal Ministry for Foreign Affairs.

The effective date of a treaty for the purpose of the domestic legal order begins on the day after its publication in the *Federal Law Gazette* unless a different date is explicitly stated. All treaties concluded by the Republic of Austria are registered with the United Nations either by Austria or the other parties to the relevant treaty. According to the established practice, Austria does not conclude classified treaties.

H. *Incorporation of Treaties into National Law*

In order to be effective within the domestic legal order, treaties that are binding upon Austria must be transformed. As far as they have the rank of statutes, this transformation is effectuated by the approval of the *Nationalrat* and the publication in the *Federal Law Gazette* following the ratification by the Federal President. If no further act is required, this procedure is tantamount to a general transformation, but is only admissible if the treaty is self-executing in nature, i.e., meets the requirements

of legality according to B–VG Article 18 and, by its formulation, lends itself to direct application. Pursuant to the principle of *lex posterior derogat legi priori*, such a statute overrides existing law of the same rank, whether of constitutional rank or statutory. However, if the treaty is not self-executing, the *Nationalrat* has to approve it subject to the enactment of laws implementing the treaty.[12] Normally, such laws are enacted simultaneously with the approval of the treaty.

As to all other treaties, the authorization to conclude the treaty given by the Federal President to the Federal Government or Federal Ministers[13] also encompasses the right to issue general regulations implementing the treaty as domestic law if it is needed.

Once a treaty has become part of the domestic legal order, it has the rank according to the transformation procedure so that it is also subject to abrogation by supervening domestic laws by virtue of the *lex posterior* principle.

I. *Judicial Control*

The Constitutional Court is competent to decide whether treaties concluded by Austria are in conformity with relevant Austrian law and to decide upon their legal effect within domestic legal order. As such, the Court has to decide whether a treaty falling under B–VG Article 50 conforms to Austrian constitutional law and whether all other treaties conform to ordinary law.[14] In case the treaty contradicts Austrian law, the Constitutional Court decides upon request of a court or administrative body – whether of the Federal Government or of the Government of a *Land* – whether the relevant defective part of the treaty or the treaty as a whole may no longer be applied by Austrian authorities.[15]

J. *Legally Binding Decisions of International Organizations*

The Austrian Constitution does not regulate either the competence to approve legally binding decisions of international organizations or the transformation of such acts as domestic law. In practice, such decisions are treated like treaty commitments. Thus, binding decisions of the Security Council of the United Nations are considered as binding on the State and as requiring special legal acts for their implementation.

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[12] B–VG Art. 50(2).
[13] B–VG Art. 66(2)2.
[14] *Compare* B–VG Art. 140a *in conjunction with* B–VG Arts. 140 *and* 139.
[15] B–VG Art. 140 a(1).

With regard to their rank within the Austrian legal order, the decisions of international organizations are treated in the same manner as treaties.

As far as supranational organizations like the European Communities are concerned, regulations and other legal acts of the Council of the European Union are not published in the Austrian *Federal Law Gazette* as a consequence of their publication in the *Official Journal* of the European Union. According to Article 249 of the European Community Treaty as interpreted by the European Court of Justice, EC regulations are directly applicable within the domestic legal order and take precedence over any existing or subsequent contrary Austrian legislation irrespective of the legislative rank of the latter.

K. *Implementation*

Treaties concluded by Austria are implemented in the same manner as domestic legislative or administrative acts, i.e., by the competent special Federal Ministry. The relevant competencies are regulated in the Act on the Federal Ministries.[16] Insofar as the treaties are of a self-executing nature and therefore are binding on the individual authorities, their observance can be ensured in the same manner as legislative or administrative acts. Thus, any treaty can be invoked before Austrian courts and is subject to the relevant appeals procedure. The compliance of administrative authorities with treaties can be ensured by resort to the Act on State's Liability for its Organs (*AmtshaftungsG*)[17] before Trial Courts of First Instance provided that the claimant suffered damage from the nonobservance. Other ways and means to ensure observance of a treaty include the right to appeal to the Ombudsman.

If an individual's constitutional rights are violated by a treaty, the individual may invoke the jurisdiction of the Constitutional Court to secure vindication of his rights.[18]

L. *Treaty Termination*

According to the modified monistic approach concerning the relationship between international and domestic law prevailing in Austria, treaties lapse for the purpose of the domestic legal order if they are terminated pursuant to a rule of international law. As to the termination of a treaty

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[16] *BundesministerienG*, BGB1. Nr. 76 (1986), *as amended.*
[17] *AmtshaftungsG*, BGBL. Nr. 20 (1949), *as amended.*
[18] B–VG Art. 144.

by Austria, this act is governed by the theory of *actus contrarius*, saying that for the termination of a treaty the same procedure is required as for the production of the consent to be bound. Thus, the procedure for the act of termination corresponds to that of the conclusion of a treaty. Consequently, the termination of a treaty concluded by the Federal President and submitted to the Parliament for approval again requires the approval of the latter and an act of the Federal President.

As a further consequence, the termination of treaties that were published in the *Federal Law Gazette* is reflected therein indicating also the date when the termination takes effect.

M. *Depositary*

Austria is depositary to only a few treaties. The question of the handling of reservations of State Parties has not yet occurred so that no particular practice has emerged. Austria being party to the Vienna Convention of the Law of Treaties, the guideline for such handling would be along the lines of Article 23 of that Convention.

N. *Treaties Concluded by Sub-National Entities*

According to a 1988 amendment to the Constitution, the constituent components of Austria, the *Länder*, are entitled to conclude international treaties with neighboring States and their constituent parts for matters falling within their exclusive competence,[19] which, in fact, is very restricted. This right to conclude treaties competes with that of the Federal State itself and is subject to review by the latter. Hence, the commencement of negotiations by the organs of the *Land* presupposes notice to the Federal Government and authorization by the Federal President. Prior to the conclusion of the treaty the Federal Government must consent to it. The treaty is concluded by the Federal President upon proposal by the Government of the *Land*. However, if it is not a treaty amending or supplementing law, the Federal President can, upon proposal of the Government of the *Land*, empower the latter to conclude the treaty.[20] If the Federal Government so requires, the *Land* is obliged to terminate such a treaty. The application of the treaty is within the responsibility of the *Land*; in the case of noncompliance with this duty or with the request to terminate the treaty, the relevant competence is conferred upon the Federal State.

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[19] B–VG Art. 16.
[20] B–VG Art. 66(3).

III. Basic Data and Documentation

A. *National Legislation*

Annex A: Austrian Constitutional Provisions (excerpts)

B. *Examples of Treaty Documents*

Annex B: Depositary Notification of Instrument of Ratification
Annex C: Instrument of Ratification
Annex D: Certification Regarding Entry into Force
Annex E: Authorization to Conclude Treaty under Article 50
Annex F: Full Power to Sign Treaty

ANNEX A

AUSTRIAN CONSTITUTIONAL PROVISIONS

(Translation by Federal Press Service)

Article 10

(1) The *Bund* has powers of legislation and execution in the following matters:

1. the Federal Constitution, in particular elections to the *Nationalrat*, and referenda as provided by the Federal Constitution; the Constitutional Court;
2. external affairs including political and economic representation with regard to other countries, in particular the conclusion of international treaties, notwithstanding *Länder* competence in accordance with Article 16 paragraph 1; demarcation of frontiers; trade in goods and livestock with other countries; customs;
3. regulation and control of entry into and exit from the Federal territory; immigration and emigration; passports; deportation, turning back at the frontier, expulsion, and extradition from or through the Federal territory;
4. Federal finances, in particular taxes to be collected exclusively or in part on behalf of the *Bund*; monopolies;
5. the monetary, credit, stock exchange and banking system; the weights and measures, standards and hallmark system;
6. civil law affairs, including the rules relating to economic association but excluding regulations which render real property transactions, legal acquisition on death by individuals outside the circle of legal heirs not excepted, with aliens and transactions in built-up real property or such as is earmarked for development subject to restrictions by the administrative authorities; private endowment affairs; criminal law, excluding administrative penal law and administrative penal procedure in matters which fall within the autonomous sphere of competence of the *Länder*; administration of justice; establishments for the protection of society against criminal or otherwise dangerous elements; the Administrative Court; copyright; press affairs; expropriation in so far as it does not concern matters falling within the autonomous sphere of competence of the *Länder*; matters pertaining to notaries, lawyers, and related professions;

7. the maintenance of peace, order and security including the extension of primary assistance in general, but excluding local public safety matters; the right of association and assembly; matters pertaining to personal status, including the registration of births, marriages and deaths, and change of name; aliens, police and residence, registration; matters pertaining to weapons, ammunition and explosives, and the use of fire-arms;
8. matters pertaining to trade and industry; public advertising and commercial brokerage; restraint of unfair competition; patent matters and the protection of designs, trademarks, and other commodity descriptions; matters pertaining to patent agents; matters pertaining to civil engineering; chambers of commerce, trade, and industry; establishment of professional associations in so far as they extend to the Federal territory as a whole, but with the exception of those in the field of agriculture and forestry;
9. the traffic system relating to the railways, aviation and shipping in so far as the last of these does not fall under Article 11; motor traffic; matters, with exception of the highway police, which concern roads declared by Federal law as Federal highways on account of their importance for transit traffic; river and navigation police in so far as these do not fall under Article 11; the postal and telecommunications systems; environmental compatibility examination for projects relating to these matters where material effects on the environment are to be anticipated and for which the administrative regulations prescribe an alignment definition by way of ordinance;
10. mining; forestry, including timber flotage; water rights; control and conservation of waters for the safe diversion of floods or for shipping and raft transport; regulation of torrents; construction and maintenance of waterways; regulation and standardization of electrical plants and establishments as well as safety measures in this field; provisions pertaining to electric power transmission in so far as the transmission extends over two or more *Länder*, matters pertaining to steam and other power-driven engines; surveying;
11. labour legislation in so far as it does not fall under Article 12; social and contractual insurance; chambers for workers and salaried employees with the exception of those relating to agriculture and forestry;
12. public health with the exception of burial and disposal of the dead and *Gemeinde* sanitation and first-aid services, but only sanitary

supervision with respect to hospitals, nursing homes, health resorts and natural curative resources; measures to counter factors hazardous to the environment through the transcendence of input limits; clear air maintenance notwithstanding the competence of the *Länder* for heating installations; refuse disposal in respect of dangerous refuse, but in respect of other refuse only in so far as a need for the issue of uniform regulations exists; veterinary affairs; nutrition affairs, including foodstuffs inspection; regulation of commercial transactions in seed and plant commodities, in fodder and fertilizer as well as plant preservatives, and in plant-safety appliances including their admission and, in the case of seed and plant commodities, likewise their acceptance;

13. archive and library services for the sciences and specialist purposes; matters pertaining to Federal collections and establishments serving the arts and sciences; matters pertaining to the Federal theatres with the exception of building affairs; the preservation of monuments; religious affairs; census as well as – allowing for the rights of the *Länder* to engage within their own territory in every kind of statistical activity – other statistics in so far as they do not serve the interests of one *Land* only; endowments and foundations when their purposes extend beyond a single *Land*'s sphere of interests and they have hitherto not been autonomously administered by the *Länder*;
14. organization and conduct of the Federal police and the Federal *gendarmerie*; settlement of the conditions pertaining to establishment and organization of other protective forces, including their armament and the right to make use of their weapons;
15. military affairs; matters pertaining to war damage and welfare measures for combatants and their surviving dependants; care of war graves; whatever measures seem necessary by reason or in consequence of war to ensure the uniform conduct of economic affairs, in particular with regard to the population's supply of essentials;
16. the establishment of Federal authorities and other Federal agencies; service code for and staff representation rights of Federal employees;
17. population policy in so far as it concerns the grant of children's allowances and the organization of burden equalization on behalf of families;
18. elections to the European Parliament.

(2) In Federal laws on the right of succession to undivided far estate as well as in Federal laws promulgated in accordance with paragraph 1(10) above *Land* legislatures can be empowered to issue implementing provisions with respect to individual provisions which must be specifically designated. The provisions of Article 15 paragraph 6 shall be analogously applied to these *Land* laws. Execution of the implementing laws issued in such cases lies with the *Bund*, but the enabling ordinances, in so far as they relate to the implementing provisions of the *Land* law, need foregoing agreement with the *Land* government concerned.

(3) The *Bund* must allow the *Länder* opportunity to present their views before its conclusion of treaties which within the meaning of Article 16 render necessary enabling measures or affect the autonomous sphere of competence of the *Länder* in another way.

Article 15a

(1) The *Bund* and the *Länder* may conclude agreements among themselves about matters within their respective sphere of competence. The conclusion of such agreements in the name of the *Bund* is, depending on the subject, incumbent on the Federal Government or Federal Minister. Agreements which are to be binding also on the authorities of the Federal legislature can be concluded by the Federal Government only with the approval of the *Nationalrat*. Article 50 paragraph 3 shall by analogy be applied to such resolutions of the *Nationalrat*; they shall be published in the *Federal Law Gazette*.

(2) Agreements between the *Länder* can only be made about matters pertaining to their autonomous sphere of competence and must without delay be brought to the Federal Government's knowledge.

(3) The principles of international law concerning treaties shall apply to agreements within the meaning of paragraph 1 above. The same holds good for agreements within the meaning of paragraph 2 above, save as provided otherwise by corresponding constitutional laws of the *Länder* in question.

Article 16

(1) In matters within their own sphere of competence the *Länder* can conclude treaties with states, or their constituent states, bordering on Austria.

(2) The *Landeshauptmann* must inform the Federal Government before the initiation of negotiations about such a treaty. The Federal Government's approval must be obtained by the *Landeshauptmann* before their conclusion. The approval is deemed to have been given if the Federal

Government has not within eight weeks from the day that the request for approval has reached the Federal Chancellery told the *Landeshauptmann* that approval is withheld. The authorization to initiate negotiations and to conclude the treaty is incumbent on the Federal President after the recommendation of the *Land* Government and with the counter-signature of the *Landeshauptmann*.

(3) Treaties concluded by a *Land* in accordance with paragraph 1 above shall be revoked upon request by the Federal Government. If a *Land* does not duly comply with this obligation, competence in the matter passes to the *Bund*.

(4) The *Länder* are bound to take measures which within their autonomous sphere of competence become necessary for the implementation of international treaties; should a *Land* fail to comply punctually with this obligation, competence for such measures, in particular for the issue of the necessary laws, passes to the *Bund*. A measure taken by the *Bund* pursuant to this provision, in particular the issue of such a law or the issue of such an ordinance, becomes invalid as soon as the *Land* has taken the requisite action.

(5) In the same way, the *Bund* is in the case of implementation of international treaties entitled to supervision also in such matters as belong to the *Länder's* own sphere of competence. The powers vested in the *Bund* as against the *Länder* are in this instance the same as in matters pertaining to indirect Federal administration (Article 102).

Article 18

(1) The entire public administration shall be based on law.

(2) Every administrative authority can on the basis of law issue ordinances within its sphere of competence.

(3) If the immediate issue of measures, which require in accordance with the Constitution a resolution by the *Nationalrat*, becomes necessary to prevent obvious and irreparable damage to the community at a time when the *Nationalrat* is not assembled, cannot meet in time, or is impeded from action by events beyond its control, the Federal President can at the recommendation of the Federal Government and on his and their responsibility take these measures by way of provisional law-amending ordinances. The Federal Government must present its recommendation with the consent of the Standing Sub-Committee to be appointed by the Main Committee of the *Nationalrat* (Article 55, paragraph 2). Such an ordinance requires the countersignature of the Federal Government.

(4) Every ordinance issued in accordance with paragraph 3 above shall without delay be submitted by the Federal Government to the *Nationalrat*

which if it is not in session at this time shall be convened by the Federal President, but if it is in session by the President of the *Nationalrat* on one of the eight days following the submission. Within four weeks of the submission the *Nationalrat* must either vote a corresponding Federal law in place of the ordinance or pass a resolution demanding that the ordinance immediately become invalidated. In the latter case the Federal Government must immediately meet this demand. In order that the resolution of the *Nationalrat* may be adopted in time, the President shall at the latest submit the motion to the vote on the last day but one before expiry of the four weeks deadline; detailed provisions shall be made in the Standing Orders. If the ordinance is in accordance with the previous provisions rescinded by the Federal Government, the legal provisions which had been invalidated by the ordinance become effective again on the day of entry into force of the rescission.

(5) The ordinances specified in paragraph 3 above may not contain an amendment to provisions of Federal constitutional law and may have for their subject neither a permanent financial burden on the *Bund* nor a financial burden on the *Länder, Bezirke* or *Gemeinden* nor financial commitments for Federal citizens nor an alienation of state property nor measures of matters specified in Article 10 paragraph 1(11) nor, finally, such as concern the right of collective association or rent protection.

Article 48

Federal laws and the treaties specified in Article 50 will be published with reference to their adoption by the *Nationalrat*, Federal laws based upon a referendum with reference to the result of that referendum.

Article 49

(1) Federal laws and the treaties specified in Article 50 shall be published by the Federal Chancellor in the *Federal Law Gazette*. Unless explicitly provided otherwise, their entry into force begins with expiry of the day on which the number of the *Federal Law Gazette* containing their publication is issued and distributed and it extends, unless explicitly provided otherwise, to the entire Federal territory; this does not however hold good for treaties which are to be implemented by the issue of law (Article 50 paragraph 2).

(2) The *Nationalrat* can on the occasion of giving its sanction to treaties pursuant to Article 50 resolve that a treaty or individual explicitly specified parts of it shall be published not in the *Federal Law Gazette*, but in another appropriate manner. Such a resolution by the *Nationalrat*

has to state the manner of publication, which must guarantee the accessibility of the treaty for the duration of its validity, and shall be notified by the Federal Chancellor in the *Federal Law Gazette*. Unless explicitly provided otherwise, the entry into force of such treaties begins with expiry of the day on which the number of the *Federal Law Gazette* containing the notification of the resolution by the *Nationalrat* is issued and distributed and it extends, unless explicitly provided otherwise, to the entire Federal territory.

(3) A special Federal law on the *Federal Law Gazette* will be promulgated.

Article 49b

(1) A plebiscite on a matter of fundamental and overall national importance for whose settlement the legislature is competent must take place if the *Nationalrat* votes it by reason of a motion from its members or from the Federal Government. Elections and matters subject to a decision by a court or an administrative authority cannot be the topic of a plebiscite.

(2) A motion pursuant to paragraph 1 above must include a proposal for the formulation of the question to be basically put in the plebiscite. This must consist either of a question to be answered with "Yes" or "No" or of two alternative solution proposals.

(3) Plebiscites shall be implemented in a manner analogous to Arts. 45 and 46. The right to vote, as to plebiscites, appertains to those who on the day appointed for election possess *Nationalrat* suffrage and have their principal domicile in a *Gemeinde* in Federal territory. The Federal electoral board must submit the result of a plebiscite to the *Nationalrat* and the Federal Government.

Article 50

(1) Political treaties, and others in so far as their contents modify or complement existent laws and do not fall under Article 16 paragraph 1, may only be concluded with sanction of the *Nationalrat*. In so far as such treaties settle matters within the autonomous sphere of competence of the *Länder*, they require in addition the approval of the *Bundesrat*.

(2) At the time of giving its sanction to a treaty which falls under paragraph 1 above, the *Nationalrat* can vote that the treaty in question shall be implemented by the issue of laws.

(3) Article 42 paragraphs 1 to 4 inclusive and, should constitutional law be modified or complemented by the treaty, Article 44 paragraphs 1 and 2 shall be analogously applied to resolutions of the *Nationalrat*

in accordance with paragraphs 1 and 2 above. In a vote of sanction adopted pursuant to paragraph 1 above, such treaties or such provisions as are contained in treaties shall be explicitly specified as "modifying the constitution."

Article 65

(1) The Federal President represents the Republic internationally, receives and accredits envoys, sanctions the appointment of foreign consuls, appoints the consular representatives of the Republic abroad and concludes treaties. At the time of conclusion of a treaty not falling under Article 50 or a treaty pursuant to Article 16 paragraph 1 which neither modifies nor complements existent laws, he can direct that the treaty in question shall be implemented by the issue of ordinances.

(2) Furthermore there is vested in him – apart from the powers assigned to him in accordance with other provisions of this Constitution – authority:

a) to appoint Federal civil servants, including officers as well as other Federal functionaries, and to bestow official titles on them;
b) to create and to bestow professional titles;
c) in individual cases to pardon persons sentenced without further resources of appeal, to mitigate and commute sentences pronounced by the courts, as an act of grace to annul sentences and to grant remission from their legal consequences, and moreover to quash criminal proceedings in actions subject to prosecution *ex officio*;
d) on the petition of parents to declare illegitimate children legitimate.

(3) Special laws provide to what extent powers are additionally vested in the Federal President with respect to the grant of honorary privileges, extraordinary gratifications, allowances and pensions, the right to nominate and confirm persons in appointments and to exercise other powers in personnel matters.

Article 66

(1) The Federal President can assign to the competent members of the Federal Government the right vested in him to appoint certain categories of Federal civil servants and empower them to delegate, as regards certain categories of Federal Civil servants, this competence to authorities subordinate to him.

(2) The Federal President can authorize the Federal Government or the competent members of the Federal Government to conclude certain categories of treaties which do not fall under Article 16 paragraph 1

nor under Article 50; such an authorization extends also to the power to order that these treaties shall be implemented by the issue of ordinances.

(3) The Federal President can in the recommendation of a *Land* Government and with the counter-signature of the *Landesbauptmann* authorize the *Land* Government to conclude treaties in accordance with Article 16 paragraph 1 when they neither modify nor complement existing laws; such an authorization extends also to the power to direct that these treaties shall be implemented by the issue of ordinances.

Article 67

(1) Save as otherwise provided by the Constitution, all official acts of the Federal President shall be based on recommendation by the Federal Government or the Federal Minister authorized by it. The law provides to what extent the Federal Government or the competent Federal Minister is herein dependent on recommendations from other quarters.

(2) Save as otherwise provided by the Constitution, all official acts of the Federal President require for their validity the countersignature of the Federal Chancellor or the competent Federal Minister.

Article 89

(1) Save as otherwise provided by this Article, the courts are not entitled to examine the validity of duly published laws, ordinances, and treaties.

(2) Should a court have scruples against the application of an ordinance on the ground of it being contrary to law, it shall file an application with the Constitutional Court for rescission of this ordinance. Should the Supreme Court or a court of second instance competent to give judgment have scruples against the application of a law on the ground of its being unconstitutional, it shall file an application with the Constitutional Court for rescission of this law.

(3) If the legal regulation to be applied has already ceased to be in force, the court's application to the Constitutional Court must request a decision that the legal regulation was contrary to law or unconstitutional.

(4) Paragraph 2 and paragraph 3 above apply analogously to treaties as provided in Article 140a.

(5) Federal law shall determine what effects an application pursuant to paragraph 2, paragraph 3, or paragraph 4 above has on pending legal proceedings.

Article 68

(1) Pursuant to Art. 142, the Federal President is responsible to the *Bundesversammlung* for the exercise of his functions.
(2) To assert this responsibility, the *Bundesversammlung* shall on the vote of the *Nationalrat* or the *Bundesrat* be convoked by the Federal Chancellor.
(3) The presence of more than half the members of each of the two representative bodies and a majority of two thirds of the votes cast is requisite to a vote whereby a charge, consonant with Art. 142, is preferred against the Federal President.

Article 140a

(1) The Constitutional Court pronounces whether treaties are contrary to law. Article 140 shall apply to treaties concluded with the sanction of the *Nationalrat* pursuant to Article 50 and to law-modifying or law-amending treaties pursuant to Article 16 paragraph 1, Article 139 to all other treaties with the proviso that the authorities competent for their execution shall from the day of the judgment's publication not apply those which the Court establishes as being contrary to law or unconstitutional unless it determines a deadline prior to which such a treaty shall continue to be applied. The deadline may not in the case of treaties specified in Article 50 and of law-modifying or law-amending treaties pursuant to Article 16 paragraph 1 exceed two years, in the case of all others one year.
(2) If the Constitutional Court establishes that a treaty whose fulfillment requires the issue of laws of ordinances is contrary to law or unconstitutional, the effect of the sanction or the directive for implementation of the treaty by ordinance expires.

Article 141

(1) The Constitutional Court pronounces upon
    a) a challenge to the election of the Federal President and election to the popular representative bodies, the European Parliament or the constituent authorities (representative bodies) of statutory professional associations;
    b) challenges to elections to a *Land* Government and to *Gemeinde* authorities entrusted with executive power;
    c) application by a popular representative body for a loss of seat by one of its members; application by at least eleven members of the European Parliament from the Republic of Austria for a loss of seat by a member from the Republic of Austria;
    d) application by a constituent authority (representative body) of a

statutory professional association for a loss of seat by one of the members of such an authority;

e) the challenge, in so far as laws of the *Bund* or *Länder* governing elections provide for a loss of seat by the ruling of an administrative authority, and after all stages of legal remedy have been exhausted, to rulings whereby the loss of a seat in a popular representative body, in a local authority entrusted with executive power or in a constituent authority (representative body) of a statutory professional association has been enunciated;

f) The challenge (application) can be based on the alleged illegality of the electoral procedure or on a reason provided by law for the loss of membership in a popular representative body, in a local authority entrusted with executive power, or in a constituent authority (representative body) of a statutory professional association. The Court shall allow an electoral challenge if the alleged illegality has been proved and was of influence on the election result. In the proceedings before the administrative authorities, the popular representative body or statutory professional association has litigant status.

(2) If a challenge pursuant to paragraph 1(a) is allowed and it thereby becomes necessary to hold the *Nationalrat* or a State Parliament election in whole or in part again, the representative body's members concerned lose their seat at the time when it is assumed by those elected at the ballot which has to be held within a hundred days after delivery of the Constitutional Court's decision.

(3) The premise for a decision by the Constitutional Court in challenges to the result of initiatives or referenda will be prescribed by federal law. How long, in view of the possibility of such a challenge, it is necessary to retard publication of the law about which a referendum took place, can also be enacted by Federal law.

Article 144

(1) The Constitutional Court pronounces on rulings by administrative authorities, including the autonomous administrative tribunals in so far as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or the infringement of personal rights on the scope of an illegal ordinance, an unconstitutional law, or an unlawful treaty. The complaint can only be filed after all other stages of legal remedy have been exhausted.

(2) The Constitutional Court can before the proceedings decide to reject a hearing of a complaint if it has no reasonable prospect of success or if the decision cannot be expected to clarify a constitutional prob-

lem. The rejection of the hearing is inadmissible if the case at hand according to Article 133 is barred from the competence of the Administrative Court.

(3) If the Constitutional Court finds that a right within the meaning of paragraph 1 above has not been infringed by the challenged ruling and if the case at hand is not in accordance with Article 133 barred from the competence of the Administrative Court, the Court shall on the request of the applicant transfer the complaint to the Administrative Court for decision whether the applicant sustained by the ruling the infringement of any other right. This applies analogously in the case of decisions in accordance with paragraph 2 above.

ANNEX B

DEPOSITARY NOTIFICATION

FEDERAL MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF AUSTRIA

NOTIFICATION
Convention on the Protection of the Alps
(Alp Convention)
Salzburg, 7 November 1991

The Federal Ministry for Foreign Affairs of Austria has the honour to notify to the Signatory States and the Contracting Parties of the Convention on the Protection of the Alps (Alp Convention) pursuant to Article 14 that the Republic of Slovenia deposited on 22 May 1995 the Instrument of Notification concerning the present Convention.

In accordance with Article 12 paragraph 4 the Convention enters into force for Slovenia on 22 August 1995.

Vienna, on ____ May 1995

ANNEX C

INSTRUMENT OF RATIFICATION

Whereas the

PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

was opened for signature at Strasbourg on 4 November 1993 and whereas the Protocol was approved by the National Council in accordance with the Constitution, the Federal President declares this Protocol ratified and undertakes on behalf of the Republic of Austria to carry it out faithfully.

In witness thereof this Instrument of Ratification is signed by the Federal President, the Federal Chancellor and sealed with the State Seal of the Republic of Austria.

Done at Vienna on ___ March 1996

The Federal President:

The Federal Chancellor:

ANNEX D

CERTIFICATION REGARDING ENTRY INTO FORCE

REPUBLIC OF AUSTRIA
FEDERAL MINISTRY FOR
FOREIGN AFFAIRS

I hereby certify that the foregoing text is a true copy of the Additional Agreement of 16 September 1988 between the Republic of Austria and the Republic of Turkey to the Haager Convention of 1 March 1954 relating to Civil Procedure.

The Additional Agreement entered into force on 1 November 1992, i.e. on the first day of the third month following the exchange of the instruments of ratification as provided for in Article 19. The exchange of the instruments of ratification took place at Vienna on 17 August 1992.

The foregoing text contains the complete substance of the Additional Agreement. No reservations or declarations have been made thereto by the parties. It was concluded in the German and Turkish language.

Vienna, ___ June 1996

For the Federal Minister
For Foreign Affairs:

Franz CEDE
Ambassador
The Legal Adviser

ANNEX E

AUTHORIZATION TO CONCLUDE TREATY UNDER ARTICLE 50

Article 49 (BGB1. No. 49/1921)

> Decree of the Federal President dated 31 December 1920 by which the Federal Government is authorized to conclude certain categories of State Treaties.

Pursuant to Article 66, paragraph 2 of the law dated 1 October 1920 (BGB1. No. 1 Federal Constitution) I hereby authorize the conclusion of State Treaties not requiring the approval of the National Council in accordance with Article 50 of the Federal Constitution unless such treaties are expressly designated as State Treaties or unless the conclusion is performed by an exchange of instruments of ratification:

a) The Federal Government insofar as such treaties are concluded in the form of intergovernmental treaties (*Regierungsübereinkommen*)

b) The competent Federal Minister acting in conjunction with the Federal Ministry for Foreign Affairs and if the Federal Ministry for Foreign Affairs is competent the Federal Minister for Foreign Affairs insofar as such treaties are concluded in a form of ministerial agreements (*Ressortübereinkommen*)

c) The competent Federal Minister insofar as such treaties constitute merely administrative agreements (*Verwaltungsübereinkommen*)

ANNEX F

FULL POWER TO SIGN TREATY

The Federal President of the Republic of Austria upon proposal by the Austrian Federal Government has authorized

Ms. Dr. Benita Maria FERRERO-WALDNER,
Secretary of State
in the Federal Ministry for Foreign Affairs

to sign the Agreement between the Republic of Austria and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.

In witness thereof the present full powers are signed by the Federal President, the Federal Chancellor and sealed with the State Seal of the Republic of Austria.

Done at Vienna on ___ May 1996

The Federal President:

The Federal Chancellor:

IV. Bibliography

Abbreviations

AÖR	Archiv des öffentliches Rechts
B–VG	Austrian Federal Constitution
BGBI	Austrian *Federal Law Gazette*
EEC	European Economic Community
FS	Festschrift
ILM	International Legal Materials
Jbl	Juristische Blätter
ÖJZ	Österreichische Juristenzeitung
OZöRV	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht
SCOR	United Nations Security Council Resolution
VCT	Vienna Convention on the Law of Treaties
VCT1	Vienna Convention on the Law of Treaties between States and International Organizations
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZÖR	Zeitschrift für öffentliches Recht

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CHAPTER THREE

NATIONAL TREATY LAW AND PRACTICE: CANADA

Maurice Copithorne[1]

I. Introduction

In Canada the making of treaties is one element of the foreign affairs power which, as in Britain, is a prerogative power that has remained with the sovereign, that is, the "crown in right" of Canada.[2] The exercise of the prerogative powers for Canada is delegated by the sovereign to the Governor General, the Queen's representative in Canada, in letters patent, the most recent being dated 1947.[3] Thus, as the making of treaties is a prerogative power, it follows that the legislature, the Parliament of Canada, has no legal or necessary role in the treaty-making process.

The prerogative powers, including that of treaty making, are exercised by the Governor General on the advice of ministers. The minister principally responsible is the Minister of Foreign Affairs pursuant to Section 10 of the Foreign Affairs and International Trade Act.[4]

In Canada the concept of treaty making subsumes ratification where that step is required, as the obligations created by the treaty are not

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[1] The author wishes to thank David Allin, formerly Head, Treaty Section, Legal Bureau, Foreign Affairs, for reviewing an earlier version of this chapter and making many valuable suggestions for improvements.

[2] A prerogative right is one "that remains in the Sovereign as one of the bundle of discretionary common law rights which were, at and by the common law, exercisable by the Sovereign in person. . . ." W.F. O'Connor, "Report to the Honourable Speaker of the Senate of Canada on the *British North American Act*," 1867, at 146 (1939), *quoted in* A.E. Gotlieb, *Canadian Treaty Making* 4 (1968). *See also id.* at 4 (prerogative powers in the field of foreign affairs include "the power to do all acts of an international character, such as the declaration of war and neutrality, the conclusion of peace, the making or renouncing of treaties, and the establishment or termination of diplomatic relations," quoting McGregor Dawson, *The Government of Canada* 158 (4th ed. 1963)). In the celebrated *Labour Conventions* case, the Chief Justice of Canada described the power of treaty making as resulting from "the crystallization of constitutional usage into a rule of constitutional law." [1936] S.C.R. 461.

[3] It is reproduced in R.S.C., App. II, No. 31 (1985) (Can.).

[4] R.S.C., 1985, ch. E-22.

perfected until the treaty is ratified. Ratification is an executive act and accordingly, the legislature is not involved.

In Canada, treaties are not automatically the law of the land. Where a change in the law is required to implement a treaty obligation, legislative action is required either by the Parliament or by provincial legislatures, depending on which level of government has general legislative competence in the relevant field as set out in the Constitution.

II. Canadian Treaty-Making Law and Practice

A. *What is an International Agreement?*

1. *General Criteria*

The Department of Foreign Affairs (hereafter "Foreign Affairs") has expressed this view of the Vienna Convention, to which Canada is a party:

> This Convention constitutes a law-making treaty laying down the fundamental principles of contemporary treaty law. Because of the paramount importance of treaties as a source of the international legal obligations binding upon states and the diversity and comprehensiveness of the interlocking network of treaties which today regulate the major part of transactions between states and serve to establish the relationships among them, the Convention must be viewed as virtually the constitutional basis, second in importance only to the UN Charter, of the international community of states.[5]

Thus, Canadian treaty terminology follows the usages of the Convention and Canadian procedures reflect its provisions.

2. *Agency-to-Agency and Implementing Agreements*

In Canadian practice there is a clear distinction drawn between treaties and quasi treaties such as those bearing the title of memoranda of understanding. These documents are considered to be international statements of intent or best efforts and, while not binding in international law, do carry significant moral or political weight. Such arrangements exist between Canada and other states, between Canadian government departments and the departments or agencies of other states, between Canadian provinces and the comparable political subunits of other states, and

[5] Excerpt from a Memorandum dated June 4, 1970, which appears in IX *Canadian Yearbook of International Law* 300 (1971).

between Canadian provinces and foreign states.[6] Such documents carry the title of memorandum of understanding, arrangement, entente, declaration of intent, and so on.[7]

This area is not without difficulties. In the case of memoranda of understanding, Australia and Britain as well as Canada have traditionally considered that such documents do not create a legal relationship. The United States has argued otherwise and various accommodations have had to be reached such as an exchange of notes constituting an enforceable "chapeau" for aspects of an otherwise non-binding memorandum of understanding.[8]

3. *Oral Agreements*

Canada takes the view, at least by implication, that international law does not require a treaty to be in written form. However, there appears to be no case of Canada recognizing an oral commitment made by itself or by a partner state as constituting a treaty.

4. *Unilateral Acts*

The informal opinion is the same with regard to unilateral acts; Canada would likely view reciprocal declarations as constituting a treaty. However, again there appear to be no precedents.

5. *Foreign Aid, Sales Contracts and Agreements Governed by Municipal Law*

Such agreements, often in the form of sales contracts, would normally be regarded as matters for private law and, unless otherwise meeting the criteria of the Vienna Convention, would not be considered treaties. There are, however, examples of land leases with other states entered into in treaty form and accordingly viewed as such.[9]

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[6] *See* Foreign Affairs 1968 statement, *quoted in* H.M. Kindred (ed.), *International Law Chiefly as Interpreted and Applied in Canada* 180 (6th ed. 2000).

[7] *See, e.g.*, Memorandum of Understanding between the Government of Canada and the United Arab Emirates on Economic and Technical Cooperation signed July 6, 1998, Trade and Investment Cooperation Agreement between the Government of Canada and the Andean Community signed May 31, 1999, Arrangement between the Organization for the Prohibition of Chemical Weapons and the Government of Canada regarding On-site Inspections at the Canadian National Single Small-Scale Facility Located at the Canadian Forces Base, Suffield, September 25, 1998.

[8] *See* John H. McNeill, "International Agreements: Recent U.S.–U.K. Practice Concerning The Memoranda of Understanding," 88 *Am. J. Int'l L.* 821 (1994). For a Canadian example of a chapeau agreement, see the Canada–U.S.A. Defence Cooperation Agreement, *CTS* 1994/34.

[9] *See, e.g.*, Treaty Leases Covering U.S. Military Bases In Canada, *CTS* 1949/15 and 1952/14.

6. *Who Decides?*
Decisions on whether a particular document constitutes a treaty would be taken by the Treaty Section of the Legal Bureau of Foreign Affairs.

B. *Executive Authorization and Approval Procedures*

1. *Coordination and Authority for Negotiation and Conclusion of Treaties*
In Canadian practice the type of authority turns on several factors. One of these is the significance of the policy involved. If a treaty deals with a matter of national significance or cuts across the jurisdictions of several government departments, or entails any legislative, as distinct from regulatory, change, a policy decision of the Cabinet is required. A typical instrument considered not to meet this criterion is a mutual legal assistance treaty (MLAT), which is incorporated into Canadian law by an order-in-council[10] amending a schedule of a Canadian statute. In such a case there is an existing government treaty initiative as reflected in the statute, and the extension of its cooperation provisions to a foreign state would not likely raise significant policy issues.

However, the making of all treaties requires formal legal authority for their execution. This takes the form of an order-in-council authorizing a named individual to sign the treaty on behalf of Canada. Foreign Affairs prepares a submission for this purpose to the Governor General-in-Council, a group of senior Cabinet ministers, pursuant to the Foreign Minister's responsibility for the conduct of external affairs. (For examples of this and other Canadian treaty related documents, see Basic Data and Documentation below.)

2. *Distinction between Treaties and International Agreements*
Reflecting the provisions of the Vienna Convention, in Canadian practice and law there is no substantive distinction between "treaties" and "international agreements." From a legal perspective, the two terms are interchangeable.

3. *Guidance Notes*
While the Treaty Section of Foreign Affairs has in the past issued comprehensive guidance in the form of a chapter in the *Departmental Procedures Manual*, no such general guide is now in use. However, the Treaty Section does issue periodic memoranda on procedural aspects of the treaty process.

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[10] An order-in-council is a subsidiary act that is made pursuant either to specific statutory authority, or as in this case, to the royal prerogative.

C. *Legislative Approval*

1. *General*

In general, Canadian treaties do not automatically become the law of the land. A treaty that is deemed to create obligations upon Canada can be implemented only by a change in the law requires legislative action. However, some treaties do not require such a change. The examples of this latter group most frequently mentioned are those that do not impinge on individual rights, do not contravene existing laws or can be implemented by executive action alone. Examples are treaties relating to foreign aid, air space, research, and weather stations.[11]

The most significant traditional superior court decision involving the treaty process is the 1937 judgment of the Judicial Committee of the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Ontario*, popularly known as the *Labour Conventions* case.[12] Until then, it had been assumed that with the recognition of Canada's independence in 1931, section 132 of the Constitution Act of 1867 – which gave authority to the federal government to implement "British Empire Treaties" – should be interpreted as encompassing all treaties. The Privy Council judgment began with a statement that the formation and the performance of the obligations constituted by a treaty were separate acts and that while the first was an executive act, the performance of the obligations, if that entailed an alteration of existing domestic law, required legislative action. More surprisingly given some of the Privy Council's earlier decisions, the judgment also declared that the competence to take this legislative action was governed by the division of general legislative powers between the federal and provincial levels of government that was set out in the constitution.[13] Thus, for example, an international agreement involving a matter of education could only be implemented by the provinces as they had exclusive legislative competence in this field. The *Labour Conventions* decision was controversial at the time and for many years thereafter,[14] and there have been judicial suggestions that the Supreme Court of Canada might revisit the subject if it was presented with the right case. There has also been evidence in recent cases that Canadian courts are

[11] *See respectively CTS* 1985/19, *CTS* 1964/4, *CTS* 1963/13, *CTS* 1975/11.

[12] [1937] A.C. 326. An extract appears in Kindred, *supra* note 6, at 190–93. Appeals from the Supreme Court of Canada to the Privy Council were subsequently abolished.

[13] By extension, it may be that implementing action for treaties potentially falling within the responsibility of aboriginal self governments will be required of those governments.

[14] *See* Gotlieb, *supra* note 2, at 75; *id.* at 26–27 and n. 80 for references and a brief overview of the various points of view.

now prepared to take a more flexible approach than was suggested by the Privy Council's metaphor of watertight compartments.[15]

2. *Executive Discretion in Deciding Whether Legislative Approval is Required*
As the foreign affairs prerogative power has not been delegated to Parliament, that body has no necessary or legal role in the making of treaties. However, the practice has been for the government to submit the more important treaties, such as the U.N. Charter and the North Atlantic Treaty, to the House of Commons for approval.[16] This is a political act; the resulting resolution is not in statutory form and does not receive Royal Assent. However, the role of Parliament as a body with which the executive consults is evolving. Consultations on Canada's most important treaties now take place regularly prior to the Government taking binding action. For example, the Standing Committee on Foreign Affairs and International Trade (SCFAIT) and its subcommittee examined and made recommendations to the Government on the Multilateral Agreement on Investment[17] and the Canada-United States Preclearance Agreement.[18]

Of more practical significance is that governments have come to take the position that they will normally only ratify a treaty after any necessary enabling legislation has been passed. This inevitably involves a scrutiny of the treaty itself. Indeed, sometimes this legislation contains a specific provision approving the treaty.[19] There is frequently significant delay in Canadian treaty ratification, particularly where the subject matter falls within provincial legislative competence. Today, on only rare occasions does Canada ratify a treaty prior to the enactment of enabling

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[15] *See, e.g.*, the Supreme Court judgment in *R.* v. *Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R., 401 where the majority characterized the subject matter of the London Marine Dumping Convention as falling within the national concern doctrine of the peace order and good government power of Parliament. An extract appears in Kindred, *supra* note 6, at 193–94.

[16] *See* Gotlieb, *supra* note 2, at 16–18 for the history of this practice and a list of representative treaties submitted to Parliament for approval by resolution up to 1968. A more recent example is the 1996 renewal of the North American Aerospace Defense Command Agreement between Canada and the United States. In this case the resolution was that the House of Commons "take note" of the importance of NORAD and the government's intentions to renew the Agreement. House of Commons Debates (11 March 1996) at 495.

[17] *See* Third Report of the SCFAIT, First Report of the Subcommittee on International Trade, Trade Disputes and Investment, December 1997.

[18] *See* Eighth Report of SCFAIT, May 25, 1999.

[19] *See, e.g.*, *North American Free Trade Agreement Implementation Act* §10, S.C. 1993, c. 44; *Canada-United States Free Trade Agreement Implementation Act* §8, S.C. 1988, c. 65; *The World Trade Agreement Implementation Act* §8, S.C. 1994, c. 47.

legislation. Typically these might involve phased obligations that were viewed as requiring changes to federal legislation over a manageable domestic timetable.[20]

D. *Reservation Questions*

1. *Bilateral Treaties*

In Canada the informal opinion is that an attempt to attach a reservation to a bilateral treaty as a condition of acceptance is tantamount to refusing the treaty and that such an act would oblige the parties to consider whether to reopen negotiations.

2. *Multilateral Treaties*

Canada does on occasion enter reservations concerning the application of multilateral treaties. This approach has sometimes been taken as a last resort to provide for the application of a treaty only to particular provinces. In practice, some categories of treaties, particularly those concerning human rights, are subject to significant federal-provincial cooperation through the mechanism of a continuing federal-provincial committee of officials responsible for human rights under which the provinces provide assurances deemed sufficient for the federal government to accede to the treaties. Generally, the federal government is quite cautious in the making and implementing of treaties that fall, in whole or in part, within provincial legislative competence. Constitutional litigation generally arises only in those cases in which the proper constitutional categorization of the subject matter in dispute is uncertain, that is, federal or provincial or possibly overlapping.

It frequently happens that some but not all provinces choose to participate in a treaty regime. Should a province so decide the federal government has three options. The first is to withhold accession or ratification until all the provinces have taken the necessary implementing action. However, this penalizes those provinces that are anxious to participate in the treaty regime.

The second is to exercise the "federal state" clause if the treaty has one. Such clauses permit a federal state to participate on a partial basis – sometimes called fractional ratification – in accordance with the extent

[20] A recent example is the Canadian Schedule of Specific Commitments to be annexed to The Fourth Protocol to the General Agreement in Trade in Services, GATS/SC/16/Suppl.3.

to which its political subunits have implemented the provisions of a treaty. An example of a "federal state" clause is Article 93 of the 1980 United Nations Sale of Goods Convention. Another article of this Convention allows states to make declarations at the time of accession that they will not be bound by certain provisions of the Convention. The province of British Columbia decided that it would not be bound by those provisions and its implementing legislation did not include this provision. Canada exercised its right under Article 93 and declared that British Columbia would not be bound by the provision in question. Subsequently, British Columbia changed its position, amended its legislation and Canada then modified its declaration concerning B.C. participation in the Convention. Canada on occasion seeks to have such clauses inserted in the course of the treaty negotiations but often faces opposition from other federal states.

The third option is to enter a reservation excluding the convention's application to the one or several provinces that decline to be bound. In the case of the United Nations Convention on the Rights of the Child which, in Article 51, expressly provides for the entry of reservations, the province of Alberta declined to be bound and Canada's ratification excluded Alberta accordingly. Only some years later did the province change its position and Canada withdrew its reservation.

E. *Consultation with the Legislature*

On occasion, the government may wish to have a political statement of support of Canada's participation in a particular treaty. In such cases the government seeks from the House of Commons a resolution of approval for Canada's action. (*See* Section II.C.2, *supra.*) However, the resolution has no legal effect. At most, a few treaties a year are submitted for such a resolution.

F. *Consultation With the Public*

As treaty prescribed norms have increasingly impinged upon daily life, public opinion has become more sensitive to the potential impact of treaties and to the absence of public debate concerning their adoption. The government has become conscious of this unease and various forms of consultation have become common. One of the more structured forms of consultation is the reference of a treaty to a Standing Committee of the House of Commons or the Senate or a joint committee which most usually holds public sessions to which individuals and organizations are

invited to make representations.[21] The reports of these parliamentary committees are not binding on the government and the extent to which their recommendations are taken into account varies significantly. There are other forms of consultation such as a standing external consultative committee of the Department of Justice which addresses primarily private international law treaties, and "round table" consultative groups of "stakeholders" established to advise the government on various areas such as adherence to World Intellectual Property Organization intellectual property conventions.

G. *Legal Bases for Agreements Not Formally Approved by the Legislature*

Constitutionally, the power to make treaties is vested in the Governor General and there are no limitations in either custom or statute on the exercise of this treaty-making power.

H. *Publication and Transmittal Requirements*

1. *Publication of Treaties and Transmission to the Legislature*

It has been the custom for the Minister of Foreign Affairs to table in the House of Commons and the leader of the Senate to table in that body, at the beginning or at the end of each session, all the treaties that have been executed by Canada since the last tabling. This process has become irregular.

All treaties back to 1928, with certain limited exceptions, are published in the Canada Treaty Series (CTS).[22] A treaty website has been established and is now being developed retrospectively with priority being given to the treaties most in demand (www.treaty-accord.gc.ca).

A public source of current treaty action by Canada is the section entitled "Treaty Action Taken by Canada" in the annual *Canadian Year Book of International Law*.

2. *Classified Agreements*

While there is no category of documents officially recognized as classified treaties, it is generally assumed that such documents do exist. The question

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[21] Examples of treaties sent to a Parliamentary Committee for consultation are those referred to *supra* notes 17 and 18.

[22] The CTS is available through Canadian Government Publishing, Ottawa, Ontario, KIA 0S9, 1–800–635–7943 (in Canada), or 1–819–956–4800 (tel), 1–819–994–1498 (fax).

remains whether such documents constitute treaties in the formal sense in view of the fact that, among other things, they are presumably not registered with the United Nations.

3. *Registration of International Treaties*
Canada regards registration with the United Nations under Article 102 of the Charter of any international agreement entered into by Canada to be mandatory and follows a practice of registering treaties on a regular basis.

I. *Incorporation into National Law*

As noted above treaties do not automatically become part of the law of the land in Canada. If treaties require a change in the law, such changes have to be incorporated into Canadian law through the legislative process. In some cases this has been declared to have been done by prior legislative act, so called "passive" or "inferred" implementation. As noted in Section II.C.1 above, not all treaty obligations require statutory implementation.

In Canada a mismatch between Canada's international obligations and the state of its domestic law can and does occur. Canadian courts have shown no hesitation in enforcing Canadian law whether it be statute or common law, even if to do so would be inconsistent with a treaty that is binding upon this country. One concession that Canadian courts have been prepared to make towards the recognition of Canada's international obligations is to interpret statutes so as to conform, as far as possible, with treaties.[23]

In addition, some judges have taken a broad view of the use of international law norms to interpret domestic statutes, at least in the human rights field. For some years there have been judicial comments suggesting that in disputes concerning the application of the Canadian Charter of Rights and Freedoms, it may be appropriate for the courts to take into account, in interpreting the wording of the Charter, international human rights instruments to which Canada is a party even if the norms in the instruments have not been expressly incorporated into Canadian domestic law. For example, in 1987, the Chief Justice of Canada declared (in dissent):

> In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the charter, these norms provide a rele-

[23] The recent authority usually cited for this proposition is *National Corn Growers Assn. v. Canada (Import Tribunal)* [1990], 2 S.C.R. 1324. See extract in Kindred, *supra*, note 6, at 204–205.

> vant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.[24]

A number of subsequent decisions addressed the concept of "relevant and persuasive" but in 1998, when the then director of the Human Rights Law section of the Department of Justice reviewed the jurisprudence on the effect upon Canadian law of unimplemented treaties, she concluded, "The current situation is one of almost total uncertainty."[25] Nevertheless, more generally, writers began to conclude that over the last 20 years, the Supreme Court has in fact become much more open to the use of international treaty law in the interpretation of Canadian law.[26]

In its 1999 decision, *Baker* v. *Canada (Minister of Citizenship and Immigration)*,[27] the Supreme Court in a 5 to 2 decision on this point, found that while the provisions of the Convention on the Rights of the Child had no direct application within Canadian law, ". . . the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review." The judgment appears to expand the use of international norms from all international human rights sources of law rather than being limited to human rights conventions to which Canada is a party but which have not been implemented into Canadian law. The judgment also appears to expand the use of such norms in Canadian courts beyond litigation arising out of the Charter to include statutory interpretation, judicial review and even administrative decisions.

J. *Legally Binding Decisions of International Organizations*

In Canada some decisions of international organizations are regarded as treaty commitments. For example, economic sanctions imposed by the United Nations Security Council under Chapter VII are regarded as commitments under Article 41 of the United Nations Charter. Canadian implementation of such decisions requires regulatory change, in this case, modification of the regulations under the *United Nations Act*.[28]

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[24] *In re Public Service Employee Relations Act*, [1987] 1 S.C.R. at 348 (Dickson, C.J., dissenting).

[25] Weiser, "Effect in Domestic Law of International Human Rights Treaties Ratified Without Implementing Legislation," 27 *Proceedings Canadian Council on International Law* 132 (1998).

[26] *See, e.g.*, Schabas, "Twenty Five Years of Public International Law at the Supreme Court of Canada," 79 *Canadian Bar Review* (2000) 175.

[27] *Baker* v. *Canada (Minister of Citizenship and Immigration)* [1999], 2 S.C.R. 817. For a discussion of the case law prior to the Supreme Court decision in the *Baker* case and a proposed analytical framework for it, *see* Weiser, *supra*, note 25.

[28] R.S.C., 1985, ch. V-2.

K. *Multilateral Conventions*

1. *Centralization*

Generally speaking the Treaty Section, and more broadly the Foreign Affairs Department, is responsible for ensuring that Canada meets its international treaty obligations. In practice, the matter is likely to be dealt with by the government department holding primary responsibility for the subject matter. The process for interdepartmental consultation, however, is unstructured. In some cases this responsibility may be shared between several government departments. For example, in the case of the three Antarctica Agreements, at the initiative of the Department of Foreign Affairs, the relevant government departments met to work out a strategy as to each department's role in the arrangements for domestic implementation.

2. *Procedures*

There are no formal procedures in Canada for ensuring the implementation of multilateral conventions but in practice there is usually a strong impetus to do so. Delays are more often the result of crowded legislative timetables or differences of view among government departments as to the need for and content of implementing legislation, or difficulties between the levels of government on the same questions. With particularly important treaties such as the Biodiversity Convention and the Comprehensive Test Ban Treaty, the government established national offices to develop implementation strategies.

L. *Treaty Termination*

In Canada the power to make a treaty embraces the power to terminate it in accordance with the provisions of the Vienna Convention. Thus, the power to terminate treaties is also an exercise of the foreign affairs power of the royal prerogative and, accordingly, there is no constitutional or other requirement to obtain the approval of the legislature for such action.

M. *International Agreements Concluded by Sub-National Entities*

The argument has been made from time to time, particularly in Quèbec, that the treaty-making power with regard to those subjects that fall within the general legislative jurisdiction of the provinces has devolved upon the Lieutenant-Governors, that is to say, the representatives of the sov-

ereign in each province.[29] There was some support for this proposition in early decisions of the Judicial Committee of the Privy Council. The federal government has traditionally strongly resisted this conclusion. It has relied instead, for example, on the comments of the Chief Justice of the Supreme Court in the *Labour Conventions* case:

> The Lieutenant Governors of a Province represent the Crown for certain purposes. But, in no respect does the Lieutenant-Governor of a Province represent the Crown in respect to relations with foreign Governments. The Canadian Executive, again, constitutionally acts under responsibility to the Parliament of Canada and it is then Parliament alone which can constitutionally control its conduct of external affairs.[30]

In its 1968 statement, Foreign Affairs concluded "[t]here has never been any delegation of such prerogative powers to the Lieutenant-Governors of the provinces. Nor is there any authority for the assertion that the provinces received any part of the royal prerogative with respect to foreign affairs and the power to make treaties."[31] In a 1956 decision the Supreme Court of Canada, in considering an arrangement between the province of Ontario and the United Kingdom, held that as treaties were between states, the arrangement before it was not a treaty. In that case, the Court held that the arrangement was *inter vires* the jurisdiction of the province.[32]

There are a wide variety of arrangements entered into between provinces and sub-units of other states. In the same 1968 paper, Foreign Affairs noted that such arrangements are not subject to international law and are therefore generally not regarded as binding. Such arrangements often involve the reciprocal recognition of legislation between two jurisdictions such as those concerning cooperation in tourist advertising and information, arrangements concerning the supply of electrical power, the maintenance of highways, the regulation of fisheries, and the recognition of the suspension of drivers licenses.[33]

Various *ad hoc* arrangements are entered into to permit provinces to achieve recognized objectives. They include "indemnity agreements" in which the federal government enters into an agreement with the

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[29] For a fuller discussion of whether Canadian provinces have a limited treaty-making capacity, *see* Gotlieb, *supra* note 2, at 27–29. The Federal position is set out in the 1968 paper quoted in Kindred, *supra*, note 6, at 180–187. The Quebec position is described in Kindred, *supra*, note 6, at 187–188.

[30] [1936] S.C.R. 461, at 488.

[31] Kindred, *supra* note 6, at 184.

[32] [1956] S.C.R. 618.

[33] *See*, Gottlieb, *supra* note 2, at 25 n. 79 for a long list of such arrangements up to 1968. The list is presumably much longer now.

government of another state on a matter of interest to a particular province. The agreement is supplemented on the Canadian side by an agreement between the federal government and the province under which the province undertakes to provide such legislative authority as may be necessary to enable the discharge within its territory of the obligations under the agreement. The province also undertakes to indemnify the federal government for any liability that may arise by reason of provincial default. Examples of this technique are the arrangements in the case of the St. Lawrence Seaway[34] and the Columbia River Treaty and Protocol.[35]

A final technique is general framework agreements or *accords cadres*. While similar to *ad hoc* covering agreements, these agreements are sufficiently open ended to allow for future agreements in a given field by any province which may be interested in doing so. Again, the federal government remains responsible in international law for such arrangements. Typical areas are those of education and cultural exchanges. An example is the cultural agreement and accompanying exchange of letters signed by the Canadian and French governments in 1965.[36]

III. Concluding Remarks

The treaty process in Canada – particularly the reception of international conventional (and customary) law into Canadian law – is complex and uncertain. Typically, this situation is attributed to three factors: (1) that treaty making is a prerogative power, rather than a written constitutional power, (2) that the implementation of treaties is a shared federal-provincial jurisdiction, and (3) that treaties are not self-executing in Canada and that in some areas such as human rights, international treaties are not as a rule expressly incorporated into domestic legislation. With regard to the latter, the Government has frequently expressed the view that the International Covenant on Civil and Political Rights is implemented in large part by the Canadian Charter of Rights and Freedoms. This has led one senior Canadian Department of Justice official to conclude that the Canadian system is unique and, "from a structural perspective, [it] is one of the most difficult places in the world for the purposes of implementing international human rights treaties."[37]

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[34] CTS 1953/21; CTS 1954/14.
[35] CTS 1964/2.
[36] CTS 1965/21.
[37] E. Eid, *Interactions Between International and Domestic Human Rights Law: A Canadian Perspective*, 2001, paper prepared for The International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia.

It is also important to note that the superior courts of Canada have been seen as traditionally avoiding international law wherever they could manage to do so. This has changed considerably over the past 25 years. However, commentators differ sharply on the results. One recent view is that

> our courts are still inclined to avoid deciding cases on the basis of international law. . . . [T]here appears to be a trend towards treating all of international law, whether custom or treaty, binding on Canada or not, implemented or unimplemented in the same manner – as relevant and perhaps persuasive, but not as determinative, or dare we say, as obligatory.[38]

Bearing in mind some of the strongly worded dissents and separate opinions in the Supreme Court, it is clear that there is a wide range of views in Canadian courts on the matter of reception of international law into Canadian law. There have been a number of opportunities for the Supreme Court to spell out definitive norms in this regard and such cases continue to arise.[39]

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[38] Brunée and Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts," XL *Can. Yearbook of Int'l L.* 5 (2002).

[39] *See, e.g., Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.R 4, and the Court of Appeal of Ontario, *Bouzari v. Islamic Republic of Iran*, 30 June 2004, Docket C38295, both discussed on www.gibvanert.com/using/ news.html.

IV. Basic Data and Documentation

A. *National Legislation*

Annex A: Extracts from 1982 Constitution Act

B. *Examples of Documents*

Annex B: Recommendation to the Governor General in Council
Annex C: Order-in-Council
Annex D: Instrument of Full Powers
Annex E: Recommendation to the Governor General in Council
Annex F: Order-in-Council
Annex G: Instrument of Ratification
Annex H: Protocol of Exchange of Instruments
Annex I: Instrument of Accession

ANNEX A

EXTRACTS FROM THE 1982 CONSTITUTION ACT

VI. DISTRIBUTION OF LEGISLATIVE POWERS

Powers of the Parliament

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. [Repealed.]
1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
2A. Unemployment Insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.

19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,

1. [Repealed.]
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
    (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
    (*b*) Lines of Steam Ships between the Province and any British or Foreign Country;
    (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. the Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

92A.

1. In each province, the legislature may exclusively make laws in relation to:
    (*a*) exploration for non-renewable natural resources in the province;
    (*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
    (*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

2. In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.
3. Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.
4. In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
   (*a*) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
   (*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.
5. The expression "primary production" has the meaning assigned by the Sixth Schedule.
6. Nothing in subsections 1 to 5 derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

ANNEX B

RECOMMENDATION TO THE GOVERNOR GENERAL IN COUNCIL

TO: HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

The undersigned has the honour to recommend that the Minister of Foreign Affairs be authorized:

(a)(i) to sign, on behalf of the Government of Canada, a Treaty between the Government of Canada and the Government of the Hellenic Republic on Mutual Assistance in Criminal Matters; or

(ii) to execute and issue an Instrument of Full Powers authorizing the Honourable Anne McLellan, Minister of Justice, or Eleni Bakopanos, Parliamentary Secretary to the Minister of Justice, or Derek Fraser, Ambassador of Canada to the Hellenic Republic, to sign, on behalf of the Government of Canada, a Treaty between the Government of Canada and the Government of the Hellenic Republic on Mutual Assistance in Criminal Matters; and

(b) to take the action necessary to bring the Treaty into force for Canada.

Respectfully submitted,

Minister of Foreign Affairs

OTTAWA

ANNEX C

ORDER-IN-COUNCIL

His Excellency the Governor General in Council, on the recommendation of the Minister of Foreign Affairs, hereby authorizes:

(a) the Minister of Foreign Affairs

(i) to sign, on behalf of the Government of Canada, the Treaty between the Government of Canada and the Government of the Hellenic Republic on Mutual Assistance in Criminal Matters, or

(ii) to execute and issue an Instrument of Full Powers authorizing the Honourable Anne McLellan, Minister of Justice, or Eleni Bakopanos, Parliamentary Secretary to the Minister of Justice, or Derek Fraser, Ambassador of Canada to the Hellenic Republic, to sign, on behalf of the Government of Canada, the Treaty between the Government of Canada and the Government of the Hellenic Republic on Mutual Assistance in Criminal Matter; and

(b) the Minister of Foreign Affairs to take the action necessary to bring the Treaty into force for Canada.

ANNEX D

INSTRUMENT OF FULL POWERS

I,
LLOYD AXWORTHY,

Minister of Foreign Affairs
in the Government of Canada,
do hereby certify that

ANNE MCLELLAN,
Minister of Justice
or
ELENI BAKOPANOS,
Parliamentary Secretary to the
Minister of Justice,
or
DEREK FRASER,
Ambassador of Canada
to the Hellenic Republic,

is vested with Full Powers and Authority to sign, on behalf of the Government of Canada, the Treaty between the Government of Canada and the Government of the Hellenic Republic on Mutual Assistance in Criminal Matters.

IN WITNESS WHEREOF,
I have signed and sealed these presents at Ottawa, this ___ day of _____, 1998.

Minister of Foreign Affairs

Je, soussigné,
LLOYD AXWORTHY,

Ministre des Affaires étrangères du
Gouvernement du Canada
certifie par les présentes que

ANNE MCLELLAN,
Ministre de la Justice,
Ou
ELENI BAKOPANOS,
Secrétaire parlementaire du
ministre de la Justice
Ou
DEREK FRASER,
Ambassadeur du Canada
auprès de la République hellénique,

est investi des Pleins pouvoirs et de l'autorité nécessaire pour signer, au nom du Gouvernement du Canada, le Traité d'entraide judiciaire en matière pénale entre entre le Gouvernement du Canada et le Gouvernement de la République Hellénique.

EN FOI DE QUOI,
j'ai apposé aux présentes mon seing et sceau à Ottawa, ce ____ jour de _____ 1998.

Le ministre des Affaires étrangères

ANNEX E

RECOMMENDATION TO THE GOVERNOR GENERAL IN COUNCIL

TO: HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

The undersigned has the honour to recommend that the Minister of Foreign Affairs be authorized to sign, on behalf of the Government of Canada, an Instrument of Ratification of *Protocol II of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, done at Noumea, on October 20, 1990.

Respectfully submitted,

Minister of Foreign Affairs

OTTAWA

ANNEX F

ORDER-IN-COUNCIL

His Excellency the Governor General in Council, on the recommendation of the Minister of Foreign Affairs, hereby authorizes the Minister of Foreign Affairs to sign, on behalf of the Government of Canada, an Instrument of Ratification of *Protocol II of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, done at Noumea, on October 20, 1990.

ANNEX G

INSTRUMENT OF RATIFICATION

I,
LLOYD AXWORTHY,

Minister of Foreign Affairs
in the Government of Canada,

do hereby certify that

the Government of Canada ratifies *Protocol II of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, done at Noumea, on October 20, 1990.

IN WITNESS WHEREOF,

I have signed and sealed this Instrument of Ratification.

DONE at Ottawa, this ___ day of _____, 1998.

Minister of Foreign Affairs

Je, soussigné,
LLOYD AXWORTHY,

Ministre des Affaires étrangères du Gouvernement du Canada,

certifie par les présentes que

le Gouvernement du Canada ratifie le *Protocole II de la Convention pour l'interdiction de la pêche ou filet maillant dérivant de grande dimension dans le Pacifique du Sud*, fait à Nouméa, le 20 octobre 1990.

EN FOI DE QUOI,

j'ai apposé ma signature et mon sceau au présent instrument de ratification.

FAIT à Ottawa, ce ____ jour de _____ 1998.

Le Ministre des Affaires étrangères

ANNEX H

PROTOCOL OF EXCHANGE OF INSTRUMENTS

The undersigned, having met for the purpose of exchanging Instruments of Ratification by their respective Governments of the Supplementary Agreement to the Agreement on Social Security of February 24, 1987 between the Government of Canada and the Government of the Republic of Austria, which was signed at Vienna on September 12, 1995, and the respective Instruments of Ratification of the aforesaid Agreement having been carefully compared and found to be in due form, the said exchange took place this day.

Les soussignés s'étant réunis pour procéder au nom de leurs Gouvernements respectifs à l'échange des Instruments de Ratification de l'Accord supplémentaire à l'Accord sur la sécurité sociale du 24 février 1987 entre le gouvernement du Canada et le gouvernement de la République d'Autriche qui a été signé à Vienne, le 12 septembre 1995, et les Instruments respectifs de ratification dudit Accord ayant été soigneusement comparés et trouveés en bonne et due forme, ledit échange a eu lieu aujourd'hui.

Die Unterzeichneten sind zusammengekommen, um im Namen ihrer jeweiligen Regierungen den Austausch der Ratifikationsurkunden betreffend das Zusatzabkommen zum Abkommen zwischen der Republik Oesterreich und Kanada ueber Soziale Sicherheit vom 24. Februar 1987 vorzunehmen, welches am 12. September 1995 in Wien unterzeichnet worden ist. Nachdem sie die Ratifikationsurkunden sorgfaeltig geprueft und in gehoeriger Form befunden haben, wurde der vorerwaehnte Austausch der Ratifikationsurkunden heute vorgenommen.

IN WITNESS WHEREOF they have signed the present Protocol of Exchange.
DONE at Ottawa this 27 day of August, 1996.

EN FOI DE QUOI ils ont signé le présent Protocole d'échange.
FAIT à Ottawa ce 27 jour de août 1996.

URKUND DESSEN haben sie das vorliegende Protokoll ueber den Austausch unterzeichnet.
GESCHEHEN zu Ottawa, am 27 August 1996.

For the Government of the Republic of Austria
Pour le Gouvernement de la République d'Autriche
Fuer die oesterreichische Bundesregierung

For the Government of Canada
Pour le Gouvernement du Canada
Fuer die kanadische Regierung

ANNEX I

INSTRUMENT OF ACCESSION

I,
LLOYD AXWORTHY,

Minister of Foreign Affairs
in the Government of Canada,

do hereby certify that

the Government of Canada accedes to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, done on April 28, 1977, as amended.

IN WITNESS WHEREOF,

I have signed and sealed this Instrument of Accession.

Done at Ottawa, this ____ day of _____, 1996.

Minister of Foreign Affairs

Je, soussigné,
LLOYD AXWORTHY,

Ministre des Affaires étrangères du Gouvernement du Canada

certifie par les présentes que

le Gouvernement du Canada accède au Traité de Budapest sur la reconnaissance internationale du dépôt des micro-organismes aux fins de la procédure en matière de brevets, fait le 28 avril 1977, tel que modifié.

EN FOI DE QUOI,

j'ai apposé mon seing et sceau au présent Instrument d'accession.

Fait à Ottawa, ce ____ jour de _____, 1996.

Le Ministre des Affaires étrangères

V. Selected Bibliography

Abbreviations

A.C. Appeal Cases
CTS Canada Treaty Series
MLAT Mutual Legal Assistance Treaties
R.S.C. Revised Statutes of Canada
S.C. Statutes of Canada
S.C.R. Supreme Court Reports: Canada

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CHAPTER FOUR

NATIONAL TREATY LAW AND PRACTICE: CHILE

Francisco Orrego Vicuña
Francisco Orrego Bauzá

I. Introduction

The conclusion of treaties in Chile is governed by two complementary but separate normative levels. International negotiations and procedures relating to treaty adoption are governed by international law, with particular reference to the 1969 Vienna Convention on the Law of Treaties, to which Chile is a party. The precise expression of these undertakings in domestic law is governed by Chilean legislation, with particular reference to the Constitution of 1980.[1]

Unlike many other national constitutions, the Chilean Constitution does not devote a separate chapter to treaties and international agreements but, rather, is concerned with the distribution of treaty-making power among the various state entities called to participate in the conclusion of treaties, namely the Executive Branch (*see* Section II.B, *infra*)[2] and Congress (*see* Section II.C, *infra*).[3] Accordingly, the Constitution outlines some stages of the treaty-making process, allocating some functions exclusively to the Executive Branch and requiring the intervention of Congress in others.

II. Treaty Law and Practice in Chile

A. *The Meaning of an International Agreement*

The Constitution does not provide a definition for a "treaty" or an "international agreement," nor does it make any formal distinction between

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[1] Constitution of October 21, 1980 (entered into force Mar. 11, 1981) (hereinafter cited as "Const.").
[2] Const. Art. 32, No. 17.
[3] Const. Art. 50, No. 1.

these concepts or others commonly used in international law. Treaties have been generally considered in judicial decisions and by authors[4] as encompassing all sorts of international agreements, irrespective of how they may have been labeled. Both the Constitution now in force and prior constitutional texts, with the sole exception of that enacted in 1925, have used the term "international treaty."[5]

Although the current Constitution does not define an "international treaty," it provides clear criteria for identifying this concept. In point of fact, the expression "international treaty" is understood as an international agreement that has been negotiated and signed by the Executive Branch and approved by Congress prior to ratification. Congress can only grant or deny consent to the ratification of a given treaty; it cannot introduce amendments.

Rather exceptionally, the Chilean Constitution admits the existence of other "agreements" different from formal treaties,[6] agreements which are entered into under the sole authority of the Executive Branch and which do not require the intervention of Congress. These are the functional equivalent of Executive agreements. Although the Constitution provides in this category only for "enforcement agreements,"[7] which are negotiated, signed and eventually ratified by the Executive Branch in compliance with, or for the enforcement of, a prior treaty in force, in practice "agreements in simplified form" have also been used, irrespective of their linkage with a prior treaty.

The Constitution clearly establishes which kinds of treaties must be submitted for Congressional approval and which do not need to meet this requirement. From the point of view of international law, this distinction is largely irrelevant since the legal consequences of the agreement will be the same in either case. In terms of domestic law, however, the distinction is relevant, since the Executive Branch could use enforcement agreements to legislate on subjects that, under the Constitution, require passage of a statute.[8]

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[4] *See generally* Francisco Orrego Bauzá, *Los Tratados Internacionales en la Constitución Política de la República de Chile de 1980* (unpublished J.D. thesis, Catholic University of Chile, 1991).

[5] The Constitution of 1925 referred to "treaties" and "other conventions."

[6] Const. Art. 50, No. 1 (which refers also to "agreements").

[7] On the nature of these agreements, *see* The Report by the Committee on Constitution, Legislation and Justice of the House of Representatives in connection with Bulletin No. 256–10 (Apr. 19, 1991) (hereinafter cited as "Committee Report").

[8] Const. Art. 60 (listing the matters which require the passing of an Act of Congress).

B. *Treaty-Making Functions of the Executive Branch*

The Executive Branch has a central role in the conclusion of treaties and enforcement agreements, because the President is empowered to direct and conduct international political relations and to negotiate, sign, and ratify treaties and other agreements. These powers are, indeed, the essence of a presidential system of government. It follows that the Executive participates in all stages of the conclusion of treaties under domestic legislation, including negotiation, signing and ratification, which are functions handled through the Ministry of Foreign Affairs in most cases.[9] Enforcement agreements and other such instruments are, by their very nature, within the exclusive purview of the Executive Branch.

In view of the centralization of foreign relations in the Ministry of Foreign Affairs, no other state agency could normally conclude treaties or international agreements; in practice, however, other ministries and agencies have made international agreements. This has notably been the case for the Ministries of Finance, Health, Education, the Central Bank, and the Civil Aviation Agency. These agreements must, of course, have a direct bearing on subjects within the competence of these various bodies. In most cases, it is more a question of implementation or clarification of agreements in force than of creating new obligations under international law.

It should also be noted in this regard that, of late, the Executive Branch has tended to distribute the responsibility for international trade and economic negotiations between the Ministries of Finance and Foreign Affairs for reasons of administrative or political convenience. The former, for example, has taken responsibility for negotiations on NAFTA, while the latter has been assigned responsibility for negotiations with the Southern Common Market (MERCOSUR) and with the European Union.

Under the Constitution, the President has exclusive authority to "undertake negotiations; conclude, sign and ratify such treaties deemed convenient with the national interest, which shall be submitted for the approval of Congress. . . ."[10] Such functions flow from the power of the President to conduct foreign relations in general, including the recognition of States and governments, the appointment of diplomatic envoys, and the severance or suspension of political relations with other States. Although this authority is exclusive, the President is accountable both constitutionally and politically for the decisions taken in the discharge of his duties, and

[9] The organization of the Ministry of Foreign Affairs is established in Decree–Law No. 161, Off. J., Mar. 31, 1979, *as amended.*

[10] Const. Art. 32, No. 17.

he can be impeached by Congress during his term of office and six months thereafter "for decisions of his administration that would have gravely compromised the honor or security of the Nation." Ministers of State can be impeached for the same reason.[11]

Some stages of the treaty-making process are provided for in the Constitution. These include negotiation, signature or adoption, approval, ratification, and exchange or deposit of instruments of ratification, which are purely Executive functions. By its very nature, the negotiation of treaties and agreements is an exclusive power of the President, who normally performs this function by granting full powers to diplomatic agents and experts. Full powers require the endorsement of the Ministry of Foreign Affairs as is customary in diplomatic practice. The form that full powers can take today is quite flexible in view of the speed of modern communications. Nevertheless, the negotiation or signature done with full powers requires the confirmation or approval of the President before submission of the text for Congressional approval. This type of presidential confirmation or approval is different from the ratification that occurs after Congressional approval.

If the President confirms the treaty, in the form presented to him, it can be then submitted to Congress at the time and in the manner determined by the President. Provisional confirmation by the President is not possible since it would leave the end result of negotiations in a state of uncertainty. While provisional application of a treaty is not contemplated in Chilean legislation, since this would infringe on the role of Congress (*see* Section II.C, *infra*), in practice this has been done occasionally in order to expedite the entry into force of important treaties and agreements.

Signature of treaties and agreements is also within the exclusive authority of the President who will normally discharge this function through his Ministers of State, ambassadors, and other high officials endowed with full powers.

Ratification is another important stage of the treaty-making process that is within the exclusive authority of the President. Ratification occurs only after Congress has granted its consent to the treaty. Ratification in Chilean practice is a solemn act by means of which the State expresses its consent to be bound by a treaty.[12] Ratification is also a discretionary power of the President. It follows that there are no specific deadlines for ratification; it may be done whenever considered appropriate. There is no obligation to ratify, and the failure to do so does not engage Chile's

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[11] Const. Art. 48, No. 2 (a) & (b).

[12] Legal Opinion No. 132 (Ministry of Foreign Affairs, Nov. 21, 1966).

responsibility under international law; it is even possible that a treaty approved by Congress could remain unratified by the President.

Accession to a treaty has the same status under Chilean legislation as ratification. Prior Congressional approval also is required in this situation.

Although the consent to be bound by a treaty is formalized by means of ratification, this consent will only have binding effect after the instruments of ratification have been exchanged or deposited, this being essentially a question of notification of the appropriate information to other States or international agencies. This stage does not have specific legal consequences in Chile, because rights and obligations established by the treaty will have effect under domestic legislation as a consequence of the decree proclaiming the treaty as a part of Chilean law.[13] Furthermore, the validity and effectiveness of such a domestic decree is not made subject to the deposit or exchange of the instrument of ratification and not even to the entry into force of the treaty. It is thus conceivable under Chilean legislation that the treaty may have legal effects domestically before it has entered into force internationally.

Enforcement agreements and other such instruments not requiring Congressional approval are normally confirmed by the Executive through the Ministry of Foreign Affairs. It is this Ministry that normally conducts negotiations and proceeds to signature. If such agreements deal with subjects that, under the Constitution, require the passing of an act in order to become effective domestically, Congressional approval will have to occur in any event.[14] But even in this situation, confirmation of the agreement is within the Executive authority, and it is also the Executive who decides when such an agreement will be submitted to Congress.

C. *Congressional Approval*

Irrespective of the various forms that the consent to be bound by a treaty may take under the law of treaties, under Chilean legislation, the normal procedure requires the participation of both the Executive and the Congress. Exceptionally, Congressional approval will not be required for enforcement agreements done in compliance with, or enforcement of, a prior treaty in force,[15] unless the subject matter would require the passing of an act, in which case the procedure reverts to the general

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[13] Opinion No. 50.227 (Republic Comptroller General, Sept. 10, 1957).

[14] Const. Art. 50, No. 1, para. 2.

[15] For a discussion of the powers of the Executive in the treaty-making process, *see* Orrego Bauzá, *supra* note 4, at 249–79.

rule of Congressional approval. To the extent that other agreements in simplified form are accepted in practice, these are also exempted from Congressional approval.

Under the normal procedure discussed above, the President is under an obligation to submit treaties to Congress for its consent before proceeding to ratification.[16] This obligation only exists, however, if the President determines that the treaty is compatible with the national interest, since otherwise he can interrupt the treaty-making procedures at any time, before or after Congressional approval.

Under the Constitution, Congress has exclusive authority to either approve or reject treaties submitted by the President before proceeding to ratification.[17] For this reason, the President submits a "proposed agreement"[18] to Congress and not a "proposed bill" (as he would normally do in the case of an act). This distinction has particular relevance, because with the approval of his proposal the President can proceed to ratify and take other steps to bring the treaty into force internationally. Moreover, he must proclaim and publish the pertinent decree giving the treaty its full legal effect domestically. The approval of a "proposed agreement" by Congress does not affect the President's authority to abstain from ratification or from enacting the corresponding domestic decree, whereas in the case of a "proposed bill" the President is under an obligation to take the steps necessary to ensure the enactment and publication of the law within the deadlines and in the manner provided for by the relevant Constitutional text.

The procedures to be followed by Congress in connection with a "proposed agreement" have been much debated, particularly as to whether Congress should proceed as with an ordinary act or introduce some procedural variations. Although ordinary law-making procedures are generally applicable to treaties, some variations are necessary. First, unlike an ordinary act, which can be initiated by either the President or the Con-

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[16] For a discussion of judicial decisions and the opinion of writers, *see* Orrego Bauzá, *supra* note 4, at 255–61.

[17] *Id.* at 279–443.

[18] It should be noted that the approval of a Proposed Agreement by Congress requires a majority of the members present in each House, but if the treaty refers to matters requiring special majorities under the Constitution, the approval of a treaty will also require this majority. Report of the Senate Committee on Constitution, Legislation and Justice in relation to Bulletin No. S 139–10 (Oct. 19, 1993). This interpretation has been upheld by decisions of the Constitutional Court of August 4 and October 3, 2000. According to a most recent decision, the Constitutional Court has upheld the view that any treaty containing unconstitutional provisions should require prior amendment to the Constitution. *See* Decision of the Constitutional Court of April 8, 2002 (on the International Criminal Court).

gress depending on the subject matter,[19] the initiative to submit a treaty to Congress is exclusively within the authority of the President. Second, since the treaty can only be approved or rejected by Congress, the procedures relating to the introduction of amendments, which are available for an act, do not apply to treaties. The fact that Congress cannot introduce amendments to a treaty does not exclude the possibility that Congress might indicate or suggest to the Executive the need to make certain reservations. But the President is not legally bound by such suggestions.

In practice, the "proposed agreement" can be submitted at the President's discretion either to the House of Representatives or to the Senate. The Foreign Relations Committees of both the House and the Senate must report on the treaty, and this report is followed by discussion in each body. Once the proposal has been approved in the chamber of origin, it must go to the other chamber for revision and approval. After approval by the House and the Senate, it is then sent to the President for further action.

It is interesting to note that Congressional consent does not bind the President, since he can discontinue further action on the agreement if he deems it appropriate. Rather, Congressional consent is a necessary prerequisite for the President to go forward with ratification and other steps. If Congress does not provide its consent, the President lacks the requisite authority and is unable to proceed further.

The simplified treaty-making procedure that was for the first time provided for under the 1980 Constitution has systematized the practice that evolved in the absence of specific constitutional rules. As noted above (Section II.B, *supra*), this procedure is limited to "enforcement agreements" concluded by the President under his regulatory authority,[20] but it does not exclude the possibility that similar procedures might eventually be applied to other types of agreements.[21] The only fundamental constitutional restriction is that no executive agreement can be made with respect to matters for which the Constitution specifically requires the passing of a statute.[22]

In the practice as it has developed since 1980, enforcement agreements are normally of an administrative nature and are negotiated to supplement

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[19] Const. Art. 62.

[20] Const. Art. 32, No. 8, providing for the President's regulatory authority. *See* Committee Report, *supra* note 7.

[21] Under the 1925 Constitution an extensive practice relating to executive agreements was developed, covering, in general, agreements made in pursuance of an express or implied statutory mandate, agreements made in compliance with a treaty in force, and agreements made pursuant to the President's regulatory authority.

[22] Const. Art. 80.

or to comply with a treaty in force.[23] They do not require Congressional approval unless they deal with matters subject to the passing of an act. Besides establishing a simplified procedure in place of what had before been purely a matter of practice, the 1980 Constitution draws a clear distinction between matters that require the passing of an act and those that do not. As to the former, there can be no bypassing of Congressional participation in connection with either domestic legislation or treaties.[24] In Chilean constitutional law, this is a most sensible rule since, in the past, there have been systematic efforts by the Executive to ignore Congressional authority and to legislate by means of decrees or other executive actions, or to enter into treaties and agreements that ignored such Congressional authority.

Another interesting innovation of the Constitution is that Congress can authorize the President to enact the necessary legislative provisions to fully comply with a treaty that has been approved by Congress. This situation involves a limited delegation of legislative functions, but, unlike the one-year restriction that applies to similar delegations in a domestic context,[25] in the case of treaties this delegated authority can be exercised as long as the treaty is in force. Restrictions established under the Constitution as to matters that Congress cannot delegate are equally applicable to the case of treaties. Nor can this delegated authority be used by the President to enter into additional executive agreements, because it only authorizes him to enact the necessary domestic legislative provisions to implement a specific treaty.

D. *Reservations to Treaties*

Congress can only approve or reject a treaty submitted for its consideration; it cannot introduce amendments of any sort. Congress can sug-

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[23] Agreements made in compliance with treaties in force are only one of the types of agreements envisaged under prior practice, *see supra* note 21. It is yet to be determined whether practice under the 1980 Constitution will be restricted to this one type or whether it will follow the broader precedents of the past.

[24] The Comptroller General of the Republic has been of the view that only enforcement agreements done in compliance with a "framework treaty" providing for its implementation by subsequent agreements do not need Congressional approval, but those agreements done in compliance with a treaty not so providing need Congressional approval even if they do not deal with matters which require the passing of an act, an interpretation which is certainly more restrictive; *see* Comp. Gen. Opinion Nos. 26683–1994 & 1842–1993; *see also* the decision of the Constitutional Court of January 28, 1999 (on compatibility of Presidential Decree No. 1.412 (August 21, 1998) with the Constitution; this decree enacted a Protocol and Annex Additional to Agreement No. 22 on Economic Complementation with Bolivia).

[25] Const. Art. 61.

gest to the President the need to make certain reservations to a treaty, but such a suggestion will have no binding effect, although it can be politically very powerful. In practice, the approval of a treaty can be politically conditioned on the acceptance by the Executive of reservations suggested by Congress.

Reservations are, therefore, within the exclusive domain of Executive functions, for it is this branch of government that determines whether a reservation or declaration in connection with a treaty is necessary or not. The President is not under any obligation to inform the Congress as to whether he intends to make reservations to a treaty at a given point in time, even though reservations can alter the treaty provisions in an important manner. Such reservations would escape parliamentary control. The procedures relating to reservations, and the question of their meaning and extent, are governed by international law. The fear of an abuse of presidential power with respect to reservations has led to some support for the view that Congress should also participate in this process.

E. *Consultation with the Public*

The Constitution does not provide for consultations with the public or for other forms of public participation in treaty-making procedures, such as referendums or otherwise.[26] Neither the Executive nor the Congress is under an obligation to engage in such consultations. In practice, however, Congress has normally invited relevant organizations or associations, including business and labor organizations, as well as qualified experts, to give their opinions on treaties submitted for its approval.

Public involvement in the discussion of treaties is growing as a consequence of public awareness of international relations. Moreover, a number of private and nongovernmental organizations are active in the discussion of issues associated with free trade, the environment, or other matters of high priority.

Because of the sensitive nature of some treaties, particularly those involving boundary questions, the President can require that discussions of the matter in Congress be held under the rule of confidentiality. The text of the treaty is, of course, always public.

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[26] The alternative of submitting certain types of treaties to referendum was discussed during the drafting of the Constitution, but later dismissed. Commission for the Drafting of the Constitution, Session No. 367 (May 9, 1978).

F. *Assuring the Constitutionality of a Treaty*

Three principal organs, independent of the Executive Branch, may be called upon to rule on the constitutionality of treaties under Chilean legislation: the Constitutional Court, the Comptroller General of the Republic, and the Supreme Court. The first two organs exercise a preventive constitutional control prior to the treaty's domestic enactment, while the Supreme Court exercises its control after the enactment of the treaty, in the course of dispute resolution.

1. *The Constitutional Court*

The Constitutional Court is called on during the process of Congressional approval to resolve questions concerning the constitutionality of treaties. The decision of this Court has broad effect, because if it rules that a given provision is contrary to the Constitution, the treaty cannot be approved by Congress and, hence, there can be no ratification or domestic enactment.

Constitutional scrutiny by this Court is not compulsory;[27] it may only intervene at the request of the President, at the request of either the House or the Senate, or at the request of one-fourth of the members of either Congressional house.

Since the competence of the Court is limited to constitutional issues raised during the process of Congressional approval of a treaty, the Court cannot intervene before the treaty is submitted to Congress. Therefore, it cannot rule on questions of constitutionality relating to the prior stages of negotiation or signature.

A problem arises as to when this competence comes to an end. With respect to the Court's general power to review the constitutionality of an act, the Constitution provides that a request to the Constitutional Court must be made before the enactment of such act by means of the pertinent decree.[28] However, in the case of treaties, rendering a decision prior to enactment is not a constitutional requirement, but one that has evolved from judicial decisions and the opinion of legal scholars. It follows that, if the deadline relating to an act is made applicable to requests concerning treaties, this could be taken to mean that the Constitutional Court is endorsing the same requirement: i.e., requests to review the constitutionality

[27] In the view of several judges of the Constitutional Court, if a proposed agreement on a treaty relates to subject matters of a Constitutional character ("rango orgànico constitucional"), it must be subject to preventive Constitutional control by the Court just as happens under the Constitution with any proposed law of a similar nature. *See* the opinions accompanying the decision of the Constitutional Court of August 4, 2000.

[28] Const. Art. 82, No. 2 & para. 3.

of a treaty must be made before the promulgation of the decree for the enactment of a treaty.

In the view of some scholars, the constitutional reference to "an act" should be understood in the broad sense of a "legal rule," thereby encompassing both an act, in the strict sense, and a treaty. Under this interpretation, the Constitutional Court would retain its competence with respect to requests made before the enactment of the decree in the case of both an act and a treaty. As noted above, however, procedures relating to treaty making are different from those relating to passage of an act, because, among other reasons, the President may decide never to ratify and enact the treaty, as that decision falls within his exclusive authority.

It could therefore be argued that the competence of the Constitutional Court only lasts as long as the treaty is before Congress and ceases thereafter. According to this view, the procedures relating to Congressional approval referred to in the Constitution cannot be interpreted to cover any stage, either before or after the Congressional approval process.[29]

Because of the wording of the Constitutional provision, it appears that the competence of the Constitutional Court is limited to treaties that have been submitted for Congressional approval, and is thus inapplicable to enforcement agreements and decrees enacted under legislative authority delegated by Congress. However, the resulting situation is not as simple as that. As discussed below, in the case of such agreements, the constitutional review must be made first by the Comptroller General of the Republic. If the President is not satisfied with the Comptroller General's conclusions, he may take the matter to the Constitutional Court. It follows then, that the Constitutional Court may be called upon in any event to intervene in a matter even when no treaty has been submitted for Congressional approval.[30]

The Constitutional Court has a time limit of ten days to decide on a question of constitutionality brought to its attention. This limit can be extended for ten additional days if serious reasons for extension are shown to exist. Although the sections of an act that have not been challenged on constitutional grounds could, in theory, be enacted while the Constitutional Court rules on the objections,[31] such a solution does not

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[29] This view has been upheld by a decision of the Constitutional Court of June 24, 1999.

[30] In a decision of January 28, 1999, the Constitutional Court held the view that an "enforcement agreement" made by the President was constitutional in that instance. The Court accepted the presentation by a group of members of Congress who argued that the Court has the power to decide on issues relating to Presidential decrees contrary to the Constitution.

[31] Const. Art. 82, para. 6.

seem to apply to treaties, since they have to be ratified and enacted as a whole. Should the Constitutional Court rule that any part of a treaty is contrary to the Constitution, such a treaty cannot be ratified or enacted.

2. *The Comptroller General*

The other entity called upon to rule on questions of constitutionality is the Comptroller General of the Republic,[32] an organ that, in Chile, reviews the legality of decrees and regulations, including their constitutionality, before they are enacted by the Executive Branch. Executive decrees are issued in connection with the enactment of treaties generally, the enactment of enforcement agreements, and the exercise of legislative authority delegated by Congress to implement a given treaty. All these decrees are subject to review by the Comptroller General before their formal enactment and promulgation. This review includes the question of compatibility with the Constitution.

If the Comptroller General finds that a decree is contrary to the Constitution or to the law, he must inform the President. The Executive Branch then has several options: it can either decline to pursue the matter or it can amend the decree to satisfy the observations made. The President can also insist in some cases on the enactment of the decree. In the latter case the President needs the signature of all cabinet ministers. Although the Comptroller General may be under an obligation to accept the President's insistence, a copy of the pertinent decree must be sent to the House of Representatives in accordance with the principle that the Executive Branch is ultimately accountable to the legislature. It must be noted that, if the decree is challenged on the ground that it is contrary to the Constitution, the President does not have the power to insist on enactment and can only request the Constitutional Court to rule on the dispute.

If a decree is issued under the authority of delegated legislative functions by Congress and it exceeds the terms of that authorization, the Comptroller General will normally report this unlawful situation. While the President could normally insist on enactment with the signature of all his ministers, if the objection relates to the Executive having departed from the text of the delegation of functions or if the objection is that the decree is contrary to the Constitution, the President has no power to insist and the only recourse is to the Constitutional Court.

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[32] Const. Arts. 87, 88.

G. *Constitutional Review by the Supreme Court*

The Supreme Court can also intervene on questions involving the constitutionality of treaties, by means of a special recourse on non-applicability.[33] Unlike the preventive review carried out by the Constitutional Court and the Comptroller General, this other type of review operates *a posteriori* in cases where an actual dispute is brought before the courts of justice. Constitutional issues may arise in spite of the prior preventive reviews, either because they were not foreseen, because no objections were raised, or because, having been raised, the President proceeded by way of insistence. If, for any reason whatsoever, the application of a treaty in a specific case affects individual rights protected under the Constitution, the Supreme Court is empowered to declare that certain provisions are not applicable to that particular case on the ground that such provisions are contrary to the Constitution. The Supreme Court can make such a ruling either on its own initiative or at the request of a party before the Court, or by way of a special procedure in cases being litigated before other tribunals requesting that the provision be declared not applicable.

Since the Constitution refers in this respect to a "legal rule" contrary to the Constitution,[34] the issue has arisen as to whether a treaty constitutes such a "legal rule." Both judicial decisions and scholarly writers have generally been in agreement that, although a treaty is different from an act, from the point of view of the "legal rule" embodied in either source of the law, the two are similar. Thus, treaties also qualify for review as to their applicability.

A separate issue is whether all treaties contain legal rules that may qualify for constitutional review. There seems to be no doubt about treaties approved by Congress or enacted under the authority of delegated legislative functions because, in both cases, a legal rule is the essence of the treaty. There is room for doubt in the case of enforcement agreements, however, since in most cases such agreements, which are closely related to the regulatory and administrative functions of the Executive, are less likely to contain a "legal rule" than an act or a formal treaty. In any event, the answer depends largely on the substantive content of the agreement.

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[33] Const. Art. 80.
[34] *Id.*

H. *Incorporation into National Law*

Two basic approaches are followed under international law for the incorporation of treaties into national law. The first is automatic in character and does not require a special procedure to transform the treaty rules into national law or even to implement them; in a number of countries, publication of the treaty suffices. Under this approach, the treaty is said to be self-executing. The second approach requires a special procedure to achieve this transformation, normally the enactment of an *ad hoc* act or, more commonly, the enactment and publication of a presidential decree.

The latter procedure is the one followed in Chile, and it results in assigning to the treaty the same effect as that of an act. Publication ensures public knowledge of the text. This approach, which has been importantly influenced by French treaty practice, requires the enactment of a Presidential Decree following the approval of the treaty by Congress. This domestic enactment is relevant mostly for the internal validity of treaties, and signifies the culmination of the process of concluding a treaty and ordering its implementation in Chile.

The decree of enactment identifies the treaty, the date and place of signature, Congressional approval, and the date and place of ratification. The decree also commands compliance with its provisions and orders its full implementation as an "Act of the Republic." Enactment of treaties was first regulated by a 1926 decree, which provided that it should be done following the ratification by the President and exchange of the instruments of ratification. Although agreements in simplified form are not "enacted" in the strict sense of the term, the practice has led to the issuance of a presidential decree approving such agreements, which are also published in the *Official Journal*. This approval is required to bind the State of Chile under international law.

In light of judicial decisions, it has been concluded that even if a treaty is in force and binding under international law, it does not automatically have effect domestically, nor is it to be understood as incorporated into national law. Formal incorporation by means of the enactment thus became, in Chile, an essential requirement for the treaty to take effect domestically on the same terms as an act. The opinion of the writers, however, is divided as to the need for this formal enactment and publication of treaties. Because practice and judicial decisions have tended to assimilate the treaty to an act for domestic purposes, the rules of the Civil Code on enactment and publication of acts have been extended to the case of treaties. The discussion that has surrounded this matter largely originates from the lack of a constitutional or other rule clarifying whether incorporation is automatic or whether it requires the special procedures of enactment and publication.

In this connection it should be noted that Decree Law 247, enacted in 1973, purported to clarify the rules applicable to the incorporation of treaties into national law. Decree Law 247 for the first time clearly opted for the requirement of enactment and publication of treaties. This requirement thus became a legal obligation and no longer a mere practice. The 1926 Decree, mentioned above, had referred to enactment, but had remained silent on the question of publication. Both the Constitution of 1925 and the current one are silent on the matter. It should be noted, however, that the practice relating to enactment and publication has been a longstanding one in Chile.

The practice is further reinforced by a significant number of judicial decisions. A particularly influential decision was adopted by the Supreme Court in 1976 in connection with the International Covenant on Civil and Political Rights.[35] The Court ruled that the lack of enactment of the treaty prevented its legal operation in the domestic legal order. In 1984, the Supreme Court specifically insisted on the requirement of publication before the treaty could have legal effect in Chile, citing the rules applicable to the enactment and publication of an act.[36]

In spite of these efforts at clarification, opinion remains divided. Those who look at the matter from the point of view of domestic law normally have insisted on the enactment and publication of treaties, while those who discuss the issue in the context of international law point out that since the treaty is in force and binding internationally it serves no purpose to add further domestic law requirements to this effect. It is important to note that the Legal Office of the Ministry of Foreign Affairs has also favored the publication of the treaty as an essential requirement for its domestic legal effect.[37]

In view of the legislative precedents and the judicial decisions and opinions of writers mentioned above, it is highly probable that enactment and publication would be retained even if the discussion on the requirements of incorporation into national law were to be clarified by a constitutional rule. Such an approach raises a question as to the ultimate responsibility of Chile for non-compliance with a binding treaty under international law if it fails to duly enact and publish the treaty domestically.

The practice followed by the Ministry of Foreign Affairs indicates that most treaties are ratified before being incorporated into domestic law by means of enactment and publication. Only in exceptional circumstances would the Ministry be prepared to accept the reverse procedure; that

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[35] Case No. 20187–146 (Sup. Ct., Aug. 25, 1976).
[36] Case No. 24128 (Sup. Ct., Oct. 22, 1984); *Fallos del Mes*, No. 311, at 588 (Oct. 1984).
[37] Legal Opinion No. 2 (Ministry of Foreign Affairs, 1968).

is, to enact and publish the treaty domestically before its ratification or entry into force under international law.[38]

In spite of the fact that the Constitution identifies a treaty with an act only for the purpose of the procedures to be followed during the Congressional approval stage, the practice has been to extend this identification for many other purposes, including enactment and publication, even if these occur after Congressional approval. It follows that the incorporation of treaties into national law will also use this identification with an act throughout the whole process.

I. *Place of Treaties in National Law*

Once a treaty has been incorporated into national law, there arises the related issue of its eventual superiority over domestic law.[39] A number of judicial decisions indicate that Chilean courts have tended to rely on international law in deciding domestic cases, thus tacitly conceding the superiority of international law and treaty law over domestic statutes. There are also important cases in which the automatic incorporation of customary international law has been recognized by the courts and applied accordingly. International law writers are generally in agreement that this is the right approach for the application of international law in Chile.

It does not follow, however, that a judicial tradition has been firmly established in this context, since there are also cases where the courts have upheld domestic law above international law.[40] This is particularly the case when a conflict arises between a treaty and a subsequent, contradictory act, because the court may be inclined to apply the rule enacted later in time. This is yet another consequence of having assigned to the treaty, by means of the process of identification described above, the same hierarchical status as a domestic statute.

If a conflict arises between a rule of international law and a provision of the Constitution, the situation will be further complicated by the fact that courts will generally approach the question with added caution.

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[38] The Comptroller General of the Republic has been of the opinion that only treaties duly ratified can be enacted domestically. Comp. Gen. Opinion No. 19776 (1995); Comp. Gen. Opinion No. 13262 (1995); Comp. Gen. Opinion No. 681 (1993).

[39] See the discussion of judicial decisions and opinions of the writers in Francisco Orrego Vicuña and Francisco Orrego Bauzá, "The Implementation of the International Law of Human Rights by the Judiciary: New Trends in the Light of the Chilean Experience," *in Enforcing International Human Rights in Domestic Courts* 135–47 (B. Conforti & F. Francioni, eds., 1997).

[40] *Duncan Fox y Cía con Dirección General de Impuestos Internos*, 30 Revista de Derecho y Jurisprudencia pt. 2, No. 1, at 100 (1933).

There is no question that, from the viewpoint of international law, the argument that constitutional provisions are superior to treaties would not prevail. But from the point of view of a Constitutional court, it is most probable that the Constitution will be upheld unless *it* provides for the supremacy of the international rule.

This last situation is, to some extent, reflected in the Chilean Constitution's treatment of the position of treaties on human rights. Article 5 of the Constitution restricts the exercise of sovereignty to the extent required by the obligation to assure fulfillment of fundamental rights emerging from human nature. The same article provides that "it is the duty of the organs of the State to observe and promote such rights guaranteed by this Constitution as well as by the treaties ratified by Chile and which are in force."[41] This provision has the effect of incorporating the international treaties on human rights to which Chile is a party into the national legal order. In one view it also affirms that such treaties now have in Chile a ranking above that of ordinary statutes and at least equal to the Constitution. In another view, however, such treaties are always subordinated to the Constitution. Furthermore, a Constitutional mandate of this kind addressed to State organs in general is likely to be observed with great care, particularly by the Judiciary.

J. *Termination of Treaties*

Neither the Constitution nor any statute deals with the question of suspension or termination of treaties, a matter that in Chile is deemed by its very nature to fall within the discretionary ambit of Presidential powers. It follows that the President is under no obligation to consult with Congress on this matter or to request its approval. Should Congress recommend the termination of a given treaty, this will be no more than a suggestion that the President may or may not take into account in making his decision.

K. *Decisions of International Organizations*

Unlike treaties and international agreements, decisions of international organizations are treated with great flexibility in Chilean practice and remain unregulated in terms of constitutional or statutory provisions. Such decisions normally fall within the discretionary ambit of the Executive Branch and are implemented by means of executive action not requiring

[41] Const. Art. 5, para. 2.

either Congressional intervention or the enactment or publication of a decree. Severance of diplomatic relations has been ordered by the President in compliance with decisions by international organizations, and trade relations and embargoes have been implemented by agreements of the Executive Board of the Central Bank, which has responsibility for the supervision of foreign trade.[42]

The main limitation that the Executive has in this context relates to the substantive content of the decision taken by the pertinent international organization because, if the decision deals with subjects that require statutory action in Chile, the issue will have to be submitted for Congressional approval.

[42] Executive Committee of the Central Bank, Decision of 23 April 1966 imposing sanctions on Cuba in compliance with OAS decisions, *Official Journal*, Apr. 30, 1966; *see also* Decision of 7 February 1967 imposing sanctions on Rhodesia in compliance with the U.N. Security Council Resolution 234.

III. Basic Documentation

A. *National Legislation*

Annex A: Constitution of 1980; Articles Relevant to Treaty-Making Powers

B. *Selected Examples of Treaty Documents*

Annex B: Full Powers for Treaty Signature
Annex C: Submission of An International Agreement for Congressional Approval to the House of Representatives
Annex D: Communications between the House of Representatives and the Senate Regarding the Approval of an International Agreement
Annex E: Instrument of Ratification
Annex F: Decree of Enactment
Annex G: Notification to a Foreign Embassy of the Approval of an International Agreement
Annex H: Full Powers for the Exchange of Instruments of Ratification

ANNEX A

CONSTITUTION OF 1980
ARTICLES RELEVANT TO TREATY-MAKING POWERS

(translation by the authors)

Article 5

* * *

Exercise of sovereignty recognizes as a limitation the respect for the essential rights originating in human nature. It is the duty of the organs of the State to observe and promote such rights guaranteed by this Constitution as well as by the treaties ratified by Chile and which are in force.

Article 32

The following are exclusive powers of the President of the Republic:

* * *

17) To conduct political relations with foreign powers and international organizations and to undertake negotiations, conclude, sign and ratify such treaties deemed convenient for the national interest, which shall be submitted for the approval of Congress as provided for under article 50, Nº 1. Debate and deliberations on these matters shall be confidential if the President so requires.

Article 50

The following are exclusive powers of Congress:

1) To approve or reject international treaties submitted by the President before ratification. The approval of a treaty shall follow the procedures of an act.

Measures adopted by the President or agreements entered into for compliance with a treaty in force shall not require additional congressional approval unless their subject matter requires the passing of an act.

In the same agreement approving a treaty, Congress may authorize the President of the Republic so that while the treaty is in force he can enact such provisions with the force of law deemed necessary for its full implementation, with the provisions of Article 61, paragraph 2 and following being applicable to this case.

* * *

Article 82

The following are powers of the Constitutional Tribunal:

* * *

2) To resolve questions concerning constitutionality which might arise during the procedures relating to the passing of an act, a constitutional amendment or treaties submitted for Congressional approval.

ANNEX B

FULL POWERS FOR TREATY SIGNATURE

REPUBLIC OF CHILE
MINISTRY OF FOREIGN RELATIONS

JOSE MIGUEL INSULZA
MINISTER OF FOREIGN RELATIONS

I GRANT FULL POWERS

to Chile's Madame Ambassador to the World Trade Organization, Carmen Luz Guarda Andersch, to sign the Second Protocol Annex to the General Agreement on Trade in Services, in the name and representation of the Government of the Republic of Chile.

IN WITNESS WHEREOF,

I have extended these Full Powers, signed by my hand and stamped with the Seal of Arms of the Republic.

GRANTED

in Santiago, Chile, on the fourteenth day of the month of June of nineteen hundred and ninety five.

ANNEX C

SUBMISSION OF AN INTERNATIONAL AGREEMENT FOR CONGRESSIONAL APPROVAL TO THE HOUSE OF REPRESENTATIVES

Honorable House of Representatives:

I have the honor of submitting for your consideration the Agreement between the Government of the Republic of Chile and the Government of the Federative Republic of Brazil on the Reciprocal Promotion and Protection of Investments and its Protocol, signed in Brasilia on March 22, 1994.

Accordingly, I have the honor of submitting the following for your consideration in the present Ordinary Legislature and session of the Honorable National Congress:

PROPOSED AGREEMENT:

"SOLE ARTICLE: Hereby ratify the agreement between the Government of the Republic of Chile and the Government of the Federative Republic of Brazil for the Reciprocal Promotion and Protection of Investments and its Protocol, signed in Brasilia on March 22, 1994."

May God Keep Your Excellency,

EDUARDO FREI RUIZ-TAGLE
President of the Republic

CARLOS FIGUEROA SERRANO
Minister of Foreign Relations

EDUARDO ANINAT URETA
Minister of the Treasury

ANNEX D

1. COMMUNICATION FROM THE HOUSE OF REPRESENTATIVES TO THE SENATE REGARDING THE APPROVAL OF AN INTERNATIONAL AGREEMENT

VALPARAÍSO, August 16, 1994

For the purpose of Message, Notification and copy of the agreement – duly authenticated – that I have the honor of delivering to Your Excellency, the House of Representatives has approved the following:

PROPOSED AGREEMENT:

"Sole Article – Hereby ratify the "Agreement between the Government of the Republic of Chile and the Government of the Federative Republic of Brazil for the Reciprocal Promotion and Protection of Investments" and its Protocol, signed in Brasilia, March 22, 1994."

May God Keep Your Excellency,

JUAN CARLOS LATORRE CARMONA
Acting President of the House of Representatives

CARLOS LOYOLA OPAZO
Secretary of the House of Representatives

2. COMMUNICATION FROM THE SENATE TO THE HOUSE OF REPRESENTATIVES REGARDING THE APPROVAL OF AN INTERNATIONAL AGREEMENT

Valparaíso, December 14, 1995

I have the honor of communicating to Your Excellency that the Senate has approved, under the same terms as the House of Representatives, the proposed agreement that approves the Agreement between the Government of the Republic of Chile and the Government of the Federative Republic of Brazil for the Reciprocal Promotion and Protection of Investments and its Protocol, signed in Brasilia on March 22, 1994.

I communicate this to Your Excellency in response to your notice No. 219 of August 16, 1994.

I return the respective records.

May God Keep Your Excellency,

GABRIEL VALDES S.
President of the Senate

RAFAEL EYZAGUIRRE ECHEVERRIA
Secretary of the Senate

ANNEX E

INSTRUMENT OF RATIFICATION

PATRICIO AYLWIN AZOCAR
President of the Republic of Chile

WHEREAS

on March 28, 1985 there was signed in Santiago between the Governments of the Republics of Chile and Ecuador the Agreement on Facilities for the Transportation of People, Luggage, and Vehicles for Tourist Purposes.

AND WHEREAS,

said Agreement was approved in accordance with the corresponding constitutional procedures, using the powers conferred upon me by the Political Constitution of the Republic, I have accepted the Agreement as law, committing the National Honor to its observance.

IN WITNESS WHEREOF,

I sign the present Instrument of Ratification, stamped with the Seal of Arms of the Republic and authenticated by the Minister of State in the Department of Foreign Relations, on the sixth day of July of nineteen hundred and ninety.

PATRICIO AYLWIN AZOCAR
PRESIDENT OF THE REPUBLIC

ENRIQUE SILVA CIMMA
MINISTER OF FOREIGN RELATIONS

ANNEX F

DECREE OF ENACTMENT

REPUBLIC OF CHILE
MINISTER OF FOREIGN RELATIONS
OFFICE OF LEGAL AFFAIRS

ENACT THE AGREEMENT WITH PANAMA WHICH AUTHORIZES DEPENDENT RELATIVES OF DIPLOMATIC, CONSULAR, ADMINISTRATIVE AND TECHNICAL PERSONNEL OF THE DIPLOMATIC AND CONSULAR MISSIONS OF CHILE IN PANAMA AND OF PANAMA IN CHILE, TO ENGAGE IN ACTIVITIES FOR PAY IN THE RECEIVING STATE UNDER THE SAME CONDITIONS ENJOYED BY THE NATIONALS OF THE SAID STATE.

No. 569 Santiago, May 11, 1995

APPROVED:

That contained in Articles 32, N°. 17, and 50, N°. 1, of the Political Constitution of the Republic.

RESOLVED:

That through the Exchange of Notes on April 29 and May 11 of 1994, the Governments of the Republics of Chile and Panama concluded the Agreement which authorizes dependent relatives of diplomatic, consular, administrative, and technical personnel of the Diplomatic and Consular Missions of Chile in Panama and of Panama in Chile to engage in activities for pay in the receiving state under the same conditions enjoyed by the nationals of the said state, a benefit extended to dependent relatives of Chilean and Panamanian nationals accredited before International Organizations with offices in either of the two countries.

That said Agreement has been approved by the National Congress, as provided by Notice N°. 525, on March 7, 1995, of the House of Representatives.

That Clause 10, second paragraph of the Agreement has been satisfied.

DECREE:

SOLE ARTICLE: "Enact" the Agreement between the Government of the Republic of Chile and the Government of the Republic of Panama

concluded by the Exchange of Notes on April 29 and May 11, 1994, which authorizes dependent relatives of diplomatic, consular, administrative and technical personnel of the Diplomatic and Consular Missions of Chile in the Republic of Panama and of Panama in the Republic of Chile to engage in activities for pay in the Receiving State under the same conditions enjoyed by nationals of said State, a benefit that has been extended to dependent relatives of Chilean and Panamanian nationals accredited before International Organizations with offices in either of the two countries; complete and implement as law and publish an authorized copy of its text in the *Diario Oficial.*

HEREBY NOTE, RECOGNIZE, REGISTER AND PUBLISH

EDUARDO FREI RUIZ-TAGLE
PRESIDENT OF THE REPUBLIC OF CHILE

JOSE MIGUEL INSULZA
MINISTER OF FOREIGN RELATIONS

ANNEX G

NOTIFICATION TO A FOREIGN EMBASSY OF THE APPROVAL OF AN INTERNATIONAL AGREEMENT

REPUBLIC OF CHILE
MINISTRY OF FOREIGN RELATIONS

[Stamped: No. 005176]

The Ministry of Foreign Relations, Office of Legal Affairs, has the honor of greeting the Embassy of Panama and has the pleasure of communicating with it for the purposes of effecting the international implementation of the Agreement adopted by the Exchange of Notes on April 29 and May 11, 1994, which authorizes dependent relatives of diplomatic, consular, administrative, and technical personnel of the Diplomatic and Consular Missions of Chile in the Republic of Panama and of the Republic of Panama in Chile to engage in activities for pay in the Receiving State under the same conditions enjoyed by nationals in the said State, a benefit that has been extended to dependent relatives of Chilean and Panamanian nationals accredited before International Organizations with offices in either of the two countries, that said Agreement was approved in accordance with the constitutional procedures of Chile.

At the same time, it is requested that the Embassy of Panama remit to this Foreign Ministry the Note from its Government that expresses the approval of said Agreement.

The Ministry of Foreign Relations, Office of Legal Affairs, takes this opportunity to reiterate to the Embassy of Panama the assurance of its most high and distinguished respect.

SANTIAGO

[Date stamped: March 15, 1995]

ANNEX H

FULL POWERS FOR THE EXCHANGE OF INSTRUMENTS OF RATIFICATION

ENRIQUE SILVA CIMMA
MINISTER OF FOREIGN RELATIONS

I GRANT FULL POWERS

to the Sub-secretary of Relations, Mr. Emundo Vargas Carreno, to proceed, in the name and representation of the Government of the Republic of Chile, to convert the Instruments of Ratification of the Agreement on Facilities for the Transportation of People, Luggage, and Vehicles for Tourist Purposes, signed in Santiago with the Government of the Republic of Ecuador on March 28, 1985.

IN WITNESS WHEREOF

I have extended these Full Powers, signed by me and stamped with the Seal of Arms of the Republic.

GRANTED

in Santiago, Chile, on the sixth day of the month of July of nineteen hundred and ninety.

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CHAPTER FIVE

NATIONAL TREATY LAW AND PRACTICE: CHINA

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I. Constitution of the People's Republic of China

A. *Common Guideline of the Chinese People's Political Consultative Conference (Common Guideline)*

On September 21, 1949, on the eve of the founding of the Central People's Government of the People's Republic of China, the first plenary session of the Chinese People's Political Consultative Conference was held in Beijing with participants from different political parties, social groups, and representatives from all walks of life. The Common Guideline was adopted at the meeting on September 29, 1949, and was considered to be the temporary constitution. In regard to the treaties concluded by past Chinese governments with foreign governments, Article 55 of the Common Guideline stipulates: "For the treaties and agreements concluded by the Kuomintang government with foreign governments, the Central People's Government of the People's Republic of China should examine them, according to their contents, to recognize, abolish, revise, or re-conclude them respectively." This stipulation was regarded as the general guiding principle of the Central People's Government of the People's Republic of China for handling treaties concluded by past Chinese governments. According to the stipulation, the power to conclude treaties belonged to the Central People's Government. Due to historical reasons, no specific procedure for concluding treaties was provided.[1]

[1] The 17th meeting of the Central People's Government adopted the Decision on the Unified Methods of Concluding a Treaty, Agreement, Protocol and Contract with Foreign States on August 7, 1952, and was the first comprehensive administrative regulation on the procedure for the conclusion of treaties in China.

Recognition is a special concept in China's treaty practice. It means recognizing the validity of the legal action taken on a treaty that was previously signed, ratified or acceded to by past Chinese governments. For example, China recognized the accession done in 1929 to the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare. If China recognizes a previous signature to a treaty, such recognition is still subject to ratification. For example, China ratified the four Geneva Conventions of 1949 in 1956, which had been signed by a past Chinese Government and recognized later by the Central People's Government.

B. *Constitution of the People's Republic of China*

On December 4, 1982, the Fourth Constitution, which is the current constitution of China, was adopted at the fifth meeting of the Fifth National People's Congress of China. This Constitution stipulates the principle of China's foreign policy: "China consistently carries out an independent foreign policy and adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries." For the conclusion of treaties with foreign states, the 1982 Constitution restates the provisions on treaty conclusion as set out in the 1954 Constitution, which was the first constitution of China.[2] Article 67, paragraph 14 of the 1982 Constitution states that the Standing Committee of the National People's

[2] On September 20, 1954, the first Constitution of the People's Republic of China was adopted at the first meeting of the First National People's Congress of the People's Republic of China. On the conclusion of treaties, Article 31 of the Constitution stated that the Standing Committee of the National People's Congress decided on the ratification and abrogation of a treaty concluded with foreign states. Article 41 of the Constitution provided that the President of the People's Republic of China shall, in accordance with decisions of the Standing Committee of the National People's Congress, ratify and abrogate treaties concluded with foreign states. On October 10, 1954, in accordance with the above regulation of the Constitution, the Decision of the Standing Committee of the National People's Congress on the Procedure of Rectifying A Treaty Concluded with Foreign States was adopted at the first meeting of the First National People's Congress. In 1975, the second Constitution was adopted, which authorized the Standing Committee of the National People's Congress to ratify and abrogate treaties, as it abolished the post of the President. In 1978, the third Constitution of China stipulated that the Standing Committee of the National People's Congress shall decide on the ratification and abrogation of treaties concluded with foreign states, and that the Chairman of the Standing Committee of the National People's Congress shall ratify the treaties concluded with foreign states.

Congress decides "on the ratification and abrogation of treaties and important agreements." Article 81 states, "(T)he President of the People's Republic of China . . . in accordance with decisions of the Standing Committee of the National People's Congress . . . ratifies or abrogates treaties and important agreements." Article 89 paragraph 9 provides that the State Council has responsibility "to conduct foreign affairs and conclude treaties and agreements with foreign states."

II. Treaty Law and Practice of China

A. *Law of the People's Republic of China on the Procedures for the Conclusion of Treaties*

On December 28, 1990, the Law of the People's Republic of China on the Procedures for the Conclusion of Treaties (hereinafter referred to as "the Procedures Law") was adopted by the 17th Session of the Standing Committee of the Seventh National People's Congress, which for the first time laid down procedural rules for the conclusion of treaties. The promulgation of the Procedures Law marks a new era for Chinese treaty practice.

Article 3 of the Procedures Law stipulates that the State Council, the Central People's Government of the People's Republic of China, shall conclude treaties and agreements with foreign states. The Standing Committee of the National People's Congress of the People's Republic of China shall decide on the ratification and abrogation of treaties and important agreements concluded with foreign states. The President of the People's Republic of China shall, in accordance with such decisions of the Standing Committee of the National People's Congress, ratify and abrogate treaties and important agreements concluded with foreign states. The Ministry of Foreign Affairs shall, under the leadership of the State Council, administer the specific affairs concerning the conclusion of treaties and agreements with foreign states.

According to the above-mentioned provision, the power to conclude treaties belongs to the State Council, i.e. the Central People's Government. The Ministry of Foreign Affairs administers the specific affairs concerning the conclusion of treaties and agreements with foreign states. The State Council exercises its power to conclude treaties through the procedures on treaty drafting, approval, negotiation, signature, entry into force, amendment, termination and the issuance of full powers to its representatives.

In comparison with the past decisions of the National People's Congress and the regulations of the State Council, the Procedures Law has the

following specific aspects: (1) the Procedures Law applies to both bilateral and multilateral treaties and agreements and other instruments with the character of a treaty concluded between the People's Republic of China and foreign states; (2) under the Procedures Law, there are three general types of treaties; treaties concluded between States; treaties concluded between governments; and treaties between governmental departments; (3) the Procedures Law makes it clear what treaties and important agreements should be ratified by the Standing Committee of the National People's Congress; (4) according to the three types of treaties, the Procedures Law specifies the respective procedures for appointing representatives, for negotiation and signature, domestic legal procedure for ratification, approval, record and registration and deposit of authentic texts of treaties–procedural rules that are specific for operational purposes; (5) the Procedures Law provides the legal procedure for accepting or acceding to a multilateral treaty and the procedure for the Ministry of Foreign Affairs to register the treaties concluded by China with the Secretariat of the United Nations; and (6) the Procedures Law provides that the Ministry of Foreign Affairs is responsible for compilation of a treaty series that contains all the treaties and agreements concluded by China.

The entry into force of the Procedures Law is an important event for China. First, because it was adopted by the Standing Committee of the National People's Congress and promulgated by the decree of the President, the Procedures Law enjoys a higher legal status than that of decisions of the National People's Congress and regulations of the State Council. Second, the Procedures Law renders a clearer legal status for treaties in the Chinese legal system. And third, based on China's 45 years of treaty practice since 1949, the Procedures Law provides detailed and operational rules. As evidenced in the subsequent years after its adoption, the Procedures Law has proved to be effective legislation.

B. *Accession to the Vienna Convention on the Law of Treaties*

On January 27, 1980, the Vienna Convention on the Law of Treaties entered into force. On May 9, 1997, the 25th Session of the Standing Committee of the Eighth National People's Congress decided that China should accede to this Convention. On September 3, 1997, the representative of the Chinese Government deposited the Instrument of Accession with the Secretary-General of the United Nations. The Convention took effect for China on October 3 of the same year. The Vienna Convention on the Law of Treaties serves to complement the domestic Procedures Law and to maintain international rules and practice in the field of treaty law.

C. *Provisions of the Procedures Law and Treaty Practice*

1. *What Is A Treaty?*

The Procedures Law does not contain a definition of a treaty, but Article 2 states: "This Law shall be applicable to bilateral or multilateral treaties and agreements and other instruments in the nature of a treaty or an agreement concluded between the People's Republic of China and foreign states." According to this provision, treaties shall possess the following characteristics: (1) the contracting party should be an international legal subject, i.e. states or inter-governmental international organizations; (2) the purpose of a treaty should be to establish, revise, or terminate rights and obligations between the contracting parties; (3) a treaty should be a written agreement concluded through consultations between the contracting parties; and (4) the content of a treaty should be in compliance with fundamental principles of international law and the free will of the parties.

2. *Type and Title of Treaties*

The Procedures Law does not characterize treaties in terms of type, but Article 4 stipulates that "the People's Republic of China shall conclude treaties and agreements with other states in the name of: (1) the People's Republic of China; (2) the Government of the People's Republic of China; (3) the governmental departments of the People's Republic of China."

Different procedures for negotiation and signature are required for these different types of treaties. Article 5 lays down detailed rules. In Chinese treaty practice, international customs and practice that are generally recognized by the international community are also used.

Treaties may possess different titles. The Procedures Law is not specific about the title of a treaty; the effect of a treaty does not depend on its title. However, different titles of treaties may indicate different contracting forms or different procedures for entry into force. The treaty titles that are commonly used by China include: treaty, convention, protocol, agreement, exchange of notes, exchange of letters, minutes, memorandum of understanding, joint communiqué, joint statement, etc.

3. *Procedure for Initiating the Conclusion of a Treaty*

According to the type of treaty to be concluded, Article 5 of the Procedures Law provides that different procedures should be followed. (1) In the case of a treaty or agreement to be negotiated and signed in the name of the People's Republic of China, the Ministry of Foreign Affairs or the relevant department under the State Council in conjunction with

the Ministry of Foreign Affairs, shall submit a proposal to the State Council for approval to start the treaty negotiations. (2) In the case of a treaty or agreement to be negotiated and signed in the name of the Government of the People's Republic of China, the Ministry of Foreign Affairs or the relevant department under the State Council (after consultation with the Ministry of Foreign Affairs), shall submit a proposal to the State Council for approval to start the treaty negotiations. (3) In the case of an agreement on matters within the mandate of a governmental department, the department, itself or in consultation with the Ministry of Foreign Affairs, shall decide. On matters of importance or those that may bear on the rights of the State Council or other government department(s), the relevant department shall, by itself or in conjunction with the other department(s) concerned, submit a proposal to the State Council for decision. The provision further provides that if the draft treaty as approved by the State Council has been substantially modified after the negotiations, such changes should be submitted to the State Council for further approval. (4) In the case of negotiations of a multilateral treaty, the internal procedures for approval are the same as provided for in Article 5 of the Procedures Law.

4. *Procedure for the Appointment of Representatives with Full Power*

Article 6 of the Procedures Law stipulates that: (1) in case of a treaty or agreement to be concluded in the name of the People's Republic of China or the Government of the People's Republic of China, the Ministry of Foreign Affairs or the department concerned under the State Council shall submit a proposal to the State Council for the appointment of a representative for negotiation. The full powers of the representative shall be signed by the Premier of the State Council, or as the case may be, by the Minister for Foreign Affairs; (2) in case of an agreement to be concluded in the name of a governmental department, a representative shall be appointed by the head of the department concerned. The letter of authorization for the representative shall be signed by the head of the department. If it is so agreed among the contracting parties that full powers should be presented, the full powers shall be signed by the Premier of the State Council, or by the Minister for Foreign Affairs; (3) the following persons shall dispense with full powers for negotiating and signing treaties and agreements: the Premier of the State Council; the Minister for Foreign Affairs; the head of a government department for agreements concluded in the name of the Department, unless otherwise agreed by the contracting parties; the head of a diplomatic mission of the People's Republic of China who negotiates and signs treaties and agreements concluded between China and the state to which he is accredited, unless it

is otherwise agreed by the contracting parties; or the person accredited to an international organization or an international conference by the People's Republic of China, who is to conclude a treaty or an agreement with the relevant organization or conference.

5. Internal Legal Procedure after the Signing of A Treaty

According to the Procedures Law, internal legal procedures should be fulfilled for treaty ratification, approval, recording and registration after signing. In this regard, Articles 7, 8 and 9 of the Procedures Law contain specific rules.

5.a. *Ratification*: Article 7 of the Procedures Law states that ratification of important treaties shall be decided by the Standing Committee of the National People's Congress. Such treaties include: (a) treaties on friendship and cooperation, as well as treaties of peace and those of a similar political nature; (b) treaties and agreements relating to territory and delimitation of boundary lines; (c) treaties and agreements on judicial assistance and extradition; (d) treaties and agreements with provisions inconsistent with the laws of the People's Republic of China; (e) treaties where ratification is required by the treaty or agreement terms; and (f) other treaties and agreements that should be subject to ratification. After signing a treaty that is subject to ratification, the Ministry of Foreign Affairs or the government department concerned submits the treaty to the State Council. The State Council then decides whether to submit it to the Standing Committee of the National People's Congress for consideration. Once the Standing Committee has decided to ratify the treaty, the President ratifies it in accordance with the decision. The instrument of ratification is signed by the President and countersigned by the Minister for Foreign Affairs. After these internal procedures are completed, the Ministry of Foreign Affairs executes the formalities for the exchange of the instruments of ratification with the other contracting party, in the case of a bilateral treaty. In the case of a multilateral treaty, it submits the instrument of ratification to the depositary.

In practice, if a reservation has to be made to a multilateral treaty, it shall be made at the time of signature and confirmed at the time of depositing the instrument of ratification. No reservation has ever been made in regard to bilateral treaties.

5.b. *Approval*: Article 8 of the Procedures Law stipulates that after the signing of a treaty that is subject to approval as prescribed by the State Council or as agreed to by the contracting parties, the Ministry of Foreign Affairs or the government departments concerned in conjunction with the Ministry of Foreign Affairs shall submit the treaty to the State Council for approval. Once approved, the Ministry of Foreign Affairs shall execute

the formalities for the exchange of the instruments of approval with the other contracting party, in the case of a bilateral treaty, or submit the instrument of approval to the depositary, in the case of a multilateral treaty. The instrument of approval shall be signed by the Premier of the State Council, or by the Minister for Foreign Affairs. Reservations, if needed, shall be made when signing the treaty and confirmed when the instrument of ratification is deposited.

5.c. *Record and Registration*: Article 9 of the Procedures Law provides that after the signing of treaties that do not need to be ratified or approved, all treaties should be sent to the State Council for the record, except for those agreements signed on behalf of government departments. The latter shall be sent to the Ministry of Foreign Affairs for registration.

6. *Accession and Acceptance of Multilateral Treaties*

According to Article 11 of the Procedures Law, accession to a multilateral treaty shall be decided by the Standing Committee of the National People's Congress or by the State Council. In regard to important multilateral treaties referred to in Article 7 of the Procedures Law, the Ministry of Foreign Affairs or the relevant government department in conjunction with the Ministry of Foreign Affairs shall, upon first consideration, submit a proposal to the State Council for decision. The State Council shall then consider the proposal and decide whether to refer it to the Standing Committee of the National People's Congress for a decision on accession. For other treaties not within the scope of Article 7, the Ministry of Foreign Affairs or the relevant department in conjunction with the Ministry of Foreign Affairs shall submit it to the State Council for a decision. The instrument of accession shall be signed by the Minister for Foreign Affairs, and be submitted by the Ministry of Foreign Affairs to the depository.

According to Article 12 of the Procedures Law, the State Council shall decide upon the acceptance of a multilateral treaty. If a treaty that has been signed does not require signature but acceptance, the Ministry of Foreign Affairs or the relevant department in conjunction with the Ministry of Foreign Affairs shall consider the matter and submit a proposal to the State Council for decision. The instrument of acceptance shall be signed by the Minister for Foreign Affairs, and the following formalities shall be done by the Ministry of Foreign Affairs.

7. *Publication, Registration and Amendment of a Treaty*

The procedure for treaty publication is provided by Article 15 of the Procedures Law. Treaties ratified or acceded to, upon the decision of the Standing Committee of the National People's Congress, shall be pub-

lished in the bulletin of the Standing Committee of the National People's Congress. Other treaties shall be published by the State Council by means as provided by it. In terms of registration, under Article 17, the Ministry of Foreign Affairs shall be responsible for registering treaties with the Secretariat of the United Nations, in accordance with the relevant provisions of the U.N. Charter. For those that should be registered with other international organizations, the Ministry of Foreign Affairs or other government departments shall register them according to the rules of the organization concerned.

Under Article 19, amendment, abrogation or withdrawal of a treaty shall, *mutatis mutandis*, follow the procedures described above.

8. *Compilation of the Collection of Treaties*

Article 16 of the Procedures Law provides that treaties and agreements concluded by the People's Republic of China shall be compiled by the Ministry of Foreign Affairs into a collection of the Treaties of the People's Republic of China.

III. Implementation of Treaties Concluded by China

The Chinese government attaches importance to its international obligations. According to the provisions of its Constitution, China adheres to the Five Principles of Peaceful Coexistence in its foreign relations and promotes economic and cultural exchanges with other countries. In accordance with these principles, China has concluded a large number of treaties with foreign states and faithfully carries out its international obligations in accordance with the Vienna Convention on the Law of Treaties.

In regard to the legal status of treaties in Chinese law, the Chinese Constitution does not contain any specific provisions on the matter. However, in practice, the following principle applies: if a treaty to which China is a party contains provisions inconsistent with Chinese laws, treaty provisions should prevail, unless China has made reservations to the relevant provisions. This principle is provided for in dozens of existing Chinese laws and regulations. (*See infra* Annex C.) One of the earliest examples is the Civil Procedural Law of the People's Republic of China adopted in 1982, which provided in Article 189 that "if a provision of an international treaty which China has concluded or acceded to is different from that of the present law, the treaty provision shall apply, unless China has made reservation to the provision." The same principle is restated in Article 142 of the General Principles of the Civil Law of the People's Republic of China (the full title of the law) of 1986, Article 72

of the Administrative Procedural Law of the People's Republic of China of 1989, Article 238 of the Civil Procedural Law of the People's Republic of China of 1991, Article 17 of the Criminal Procedural Law of the People's Republic of China as revised in 1996, and Article 9 of the Criminal Law of the People's Republic of China as revised in 1997. In addition, the same provision can be found in the Customs Law of the People's Republic China of 1987, the Patent Law of the People's Republic of China of 1992, the Maritime Law of the People's Republic of China of 1992, the Trademark Law of the People's Republic of China of 1993 and the Civil Aviation Law of the People's Republic of China of 1995.

Nevertheless, it should be pointed out that there is no principle in the existing Chinese Constitution or national laws that gives priority to treaties over domestic laws on a general basis. The above-mentioned provisions in regard to relations between treaty provisions and domestic laws in the Chinese legal system should be applied strictly in the specific context provided by each law.

With regard to the formality of implementing treaty provisions in the domestic setting, there is no specific rule provided either in the Constitution or general laws. Under some laws, treaty provisions are directly applied in China, while in other cases, they have to be applied through national laws. For example, China acceded to the Vienna Convention on Diplomatic Relations in 1975 and the Vienna Convention on Consular Relations in 1979. China enacted the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities and the Regulations of the People's Republic of China Concerning Consular Privileges and Immunities in 1986 and 1990 respectively. Domestically, these regulations will be directly applied rather than the two conventions.

Many Chinese administrative laws and regulations contain special provisions on how to implement treaty obligations. For example, Article 12 of the Regulation of Maritime Transportation of Containers enacted by the State Council in 1990 stipulates that the transport of containers at sea should accord with international container standards, the fixed technical standards and the regulations of relevant international container transport conventions. On September 25, 1992, the State Council issued Decree No. 105 of the State Council of the People's Republic of China for the implementation of the International Copyright Treaty. In order to implement the Patent Cooperation Treaty, China's Patent Bureau enacted the Regulation on the Implementation of the Patent Cooperation Treaty in 1995. In 1997, the State Council published the Notice on China's Nuclear Export Policy, which laid down specific rules and regulations in strict line with the provisions of the Treaty on Non-Proliferation of Nuclear Weapons.

In practice, judicial interpretations issued by the Supreme People's Court may also concern treaty implementation. For example, after China acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Supreme People's Court issued a notice to the lower courts concerning the application of the convention. On service of legal documents to foreign nationals or permanent residents of foreign countries, the Supreme People's Court directed the lower courts to adopt the means of service in accordance with the terms of treaties to which both China and the national state of the person concerned are party.

If treaty provisions concern the fundamental laws of China, national legislation should be in place for their implementation. Upon its entry into the World Trade Organization, for instance, all agreements concluded thereunder had to be implemented through national legislation.

IV. The Application of International Treaties in Hong Kong and Macao Special Administrative Regions (SAR)

Article 31 of the Constitution of the People's Republic of China stipulates that the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of specific conditions. Accordingly, and in line with the principle of "one country, two systems," the National People's Congress adopted the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China on April 4, 1990 and the Basic Law of the Macao Special Administrative Region of the People's Republic of China on March 31, 1993. Since China resumed the exercise of sovereignty over Hong Kong and Macao in 1997 and 1999 respectively, the Constitution and the two Basic Laws have provided a solid legal basis to ensure social stability and economic prosperity in the two regions. During the process of handover, one of the important issues was the treaty arrangements, particularly the legal status of those treaties already applicable in the two regions through the United Kingdom and Portugal.

A. *Application of Multilateral Treaties in Hong Kong and Macao*

1. *Arrangements Made During the Transitional Period*

In 1984, the Chinese government and the British government reached an agreement to return Hong Kong to China on July 1, 1997, and signed the Joint Declaration on the Question of Hong Kong. In 1987, the Chinese

government signed a similar joint declaration with the Portuguese government on the return of Macao to China on December 20, 1999. According to the two joint declarations, and with a view toward ensuring a smooth transition, consultations were conducted between the relevant governments on various issues, including arrangements on international treaties. After extensive consultations, arrangements were made, and consequently, it was decided that 214 treaties would continue to apply in Hong Kong and 158 in Macao after the handover. The Chinese government, together with the United Kingdom government and the Portuguese government respectively, notified the relevant depositaries and state parties of these arrangements. No objections have been raised to them.

2. *Treaty Practice after the Handover*

After their return, the Central Government of China continues to handle treaty matters in accordance with the Basic Laws and the principle of "one country, two systems." In regard to treaties on foreign affairs and national defense, the Central Government will notify the governments of the two special administrative regions (SAR) in due course of forthcoming legal action in regard to signature, ratification, acceptance or approval of such treaties. For other treaties, the Central Government will first seek the opinions of the two SAR governments before going through the domestic legal procedures of concluding a treaty. Upon replies from the two SAR governments, the Central Government will then decide whether the treaty concerned will apply to the two regions. From the return up until 2003, the Central Government has handled 58 cases concerning a treaty's application to Hong Kong, out of which 21 treaties currently apply to the region. 32 cases have been dealt with for Macao, out of which 22 treaties have become applicable to it.

Under arrangements made during the handover, the two special administrative regions may, in their own capacity, take part in certain international conferences and speak on behalf of the two regions in the negotiation of international treaties.

B. *Application of Bilateral Treaties in Hong Kong and Macao*

After July 1, 1997, when Hong Kong was returned to China, all bilateral treaties concluded by the UK and extended to Hong Kong ceased to apply in Hong Kong. Likewise, after December 20, 1999, all bilateral treaties concluded by Portugal and extended to Macao ceased to apply in Macao.

C. *Legal Questions on the Application of International Treaties in the Two Special Administrative Regions*

The return of Hong Kong and Macao has offered a new treaty practice for China and has also set up a precedent in the field of international treaty law. In accordance with the two Joint Declarations and the two basic laws, the two regions may: (1) maintain their own external relations and conclude agreements with foreign states and regions in various fields including economic matters, trade, finance, shipping, communications, tourism, culture and sports, etc.; (2) conclude, with the authorization and assistance of the Central Government, agreements on civil aviation, mutual legal assistance and visas with foreign states or regions; (3) give opinions to the Central Government on whether an international treaty should be applied to the two regions; and (4) continue to apply international agreements to the two regions even if they do not apply to the country in totality. The Central Government shall make appropriate arrangements for that purpose at the international level.

Treaty arrangements in regard to Hong Kong and Macao bear a few unique features.

1. *Territorial scope of application*

In accordance with the Basic Laws, international treaties concluded by China may in certain cases not apply to the two regions. Besides, certain treaties may only apply to the two regions but not to the country as a whole. Although this is not contrary to Article 29 of the Vienna Convention on the Law of Treaties, where special arrangements are allowed in terms of territorial scope of treaty application, this practice is quite unprecedented in Chinese treaty practice.

2. *Continued application of international treaties*

Because China did not recognize the three unequal treaties relating to the cession of Hong Kong, and only resumed the exercise of its sovereignty over the territory, it did not consider the transfer of power as succession. Therefore, the treaty arrangements are not for purposes of treaty succession either. They are specially designed to resolve matters left over by history while taking into account the new regime to be established in the region.

V. Basic Data and Documentation

A. *National Legislation*

Annex A: Relevant Provisions of the Constitution of the People's Republic of China
Annex B: Law of the People's Republic of China on the Procedures for the Conclusion of Treaties
Annex C: Other Laws

B. *Selected Examples of Treaty Documents*

Annex D: Full Power
Annex E: Instruments of Ratification
Annex F: Instrument of Approval
Annex G: Instrument of Accession
Annex H: Instrument of Acceptance
Annex I: Note on Reservation
Annex J: Registration Document
Annex K: Note to the Depositary
Annex L: A Proclamation

C. *Statistical Data*

Annex M: Statistical Data

ANNEX A

RELEVANT PROVISIONS OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA

Article 67

The Standing Committee of the National People's Congress exercises the following functions and powers:

* * *

(14) to decide on the ratification or abrogation of treaties and important agreements concluded with foreign states.

Article 81

The President of the People's Republic of China receives foreign diplomatic representatives on behalf of the People's Republic of China and, in accordance with the decisions of the Standing Committee of the National People's Congress, appoints or recalls plenipotentiary representatives abroad, and ratifies or abrogates treaties and important agreements concluded with foreign states.

Article 89

The State Council exercises the following functions and powers:

* * *

(9) to conduct foreign affairs and conclude treaties and agreements with foreign states.

ANNEX B

LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON THE PROCEDURE FOR THE CONCLUSION OF TREATIES

(Adopted at the 17th Meeting of the Standing Committee of the Seventh National People's Congress on December 28, 1990, promulgated by Order No. 37 of the President of the People's Republic of China on December 28, 1990, and effective as of the same date)

Article 1

The present Law is enacted in accordance with the Constitution of the People's Republic of China.

Article 2

This Law shall be applicable to bilateral or multilateral treaties and agreements and other instruments in the nature of a treaty or agreement concluded between the People's Republic of China and foreign states.

Article 3

The State Council, that is, the Central People's Government, of the People's Republic of China shall conclude treaties and agreements with foreign states.

The Standing Committee of the National People's Congress of the People's Republic of China shall decide on the ratification and abrogation of treaties and important agreements concluded with foreign states.

The President of the People's Republic of China shall, in accordance with decisions of the Standing Committee of the National People's Congress, ratify and abrogate treaties and important agreements concluded with foreign states.

The Ministry of Foreign Affairs of the People's Republic of China shall, under the leadership of the State Council, administer the specific affairs concerning the conclusion of treaties and agreements with foreign states.

Article 4

The People's Republic of China shall conclude treaties and agreements with other states in the name of:

(1) the People's Republic of China;
(2) the Government of the People's Republic of China;
(3) the governmental departments of the People's Republic of China.

Article 5

The decision to negotiate and sign treaties and agreements shall be made according to the following procedures:

(1) In the case of a treaty or agreement to be negotiated and signed in the name of the People's Republic of China, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation and draw up a draft treaty or agreement of the Chinese side and submit it to the State Council for examination and decision.

(2) In the case of a treaty or agreement to be negotiated and signed in the name of the Government of the People's Republic of China, the Ministry of Foreign Affairs or the department concerned under the State Council shall make a recommendation and draw up a draft treaty or agreement of the Chinese side and, after consultation with the Ministry of Foreign Affairs, submit it to the State Council for examination and decision. In the case of an agreement concerning a specific line of business, its Chinese draft shall, with the consent of the State Council, be examined and decided upon by the department concerned under the State Council or when necessary in consultation with the Ministry of Foreign Affairs.

(3) Agreements to be negotiated and signed in the name of a governmental department of the People's Republic of China concerning matters within the scope of functions and powers of the department concerned shall be decided upon by the department itself or after consultation with the Ministry of Foreign Affairs. In the case of an agreement relating to matters of major importance or matters falling within the functions and powers of other departments under the State Council, the department concerned shall submit it, by itself or after consultation with the other departments concerned under the State Council, to the State Council for decision. The draft agreement of the Chinese side shall be examined and decided upon by the department concerned or when necessary in consultation with the Ministry of Foreign Affairs.

When major modification in the Chinese draft of a treaty or agreement already examined and decided upon by the State Council are necessary as a result of negotiation, the revised draft shall be submitted to the State Council for examination and decision.

Article 6

Representatives for negotiating and signing treaties or agreements shall be appointed according to the following procedures:

(1) In the case of a treaty or agreement to be concluded in the name of the People's Republic of China or the Government of the People's Republic of China, the Ministry of Foreign Affairs or the department concerned under the State Council shall submit a report to the State Council for the appointment of a representative. The full powers of the representative shall be signed by the Premier of the State Council, but may also be signed by the Minister of Foreign Affairs.
(2) In the case of an agreement to be concluded in the name of a governmental department of the People's Republic of China, a representative shall be appointed by the head of the department concerned.

The letter of authorization for the representative shall be signed by the head of the department. Where the head of a department signs an agreement concluded in the name of the governmental department, and where the contracting parties agree that it is necessary for the head of the department to produce full powers, the full powers shall be signed by the Premier of the State Council, but may also be signed by the Minister of Foreign Affairs.

The following persons shall dispense with full powers for negotiating and signing treaties and agreements:

(1) the Premier of the State Council, the Minister of Foreign Affairs;
(2) the head of a diplomatic mission of the People's Republic of China who negotiates and signs treaties and agreements concluded between China and the state to which he is accredited, unless it is otherwise agreed by the contracting parties;
(3) the head of a governmental department of the People's Republic of China who negotiates and signs the agreements concluded in the name of his department, unless it is otherwise agreed by the contracting parties;
(4) the person, dispatched to an international conference or accredited to an international organization by the People's Republic of China, who is at the same time the representative for negotiating treaties or agreements in that conference or organization, unless it is otherwise agreed by the conference or otherwise provided for in the constitution of the organization.

Article 7

The ratification of treaties and important agreements shall be decided upon by the Standing Committee of the National People's Congress. The treaties and important agreements referred to in the preceding paragraph are as follows:

(1) treaties of friendship and cooperation, treaties of peace and similar treaties of a political nature;
(2) treaties and agreements relating to territory and delimitation of boundary lines;
(3) treaties and agreements relating to judicial assistance and extradition;
(4) treaties and agreements which contain stipulations inconsistent with the laws of the People's Republic of China;
(5) treaties and agreements which are subject to ratification as agreed by the contracting parties; and
(6) other treaties and agreements subject to ratification.

After the signing of a treaty or an important agreement, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall submit it to the State Council for examination and verification; the State Council shall then refer it to the Standing Committee of the National People's Congress for decision on ratification; the President of the People's Republic of China shall ratify it in accordance with the decision of the Standing Committee of the National People's Congress.

After the ratification of a bilateral treaty or an important bilateral agreement, the Ministry of Foreign Affairs shall execute the formalities for the exchange of the instruments of ratification with the other contracting party. After the ratification of a multilateral treaty or an important multilateral agreement, the Ministry of Foreign Affairs shall execute the formalities for the deposit of the instrument of ratification with the depositary state or international organization. The instrument of ratification shall be signed by the President of the People's Republic of China and countersigned by the Minister of Foreign Affairs.

Article 8

After the signing of the agreements and other instruments in the nature of a treaty which do not fall under paragraph 2, Article 7 of this Law and which are subject to approval as prescribed by the State Council or as agreed by the contracting parties, the Ministry of Foreign Affairs or the departments concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall submit them to the State Council for

approval. After the approval of agreements and other instruments in the nature of a treaty, in the case of a bilateral one, the Ministry of Foreign Affairs shall execute the formalities for the exchange of the instruments of approval with the other contracting party or for mutual notification of the approval by diplomatic notes. In the case of a multilateral one, the Ministry of Foreign Affairs shall execute the formalities for the deposit of the instrument of approval with the depositary state or international organization concerned. The instrument of approval shall be signed by the Premier of the State Council, but may also be signed by the Minister of Foreign Affairs.

Article 9

After the signing of the agreements which need no decision on ratification by the Standing Committee of the National People's Congress or approval by the State Council, the agreements shall be submitted by the departments concerned under the State Council to the State Council for the record, except those agreements concluded in the name of the governmental departments of the People's Republic of China which are to be submitted by these departments to the Ministry of Foreign Affairs for registration.

Article 10

If the two contracting parties need to go through different domestic legal procedures for the entry into force of the same treaty or agreement, the said treaty or agreement shall enter into force after the accomplishment by the two parties of their respective legal procedures and mutual notification by diplomatic notes.

After the signing of the treaties and agreements listed in the preceding paragraph, the formalities of ratification, approval, entry on the record or registration shall be executed as the case requires in accordance with Articles 7, 8 or 9 of this Law. The formalities of notification by note shall be completed by the Ministry of Foreign Affairs.

Article 11

The decision to accede to multilateral treaties or agreements shall be made by the Standing Committee of the National People's Congress or the State Council as the case requires. The procedures for acceding to multilateral treaties and agreements shall be as follows:

(1) to accede to a multilateral treaty or an important multilateral agreement listed in Paragraph 2, Article 7 of this Law, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation after examination and submit it to the State Council

for examination and verification; the State Council shall then refer it to the Standing Committee of the National People's Congress for decision on accession. The instrument of accession shall be signed by the Minister of Foreign Affairs, and the specific formalities executed by the Ministry of Foreign Affairs;

(2) to accede to a multilateral treaty or agreement other than those listed in Paragraph 2, Article 7 of this Law, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation after examination and submit it to the State Council for decision on accession.

The instrument of accession shall be signed by the Minister of Foreign Affairs, and the specific formalities executed by the Ministry of Foreign Affairs.

Article 12

The decision to accept a multilateral treaty or an agreement shall be made by the State Council.

In the case of a multilateral treaty or agreement containing clauses of acceptance which is signed by the Chinese representative or does not require any signature, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation after examination and submit it to the State Council for decision on acceptance. The instrument of acceptance shall be signed by the Minister of Foreign Affairs, and the specific formalities executed by the Ministry of Foreign Affairs.

Article 13

A bilateral treaty or agreement concluded by the People's Republic of China with a foreign state shall be done in the Chinese language and the official language of the other contracting party, both texts being equally authentic. When necessary, a text in the language of a third state agreed upon by the two contracting parties may be executed in addition as a third, equally authentic, official text or an unofficial text for reference. It may be stipulated by agreement of the two contracting parties that the third text shall prevail in case of divergence of interpretation of the treaty or agreement.

For agreements on specific lines of business and treaties and agreements concluded with international organizations, a single language fairly commonly used internationally may also be used by agreement of the two contracting parties or in accordance with the provisions of the constitutions of the international organizations concerned.

Article 14

Signed originals of bilateral treaties and agreements concluded in the name of the People's Republic of China or the Government of the People's Republic of China and copies of multilateral treaties and agreements certified as true by the depositary states or international organizations concerned shall be deposited with the Ministry of Foreign Affairs. Signed originals of bilateral agreements concluded in the name of the governmental departments of the People's Republic of China shall be deposited with these departments.

Article 15

A treaty or an important agreement of which the Standing Committee of the National People's Congress has decided on ratification or accession shall be published in the bulletin of the Standing Committee of the National People's Congress. The measures for publishing other treaties and agreements shall be made by the State Council.

Article 16

Treaties and agreements concluded by the People's Republic of China shall be compiled by the Ministry of Foreign Affairs into a collection of the Treaties of the People's Republic of China.

Article 17

Treaties and agreements concluded by the People's Republic of China shall be registered with the Secretariat of the United Nations by the Ministry of Foreign Affairs in accordance with the relevant provisions of the United Nations Charter. Treaties and agreements concluded by the People's Republic of China that require registration with other international organizations shall be registered by the Ministry of Foreign Affairs or the departments concerned under the State Council in accordance with the respective constitutions of the international organizations.

Article 18

The procedures for the conclusion of a treaty or an agreement with an international organization by the People's Republic of China shall follow this Law and the constitution of the relevant international organization.

Article 19

The procedures for amendment to, abrogation of and withdrawal from treaties and agreements concluded by the People's Republic of China shall follow *mutatis mutandis* the procedures for the conclusion of the treaties and agreements in question.

Article 20

The State Council may make regulations in accordance with this Law for its implementation.

Article 21

This Law shall enter into force as of the date of promulgation.

ANNEX C

OTHER LAWS

1. LAW OF SUCCESSION OF THE PEOPLE'S REPUBLIC OF CHINA

(Adopted at the Third Session of the Sixth National People's Congress, promulgated on April 10, 1985, and effective as of October 1, 1985)

Article 36

For inheritance by a Chinese citizen of an estate outside the People's Republic of China or of an estate of a foreign national within the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply. For inheritance by a foreign national of an estate within the People's Republic of China or of an estate of a Chinese citizen outside the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply. Where treaties or agreements exist between the People's Republic of China and foreign states, matters of inheritance shall be handled in accordance with such treaties or agreements.

2. GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA

(Adopted at the Fourth Session of the Sixth National People's Congress, promulgated on April 12, 1986, and effective as of January 1, 1987)

Article 142

The application of law in civil relations with foreign nationals shall be determined by the provisions in this chapter. If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.

3. ADMINISTRATIVE PROCEDURAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA
(Adopted at the Second Session of the Seventh National People's Congress on April 4, 1989, promulgated on April 4, 1989, and effective as of October 1, 1990)

Article 72

If an international treaty concluded or acceded to by the People's Republic of China contains provisions different from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.

4. CIVIL PROCEDURAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA
(Adopted at the Fourth Session of the Seventh National People's Congress on April 9, 1991, promulgated on April 9, 1991, and effective as of the date of promulgation)

Article 238

If an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from provisions of this Law, the provisions of the international treaty shall apply, except those on which China has made reservations.

Article 239

Civil actions brought against a foreign national, a foreign organization or an international organization that enjoys diplomatic privileges and immunities shall be dealt with in accordance with the relevant law of the People's Republic of China and the provisions of the international treaties concluded or acceded to by the People's Republic of China.

Article 262

In accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity, the people's courts of China and foreign courts may make mutual requests for assistance in the service of legal documents, in investigation and collection of evidence or in other litigation actions.

Article 263

The request for the provision of judicial assistance shall be effected through channels provided in the international treaties concluded or acceded to by the People's Republic of China; in the absence of such treaties, they shall be effected through diplomatic channels.

5. EDUCATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA
(Adopted by the Third Session of the Eighth National People's Congress on March 18, 1995)

Article 70

In accordance with the international treaties concluded or acceded to by the People's Republic of China or with the relevant regulations of the country, China acknowledges the diploma and the education background certificates issued by foreign educational organizations.

6. CRIMINAL PROCEDURAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA
(Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979, and amended by the Fourth Session of the Eighth National People's Congress on March 17, 1996)

Article 17

In accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity, the judicial organs of China may raise mutual requests for criminal legal assistance to the judicial organs of other countries.

7. CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA
(Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997)

Article 9

This law is applicable to the crimes specified in international treaties to which the PRC is a state party or of which it is a member and the People's Republic of China exercises criminal jurisdiction over such crimes within its treaty obligations.

8. NATIONAL DEFENSE LAW OF THE PEOPLE'S REPUBLIC OF CHINA

(Adopted by the Fifth Session of the Eighth National People's Congress on March 14, 1997)

Article 67

The People's Republic of China shall observe the provisions set out in the treaties and agreements concluded, acceded to or accepted by China in military relations with foreign states.

ANNEX D

FULL POWER

The State Council of the People's Republic of China invests Mr. Xu Fangming with full power and authority to negotiate and sign with the representative having full powers of the Kuwait Arab Economic Development Fund the Loan Agreement on the Qin Zhou-Xi Niu Jiao Road Program between the People's Republic of China and the Kuwait Arab Economic Development Fund.

(Signed) Li Zhaoxing
Minister for Foreign Affairs
People's Republic of China
December 1, 2003 Beijing

ANNEX E

INSTRUMENT OF RATIFICATION

In pursuance of the decision of the Third Session of the Tenth Standing Committee of the National People's Congress, the President of the People's Republic of China ratifies the Sixth Additional Protocol of the Charter of the Universal Postal Union signed by the representative of the People's Republic of China on September 15, 1999, in Beijing.

The People's Republic of China shall fully observe the provisions of the said protocol.

In witness whereof, the President of the People's Republic of China has signed the Instrument of Ratification and affixed the Seal of the State.

(signed) Hu Jintao
President of the People's Republic of China

(signed) Li Zhaoxing
Minister for Foreign Affairs

June 28, 2003, Beijing

ANNEX F

INSTRUMENT OF APPROVAL

The State Council of the People's Republic of China approves the Loan Agreement on the Qin Zhou-Xi Niu Jiao Road Program between the People's Republic of China and the Kuwait Arab Economic Development Fund signed by Mr. Xu Fangming, the representative of the People's Republic of China, on September 15, 1999 in Beijing.

The People's Republic of China shall fully observe the provisions of the said protocol.

(Signed) Li Zhaoxing
Minister for Foreign Affairs
People's Republic of China
April 23, 2004 Beijing

ANNEX G

INSTRUMENT OF ACCESSION

Beijing, 18 June 1992

Mr. T.P. Hayes
Secretary-General
Customs Cooperation Council

Brussels

Your Excellency,

I have the honor to inform you that the Government of the People's Republic of China has decided to accede to the International Convention on the Harmonized Commodity Description and Coding System done at Brussels on 14 June 1983 and declare hereby that the above mentioned Convention shall enter into force in respect of the People's Republic of China on 1 January 1993.

I avail myself of this opportunity to renew to your Excellency the assurances of my highest consideration.

(Signed) Qian Qichen
Minister for Foreign Affairs
People's Republic of China

ANNEX H

INSTRUMENT OF ACCEPTANCE

Beijing, June 24, 1987

Your Excellency,

I have the honor to inform you that the Government of the People's Republic of China has decided to accept the Statute of The Hague Conference on Private International Law (revised text), drawn up at the Seventh Session of the Conference held at The Hague from 9 to 31 October 1951.

I avail myself of this opportunity to renew to you the assurances of my highest consideration.

(Signed) Wu Xueqian
Minister for Foreign Affairs
People's Republic of China

H. Van den Broek
Minister for Foreign Affairs
The Kingdom of the Netherlands
The Hague

ANNEX I

NOTE ON RESERVATION

Brussels, 15 June 2000

Your Excellency,

I am authorized to sign, on behalf of the Government of the People's Republic of China, the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures and have the honor to inform Your Excellency of the Following:

1. The above-mentioned signature comes into force in respect of the Government of the People's Republic of China without ratification;
2. Meanwhile, the Government of the People's Republic of China states that:

   (a) the Government of the People's Republic of China accepts Specific Annex D Customs Warehouse and Free Zones Chapter 1 Customs Warehouse and Specific Annex G Temporary Admission Chapter 1 Temporary Admission, as contained in Appendix III to the above-mentioned Protocol;
   (b) the Government of the People's Republic of China registers its reservations with regard to Specific Annex D Chapter 1, 9 and Specific Annex G Chapter 1, 16, and 21.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(Signed) Song Mingjiang
Ambassador Extraordinary and Plenipotentiary
People's Republic of China
The Kingdom of Belgium

His Excellency
Mr. Michel Danet
Secretary-General
World Customs Organization
Brussels

ANNEX J

REGISTRATION DOCUMENT

This is to certify that the attached texts are the authentic copy of the Agreement on Civil Aviation between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Grand Duchy of Luxembourg signed on June 3, 1998 in Hong Kong, done in English. In accordance with the provision of Article 19 of the Agreement, the Agreement shall enter into force from the date of mutual notifications of the completion of legal procedures by the contracting parties, i.e. June 6, 2003. There are no reservations for both parties.

(Signed) Hu Zhiqiang
Director
Department of Treaty and Law
Ministry of Foreign Affairs
People's Republic of China
Beijing, August 8, 2003

ANNEX K

NOTE TO THE DEPOSITARY

New York, 2 May 2001

Your Excellency,

I have the honor to transmit to you the Instrument of Ratification by the People's Republic of China of the Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 September 1995 and to state on behalf of the Government of the People's Republic of China that the Amendment applies to the Hong Kong Special Administrative Region and the Macao Special Administrative Region of the People's Republic of China.

I should be most grateful if you could confirm the deposit of the above-mentioned Instrument of Ratification.

Please accept, Your Excellency, the assurances of my highest consideration.

(Signed) Wang Yingfan
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of the
People's Republic of China to the United Nations

H.E. Mr. Kofi Annan
Secretary-General
United Nations
New York

ANNEX L

A PROCLAMATION

H.E. Mr. Kofi Annan
Secretary-General
United Nations
New York

New York, April 8, 2003

Your Excellency,

I have the honor to inform you by the instruction of my government as follows:

In accordance with the provision of Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Government of the People's Republic of China decides that the United Nations Framework Convention on Climate Change and the Kyoto Protocol to the United Nations Framework Convention on Climate Change apply to the Hong Kong Special Administrative Region of the People's Republic of China.

The United Nations Framework Convention on Climate Change will continue to apply to the Macao Special Administrative Region of the People's Republic of China. Before further notification from the Government of the People's Republic of China, the Kyoto Protocol to the United Nations Framework Convention on Climate Change will not apply to the Macao Special Administrative Region of the People's Republic of China.

I should be grateful if the above information is recorded and circulated to the other contracting parties.

Please accept, Your Excellency, the assurances of my highest consideration.

(Signed) Wang Yingfan
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of the
People's Republic of China to the United Nations

ANNEX M

STATISTICAL DATA

1. Based on the statistics of the Collection of Treaties Concluded by the People's Republic of China (Volumes 1–48), the total number of bilateral treaties concluded by China is 6,287.

2. The number of multilateral treaties to which China is a party is 273 as recorded by the Ministry of Foreign Affairs of China.

3. By the end of February 2004, there are 214 multilateral treaties applicable to the Hong Kong Special Administrative Region of the People's Republic of China. By the end of August 2003, there are 180 multilateral treaties applicable to the Macao Special Administrative Region of the People's Republic of China.

CHAPTER SIX

NATIONAL TREATY LAW AND PRACTICE: COLOMBIA

Germán Cavelier

I. Introduction

The following sources of law define the Colombian legal regime concerning the adoption, approval, and ratification of treaties.

The Colombian Constitution that entered into force on July 7, 1991 provides that:

a) The President of the Republic is empowered to enter into international treaties;[1]
b) Congress may approve or disapprove such treaties;[2]
c) The Constitutional Court examines the approving law and the treaty itself for the purpose of verifying whether they are in conformity with the Constitution. If they are not in conformity, the law and treaty are not approved, and ratification cannot be made;[3]
d) The President may only ratify the treaty if it is approved by the Constitutional Court, and the President must follow any requirement by the Constitutional Court concerning the need to make reservations to the treaty;[4]
e) The President exchanges or deposits the ratifications together with the reservations required by the Court;[5] and
f) The President enacts the approving law and the treaty itself, which is enforceable from the date of enactment, unless the treaty or the approving law shall set forth another date.[6]

Law 5 of 1992 vests in Congress the power to postpone the enforceability of a treaty and to raise questions concerning the text itself.[7]

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[1] Political Const., Art. 189 para. 2.
[2] Political Const., Art. 150 para. 16.
[3] Political Const., Art. 241 para. 10.
[4] *Id.*
[5] *Id.*
[6] Law 7 of 1944, Art. 2.
[7] Law 5 of 1992, Art. 217.

The Constitutional Court decided in a June 17, 1993 decision[8] that it is constitutional for Congress to require reservations, which are mandatory for the President when the latter ratifies the treaty and when he exchanges or deposits the instruments of ratification. Additionally, if Congress postpones the entry into force of a treaty and of the approving law, the President must obey such an order from Congress; he is not able to perfect the treaty before the date set forth by Congress.[9] Accordingly, to an even greater degree than the Constitution, the Constitutional Court's decision restricts the presidential power to enter into treaties and to raise reservations, since the President is subject to the terms established by Congress in the approving law.

The political control exerted by Congress and the constitutional control exerted by the Court are binding on the President with respect to any treaty that he may enter into and thereby limit the President's authority to conduct foreign relations.

Finally, Law 5 of 1992 and the Constitutional Court's Decision of June 17, 1993 infringe on the Vienna Convention on the Law of Treaties, which vests in the "State" (and, by implication, in the Head of State, the President) the power to formulate reservations to international treaties.[10]

II. Colombian Treaty-Making Law and Practice

A. *International Agreements*

1. *General Criteria*

The Colombian Constitution does not define "treaties," but insofar as it refers to "treaties or conventions,"[11] it attempts to encompass all kinds of international agreements that constitute obligations of the Colombian state.

Moreover, Colombian authorities and agencies are now governed by the definition of "treaties" in the 1969 Vienna Convention on the Law of Treaties, to which Colombia is a party.[12] Colombia ratified the Vienna Convention on April 10, 1985, with a reservation:

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[8] Constitutional Court, Decision No. C-227 of June 17, 1993, in re *Germán Cavelier vs. the State* on unconstitutionality of Article 217 of Law 5 of 1992, *Gaceta de la Corte Constitucional*, Vol. 6 of June 1996, pages 127–145, File No. D-201.

[9] *Id.*

[10] *See* Vienna Convention on the Law of Treaties, done at Vienna May 23, 1969, 1155 *U.N.T.S.* 331 (entered into force Jan. 27, 1980), *reprinted in* 8 ILM 679 (1969) ("Vienna Convention"), Art. 19.

[11] Political Const., Arts. 93, 189 para. 2.

[12] Vienna Convention, Art. 2(1)(a).

> With regard to Article 25, Colombia formulates the reservation that the Political Constitution of Colombia does not recognize the provisional application of treaties; it is the responsibility of the National Congress to approve or disapprove any treaties and conventions which the Government concludes with other States or with international legal entities.

2. *Agency-to-Agency Agreements*

As a general rule, government agencies do not enter into international agreements because the Constitution vests in the President the absolute power to enter into international treaties and conventions.

From time to time, however, government agencies enter into limited agreements with agencies of other governments to regulate specific points of inter-governmental relations on issues such as education, health, frontier traffic, and the like. But these agreements are short-lived and are implemented at a lower level of government. Such agreements are extra-constitutional.

3. *Implementing Agreements*

The Constitution grants the President the "regulatory powers" of all laws. In the exercise of this power, the government enacts decrees and resolutions designed to implement certain norms of treaties that are not self-implementing.[13]

The implementing decrees are subject to the jurisdiction of the administrative courts because they are "acts of Government" subject to the law they purport to regulate. But the administrative court cannot examine the regulatory decrees in direct relation to the treaty they attempt to regulate without first verifying the law of approval of the treaty and then examining the treaty itself in relation to the regulatory decrees.[14]

4. *Community Law*

Colombia is a party to the Cartagena Agreement, or Andean Pact, pursuant to which member countries transferred limited legislative and regulatory powers to the Andean Pact Commission.[15] The Andean Pact Commission enacts "decisions" that are binding on the members states upon publication in the *Official Gazette of the Cartagena Agreement*, and which are automatically incorporated into the domestic law of the member

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[13] Political Const., Art. 150 para. 11.

[14] But these regulatory acts of treaties are subject to discussion as to their legal status if they exceed the contents of the basic instrument. The administrative courts can examine them from the point of view of internal Colombian administrative law.

[15] Germán Cavelier, 4 *Tratados de Colombia, 1963–1970* 40 (Bogotá: 1987).

states.[16] However, the member states may enact regulatory norms with respect to the decisions of the Andean Pact Commission, according to the regulatory powers that the decision grants to them.[17] Thus, with regard to the legal effect on the Colombian government, there is a significant difference between a treaty and a decision made by an intergovernmental organization with the power to enact binding legislation upon the participant states in the organization.

5. *Verbal Agreements*
In international matters, the Colombian state and its agencies are not bound by verbal agreements because the citizens and civil servants are not obliged to observe rules that have not been duly promulgated in print by the *Official Journal.*

6. *Unilateral Acts*
Such acts may be taken by the government in domestic or international matters, and the government is bound by them if they are duly enacted.

In international matters, the government of Colombia follows the customary norms of international law as to the binding effect of unilateral acts by the state in favor of another state or acts that may create a binding obligation to the Colombian state.

7. *Contracts with Foreign Entities*
Colombian law recognizes and regulates the adoption, approval, and effect of contracts entered into by the government of Colombia with foreign government agencies or private persons in the following manner.[18]

7.a. *Foreign Government or Multilateral Agencies*:[19] Contracts executed in Colombia that are to be performed abroad may be governed by foreign law.

Contracts financed with the funds of multilateral agencies, or executed with foreign official agencies (or with international agencies providing cooperation, assistance, or aid), may be subject to the regulations of such agencies on the procedures governing the formation or awarding of contracts, and may have special clauses on contract performance, compliance, payment, and adjustments.

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[16] Art. III of Tratado del Tribunal de Justicia del Acuerdo de Cartagena, approved by Law 17 of 1980, *Diario Oficial* No. 35.459 of February 18, 1980.
[17] *See supra* note 14.
[18] Law 80 of 1993, Art. 13.
[19] Law 80 of 1993, Art. 20.

7.b. *Private Foreign Contractors*: Contracts between the Government of Colombia and private foreign contractors are subject to the following substantive rules. State entities must seek to ensure that, in loan agreements and other forms of financing, creditors do not order the use or acquisition of goods or the rendering of services of a specific origin, or demand that the granting of the financing be conditioned thereon. State entities must also seek to incorporate conditions that ensure the participation of bidders of domestic goods and services.[20]

When foreign offers are otherwise on equal terms, the one that will be preferred is that which incorporates the greater amount of the domestic workforce, the greater national component, and better conditions for transferring technology.[21]

Registration of foreign persons: When foreign individuals not domiciled in Colombia, or foreign private legal entities without a branch established in Colombia, seek to present bids or execute contracts for which the presentation of the registration contemplated in Colombian law is required, a document will be required from them proving the registration at the corresponding registry in the country in which their main domicile is located, as well as documents that prove their existence and incumbency, when such is the case. In the absence of such a registration document, they must present the certification of registration at the registry established under Colombian law. In addition, they must appoint an agent in Colombia, who must be domiciled in Colombia and duly empowered to present the bid and execute the contract as well as to represent them in or out of court.[22]

Documents granted abroad must be presented and duly legalized by Apostille. These provisions will be interpreted without prejudice to the duty of the State entity to demand from such persons, documents or information giving evidence of their experience, capacity, and fitness.[23]

7.c. *Contracts on Public Services*: Contracts with foreign persons and contracts including long-term financing or a system of payment based on the exploitation of the asset built or the operation of assets to render a public service may contemplate that differences arising from the contract be subject to decision by an international arbitration tribunal.[24]

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[20] Law 80 of 1993, Art. 21.
[21] *Id.*
[22] Law 80 of 1993, Art. 21 para. 2.
[23] *Id.*
[24] Law 80 of 1993, Art. 69.

B. *Executive Authorization and Approval Procedures*

1. *Centralized Treaty-Making Power*

The Colombian Constitution vests in the President absolute treaty-making power. The President is the only state official who can adopt treaties, either by himself or through a duly appointed representative provided with full powers.[25] There are only a few cases in Colombian diplomatic history when the President himself has executed an international agreement.[26] Usually the President grants a deputy the power to sign a particular international agreement *ad referendum*. The President can choose whether or not to confirm the treaty thus adopted and executed by his deputy. If the President confirms it, then he, as attested by the Minister of Foreign Affairs, issues an executive resolution approving the treaty and ordering its remittance to Congress for approval. (*See* Annex D.)

2. *Government-level or Agency-level*

The distinction between these two levels of treaty making is highly relevant. Treaties entered into by the State at the governmental level are full international agreements duly perfected according to the Constitution, while agency-level agreements, which are those entered into by agencies to regulate particular fields or relations with another state agency, are not international agreements in accordance with the Constitution.

For instance, the Colombian Aeronautical Board entered into flight regulation agreements with Chile and Venezuela without presidential or congressional approval. As a result, the Constitutional Court reprimanded the President for allowing a government agency to contract international obligations without approval by Congress and oversight by the Constitutional Court.[27]

3. *Detailed Regulations on the Matter of International Treaties*

There are no detailed domestic regulations on international treaties. The only legal norms governing them are the Constitution, Law 7 of 1944, Law 5 of 1992, the Vienna Convention on the Law of Treaties of 1969, and the cases decided by the Constitutional Court, which are binding on all branches of Government, but only for each case in question.

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[25] Political Const., Art. 189 para. 2.

[26] Germán Cavelier, *El Régimen Jurídico de los Tratados Internacionales en Colombia* 52 (Bogotá: 2d ed., 1985).

[27] Writ of the Constitutional Court (Mar. 8, 1993).

C. *Legislative Approval*

1. *Mandatory Approval by the Legislature*

All international treaties and agreements entered into by the President of the Republic, or confirmed by him, must be submitted to Congress for approval before any kind of acceptance, ratification, or provisional entry into force of the treaty.

The only constitutional exception to this rule is international agreements of an economic nature accepted or acceded to in the framework of an international organization. This exception refers only to the acceptance of the provisional entry into force of those agreements, which can be accepted and implemented by the President, but with the express obligation to submit the treaty immediately for the approval of Congress. If the President omits the submission to Congress, he violates his constitutional responsibility.[28]

2. *Discretion of the Executive*

The President has no discretion to decide whether an agreement should receive the approval of the legislature prior to ratification.[29] As discussed above, the only exception is that the President can put into force any international agreement of an economic nature entered into through an international organization, but only with the correlative obligation to submit it for Congress' approval immediately after its provisional entry into force.[30]

In short, the President must submit for the approval of Congress any treaty or international agreement that conforms to the definition of treaty found in the Vienna Convention on the Law of Treaties of 1969.

3. *Consultation with the Legislature*

The President is not obligated to consult with the legislature as to whether an international agreement should be submitted for the prior approval of Congress. There is no rule that permits such a consultation or that would bind the President to do so. The President is sovereign in deciding which international agreements he must submit to Congress, but if he fails to take the appropriate action, he violates his constitutional responsibility.

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[28] Political Const., Arts. 150 para. 16, 224.
[29] Political Const., Arts. 150 para. 6, 189 para. 2, 224.
[30] Political Const., Art. 224.

At the same time, Congress cannot request from the President information on confidential international matters, including treaty and diplomatic negotiations.[31]

4. *Nullity of Executive Agreements Not Approved by Congress*

Executive agreements entered into by the President alone, or through a person empowered by him, cannot be executed if prior approval by Congress has not been obtained. Furthermore, the Constitutional Court has to exercise its constitutional scrutiny over any treaty approved by Congress. When the President executes a law passed by Congress approving a treaty, the President has to submit the law and the treaty to the Constitutional Court within six days. He cannot ratify a treaty or make it applicable without final approval of the Constitutional Court.

If the President fails to submit the treaty to Congress, he violates his constitutional responsibility, for the Constitution prohibits the President from putting the treaty into force, promulgating it, or ratifying it without the prior approval of Congress. The President's failure to meet his constitutional obligations could constitute a violation of the Vienna Convention in the circumstances described in Article 18 of the Vienna Convention and could, moreover, nullify the agreement because of the failure to abide by an essential condition of domestic law.

D. *Reservation Questions*

1. *Bilateral Treaties*

Reservations to bilateral treaties are usually made at the time of the exchange of ratifications in the following cases:

- The President considers that he cannot ratify the treaty without making one or more reservations to the treaty.
- Congress approves the treaty with the condition that the President make one or more reservations as directed by Congress.
- The Constitutional Court orders the President to make one or more reservations before or at the time of the exchange of ratifications with the other party, or deposit of same in the hands of the depositary.

It is doubtful, however, that international law would sanction the practice of making reservations to a bilateral treaty because the state that proceeds in this way contravenes Article 18 of the Vienna Convention. In effect, if a treaty, duly agreed upon between the two parties, is sub-

[31] Political Const., Art. 136 paras. 1 & 2.

ject to reservations by one party prior to the exchange of instruments of ratification, the other party may very well object to such a practice, which essentially results in the withdrawing of the effect of a clause or clauses of the treaty without subjecting them to negotiation before the conclusion of the treaty.

2. *Multilateral Treaties*

These reservations follow the same pattern as reservations to bilateral treaties, but with the difference that the President must carefully examine the nature of the reservation, whether it is authorized by the multilateral treaty (some of them do not permit reservations), or if the reservation would deprive the treaty of its effect. In these cases, the President cannot make the reservation.

If Congress or the Constitutional Court, or both, require a reservation by the President, he must make the reservation. If the reservation is not possible under the treaty or under international law, then the President cannot ratify the treaty and the Colombian state will not become a party to the treaty.

E. *Consultation with the Legislature*

1. *Practice of the Executive*

The Constitution and relevant laws do not contemplate the possibility of the Executive consulting the Congress on the desirability of a proposed agreement. The President takes responsibility for entering into any treaty or international agreement. If such a consultation were requested, Congress would refrain from answering it because Congress cannot express an opinion on a treaty in advance if the treaty will afterwards come under its examination for approval.

As there are no international agreements in Colombia that are not subject to approval by Congress, any such consultation would necessarily be rejected by the Congress.

2. *Meaning of Such Consultation*

The question of the President consulting the legislature on the desirability of a proposed agreement has not come under consideration in Colombia. Since 1821, the treaty-making power has been vested in the President by the Constitution, and he is the one responsible for deciding to enter into an international agreement. Congress only approves or withholds approval of a treaty made by the President; Congress is not competent to participate in the negotiation of the treaty, by way of consultation or otherwise.

F. *Consultation with the Public*

With respect to consulting the public on the desirability of a proposed agreement, the Constitution empowers the President and his Cabinet to consult the people on decisions of national importance.[32] But so far no government has used this means in order to consult the people on a treaty.

G. *Legal Bases for Agreements Not Formally Approved by the Legislature*

The Constitution empowers the President to conduct foreign relations and to adopt treaties or conventions with other States and with international organizations. Such treaties must be submitted to Congress for approval.[33] The Constitution makes no provision for a valid international agreement that is not approved by the legislature. The Constitution empowers Congress to approve or disapprove the treaties adopted by the President with other States or entities of international law. Here, the Constitution also empowers Congress to approve treaties for the creation of international organizations for economic integration with other states, but only upon the basis of equity, reciprocity, and national benefit.[34]

The only treaties that can be put into force provisionally, without previous approval by the legislature, are those of an economic nature, entered into within the framework of an international organization; nonetheless, such agreements have to be submitted to Congress for approval immediately after their provisional entry into force.[35]

Law 7 of 1944, which regulates treaties and other international agreements, also subjects all treaties to approval by Congress.[36]

Thus, in the Colombian regime of treaties, agreements not formally approved by the legislature have no legal basis. There are agreements entered into by the government that have not been submitted to the legislature, but they are void *ab initio* and cannot be implemented internally.

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[32] Political Const., Art. 104.
[33] Political Const., Art. 189 para. 2.
[34] Political Const., Art. 150 para. 16.
[35] Political Const., Art. 224.
[36] *Leyes de Colombia*, at 14 (1944), and decision by the Supreme Court of *Gaceta Judicial*, Vol. CLII and CLIII Nos. 2393–2394, at 205 (Bogotá, 1975).

H. *Publication and Transmittal Requirements*

1. *Publication of Treaties and Other International Agreements*

According to Article 165 of the Constitution, once Congress has approved a law, the President must execute the same and order its publication as law. All treaties and other international agreements approved by Congress must be published in the Official Gazette, called the *Diario Oficial*.

However, a law approving a treaty does not enter into force until the following steps are taken: the law must be submitted by the President to the Constitutional Court for scrutiny;[37] if it is approved by the Court, the President must ratify the treaty and promulgate the law and the treaty by decree;[38] and the treaty (and approving law) then enters into force on the date of publication of the decree in the *Diario Oficial*.[39]

2. *Transmittal to the Legislature of Agreements Not Expressly Approved by It*

The government is bound to transmit to the legislature any executed treaties, in order to obtain approval from Congress. Should the government transmit a treaty to the legislature for information only, it would be returned for proper submission. There is no example of such a transmission for information only.

3. *Approval by the Legislature*

All treaties entered into by the President are confirmed by him alone. The President, with the attestation of the Minister of Foreign Affairs, then sends the treaty to Congress for approval. The treaty is attached to a presidential message setting forth the particulars of the treaty and the reasons why it should be approved. In the past there have been examples of transmittal without explanation of the particulars of the treaty, but Law 5 of 1992, which regulates the working of Congress, makes mandatory the submission of the explanation together with the treaty.

The submission is always made to the Senate, whose President sends it to the appropriate Committee of Foreign Affairs, where the Committee Chairman appoints one Senator to make a study of the treaty and propose its adoption or rejection. If the Committee votes for adoption, then the treaty is transmitted to the Senate plenary session for further discussion and approval or rejection.

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[37] Political Const., Art. 224.
[38] Law 7 of 1944, Art. 2.
[39] *Id.*

If the treaty is approved by the Senate, then it is transmitted to the Chamber of Representatives, where a similar procedure is followed.

If both chambers approve the treaty, it is sent to the President for execution, publication in the *Diario Oficial*, submission to the scrutiny of the Constitutional Court, ratification, and promulgation by decree – published in the *Diario Oficial*.

4. *Registration of Agreements with the United Nations*

As a member of the United Nations and a party to the Vienna Convention, Colombia is bound to register with the United Nations all treaties and other international agreements to which it becomes a party. However, not all of the treaties to which Colombia is a party have yet been registered with the United Nations.

5. *Publication of Treaties*

Treaties submitted by the Government to Congress are published in the Official Gazette of Congress, called the *Gaceta Oficial del Congreso*, once the treaty has come under study by the Committee of Foreign Affairs.

When the treaty has been approved by Congress and executed as law by the President, it is published in the *Diario Oficial*, and then it is sent for constitutional scrutiny to the Constitutional Court. The decision of the Court, together with the text of the treaty, is published in the *Gaceta de la Corte Constitucional*, but the treaty enters into force only when it is ratified by the President and the ratification is either exchanged or deposited.

When these formalities have been fulfilled, the President promulgates the text of the treaty in a decree, also published in the *Diario Oficial*, which sets forth the particulars of its approval by all entities concerned, and spells out the date of entry into force following the exchange or deposit of ratifications.

Finally, the approving law and the treaty itself are published in the yearly volume of *Leyes de Colombia*, which has been published almost every year since 1823.

The government has no separate collection of treaties, but the author of this essay is in the process of publishing, under the title *Tratados de Colombia*, all the Colombian treaties approved by Congress and ratified since 1811, eight volumes to date covering the years 1811–1993.

There is no publication that periodically lists and sets out the status of treaties in force, but the database of Cavelier Abogados in Bogotá maintains such a list, which is updated daily.

I. *Incorporation into National Law*

Incorporation of the contents of a treaty into national law occurs when the treaty is ratified and enters into force through the publication of the decree of promulgation. From this date, all authorities are bound to apply the treaty and to be guided by it.

The only exceptions to this rule are the decisions under the Cartagena Agreement, which are international agreements that enter into force once they are published in the *Gaceta Oficial del Acuerdo de Cartagena* in Lima, Perú, headquarters of the Andean Community Commission.[40]

J. *Legally Binding Decisions of International Organizations*

1. *Such Decisions Are Treaty Commitments*

If the decision of an organization such as the Andean Pact is enacted according to the procedures authorized by the treaty establishing the organization in question, and is legally binding on member states upon adoption by the organization, it is incorporated into national Colombian law upon promulgation by the international organization. If, however, the fundamental treaty of the organization requires that certain decisions or categories of decision be ratified by member states, such decisions will be incorporated into Colombian law only when duly approved by Congress and the Constitutional Court, ratified by the President, and promulgated by him.[41]

2. *Such Decisions Follow Separate Procedures of Incorporation*

As explained above, community law of the Cartagena Agreement enters into force as soon as promulgated by the Commission. However, other decisions of international organizations enter into force only when they have followed the procedures of executive and legislative approval of member states. This is the case, for example, with the resolutions of the International Labor Organization that, in Colombia, need to be approved by the President, Congress, and the Constitutional Court, ratified by the President, and finally promulgated by him.

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[40] *Tratado del Tribunal de Justicia del Acuerdo de Cartagena, approved by* Law 17 of 1980, *Diario Oficial*, No. 35.459 (Feb. 18, 1980).

[41] Law 7 of 1944, Art. 2.

K. *Implementation of Multilateral Conventions*

1. *Manner of Implementation*

Responsibility for the implementation of multilateral conventions does not lie with a single office, but is distributed among the different ministries and administrative departments according to their specialties: copyright, international relations, defense, education, foreign trade, communications, labor, and the like.

2. *Implementation Procedures*

The concerned ministry or administrative department must determine if the international agreement under its care is in need of implementation; if this is the case, the corresponding ministry or administrative department proposes to the President a draft decree of implementation. If the draft decree is approved, then it is enacted by the President and published in the *Diario Oficial*, whereby it enters into force.

L. *Treaty Termination*

1. *Termination of Treaties and Agreements*

The President is empowered by the Constitution to make treaties and other international agreements, and such power has been understood also to comprise the sole power to terminate treaties, without further approval.

In one case, Congress approved a treaty by law and when the treaty was terminated by the President, Congress approved another law withdrawing the approval given by the first law. This is an exceptional case regarding the 1894 arbitration with Ecuador and Peru where the parties were free to withdraw from the arbitration.

In *Germán Cavelier vs. the Minister of Foreign Affairs*, the Council of State (the administrative high court) ruled that termination of the 1892 treaty with Germany had been done unlawfully by the Minister of Foreign Affairs, and the President was obliged to denounce the treaty formally.

Termination of a treaty by denunciation or otherwise must be done through a decree published in the *Diario Oficial*.

2. *Consultation with the Legislature*

Neither the Constitution nor the law requires that the President consult the legislature on the termination of a treaty; the President acts alone in the termination or denunciation of a treaty.

3. *The Notice Provision of Denunciation Makes a Difference*
If a treaty includes a clause permitting the parties to terminate it with prior notice, the denunciation made by the President is legal. Otherwise, it is not, and the President is bound to follow the procedures set forth in Articles 65–68 of the 1969 Vienna Convention.

4. *Consultation with the Public*
The Constitution provides, in Article 170, the mechanics of a popular referendum for the repeal of a law, but it is forbidden to make one with respect to laws that approve treaties.

M. *Depositary Problems*

1. *Reservations*
As a depositary for treaties, the government of Colombia is bound to register all ratifications to a treaty as well as all reservations entered by the treaty parties at the time of deposit of the ratification in question.

2. *Succession to Treaties*
Colombia has accepted the succession of treaties perfected by the first Republic of Colombia (1821–1830) and has also recognized the succession of other state successors to any treaty to which Colombia was a party at the time.

3. *Non-Recognized Governments*
Colombia observes the treaties concluded with any state even if a state is temporarily ruled by a government that Colombia does not recognize.

N. *International Agreements Concluded by Sub-National Entities*

1. *Scope of Authority*
Sub-national entities have no international personality in Colombia and cannot conclude international agreements.

2. *Procedures for Approval by the Government*
Since sub-national entities are not allowed to enter into international agreements, there is no procedure for approval by the central national government, even if agreements were to be concluded by such entities.

III. Basic Data and Documentation

A. *National Legislation*

Annex A: Constitutional Provisions (excerpts)
Annex B: Statutory Provisions (excerpts)

B. *Selected Examples of Treaty Documents*

Annex C: Full Powers
Annex D: Confirmation of a Treaty by the President
Annex E: Message to the Legislature on Particular Treaties
Annex F: Publication of a Treaty in the *Gaceta del Congreso*
Annex G: Publication in the *Gaceta del Congreso* of the Report by the Constitutional Second Commission of the Senate
Annex H: Publication of the Law of Approval of a Treaty in the *Diario Oficial*
Annex I: Introduction to a Decision by the Constitutional Court as Published in the *Gaceta de la Corte Constitucional*
Annex J: Instrument of Ratification
Annex K: Official Proclamation of Treaties in the *Diario Oficial*

C. *Statistical Data*

1. Agreements in force for Colombia at this time: 862
2. Approved by the Legislature and pending ratification: 45
3. Executed but not approved by Congress: 1,122
4. Annual average of agreements concluded: 14

ANNEX A

CONSTITUTIONAL PROVISIONS[42]

[Author's Translation]

Article 9

The foreign relations of the State are founded on national sovereignty, in respect for the self-determination of people and in recognition of the principles of international law accepted by Colombia.

Article 93

The international treaties and conventions ratified by Congress, which recognize human rights and prohibit their limitations in the states of exception, prevail in the internal order. The rights and duties consecrated in this Charter are to be interpreted in conformity with the international treaties on human rights ratified by Colombia.

Article 104

The President of the Republic, with the signature of all the ministers and previous favorable consent of the Senate, can consult the people on decisions of national importance. The people's decision will be binding. The consultation can not be held at the same time with another election.

Article 150

It corresponds to Congress to make laws. By means of these laws it exercises the following functions:

* * *

16. To approve, or withhold approval of, the treaties that the Government enters into with other States or entities of international law. By means of those treaties the State can, upon the basis of equity, reciprocity and national convenience, partially transfer certain powers to international organizations whose purpose is to promote or consolidate economic integration with other States.

Article 164

Congress shall give priority over any other draft bills to the processing of a draft law of approval of treaties on human rights that are submitted to its consideration by the Government.

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[42] *Constitución Política de la República de Colombia, Gaceta Constitucional* No. 116, July 20, 1991.

Article 189

Corresponding functions of the President of the Republic:

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2. Direct international relations; appoint diplomatic and consular agents; receive the respective agents and conclude with other States and entities of international law treaties or conventions that must be submitted to Congress for approval.

Article 224

In order to be valid, treaties must be approved by Congress. However, the President of the Republic can give provisional application to treaties of an economic and commercial nature agreed upon within international organizations including such an application. In this case, as soon as the treaty enters provisionally into force, it must be sent to Congress for approval. If it is not approved, its application should be suspended.

Article 226

The State shall promote the internationalization of political, economic, social, and ecological relations based upon equity, reciprocity, and national convenience.

Article 227

The State shall promote economic, social, and political integration with all the other nations and particularly with the countries of Latin America and the Caribbean, through the conclusion of treaties to create supranational organizations based upon equity, equality, and reciprocity, including those to create a Latin-American community of nations.

* * *

Article 241

The guardianship of the integrity and the supremacy of the Constitution is vested in the Constitutional Court under the strict and precise terms of this article. To this end, it shall fulfill the following functions:

* * *

10. Decide definitively on the constitutionality of the international treaties and the laws approving them. To this end, the Government shall send them to the Court within six (6) days following the execution of the law. Any citizen can intervene to defend or attack its constitutionality. If the Court declares it constitutional, the Government

can make the exchange of notes [of ratification]; otherwise, it shall not be ratified. When one or several norms of a multilateral treaty are declared unconstitutional by the Constitutional Court, the President of the Republic can only express his consent [in the act of ratification] with the declaration of the corresponding reservation.

ANNEX B

STATUTORY PROVISIONS

[Author's Translation]

LAW 7 OF 1944[43]

Article 1

Treaties, pacts, conventions, agreements or other international acts approved by Congress, in accordance with Articles 69 and 116 of the Constitution,[44] shall not be considered to have the force of domestic law as long as they have not been confirmed as such by the Government, through means of the exchange of letters of ratification, the deposit of instruments of ratification, or other similar formality.

Article 2

As soon as the international obligations assumed by Colombia under a treaty, agreement, convention, etc. become binding, the Executive shall promulgate a decree in which the text of the treaty or convention referred to shall be included, as well as the text of any reservations formulated by the Government at the time of the deposit of its ratification.

Article 3

In addition to being subject to the provisions of this Act and subject to publication in the Official Journal, each decree promulgating treaties and conventions shall be published in a separate series and numbered consecutively according to the date on which the international obligation assumed by Colombia became binding.

Article 4

When a treaty, convention, agreement, etc. ceases to be in force for Colombia because of its non-validity, or for any other reason, the Executive shall issue a decree stating this fact and the date on which the treaty ceased to be valid for Colombia. These decrees shall be published as supplements to the series referred to in Article 3, and reference shall be made in the text of such decrees to their serial numbers.[45]

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[43] Law 7 of 1944, Art. 2.

[44] At the time of the passing of the Act, the Constitution of 1886, as amended, was in force. The Articles specified in the Act are now Articles 150(16) and 189(2) of the 1991 Constitution.

[45] All treaties published by Germán Cavelier in *Tratados de Colombia* (8 v.) have their own serial number.

LAW 5 OF 1992, ON REGULATION FOR CONGRESS, THE SENATE AND THE CHAMBER OF REPRESENTATIVES

V. Draft Laws on International Treaties

Article 216 – Priority Processing

Congress will give priority to the draft laws for approval of treaties on human rights sent to its consideration by the Government.

The Attorney General can request Congress to issue laws that assure the promotion, application and protection of human rights.

Article 217 – Conditions for its Processing

Proposals can be filed for non-approval, to delay entry into force and to make a reservation to international treaties and agreements.

The text of treaties cannot be the subject of modifications.

Proposals for reservations can only be made with respect to treaties and agreements that would provide for such eventuality or whose contents admit them. Such proposals, as well as those to delay entry into force, will follow the regime established for the amendments in the regular legislative procedure.

The competent commissions will present to the plenary sessions, according to general regulations, considered proposals as to the granting or rejection of the requested approval.

DECREE 2067 OF 1991, ON THE PROCEDURAL REGIME OF THE LAWSUITS AND OTHER ACTS TO BE CARRIED ON BEFORE THE CONSTITUTIONAL COURT[46]

Article 44

In lawsuits of constitutionality of treaties and their laws of approval, as per Article 241, paragraph 10 of the Constitution, the regulations regarding the control of the draft statutory laws will be applied as far as pertinent to the present matter. If the unconstitutionality would be only in part, the mentioned regulations would apply.

[The articles regarding statutory laws are:]

Article 33

If the Court considers that the draft bill is unconstitutional in part only, such a circumstance shall be indicated to the Chamber of origin of the draft in order that, upon hearing of the corresponding minister, he may redo and integrate the norm affected in such terms that would be in accordance with the opinion of the Court. Once this procedure has been carried out, the draft bill shall be sent to the Court for its final decision.

Article 40

The draft statutory bill shall be revised by the Court according to the regular procedure.

Article 41

If the draft is constitutional, the President of the Court sends it to the President of the Republic to be enacted by him. If the draft is unconstitutional totally or in part, the President of the Court shall send the draft bill to the President of the Chamber where the draft originated with the corresponding related decision. If the constitutionality is in part, the procedure of Article 33 shall apply, provided the corresponding session of the legislature has not ended.

Article 45

If the Court finds defects in the proceedings of the act subject to its scrutiny and they can be remedied or cured, it shall order that the draft be sent back to the authority that issued it in order that the defect be

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[46] *Diario Oficial* No. 40.012 of September 4, 1991.

corrected within the time indicated by the Court, if at all possible. Once the defect has been cured or the time expired, the Court shall proceed to decide on the constitutionality of the act. If the defect has not been cured in the appointed time, the law would be decreed unconstitutional.

RESOLUTION 482 OF 1953[47]

The Ministry of Foreign Affairs, in use of its legal faculties, and

CONSIDERING:

That Resolution 190 of August 5, 1950, ordered that the numbering of the treaty series of the Republic would be done from now on from the number CCCLVII onwards;

That numbers CCCLII through CCCLV of the list published by the ministry in 1950, according to Resolution 190 of 1950, correspond to pacts not yet approved by Congress, while there are other pacts already approved.

RESOLVES:

Article First

In the numbering of the Treaties and Agreements Series of the Republic the number CCCLII corresponds to the Final Act of the IX International American Conference of Bogotá, April 1948.

Article Second

In the numbering of the Treaties and Conventions Series of the Republic the number CCCLIII corresponds to the Universal Declaration of the Rights of Man, General Assembly of the United Nations, Paris, 10th December 1948.

Article Third

The next pact of the Republic that is enacted will bear the number 354 in the chronological order of its date of entry into force.

[47] On the numbering of the Treaties and Conventions of the Republic, *see* Germán Cavelier, *El Régimen Jurídico de los Tratados Internacionales en Colombia* 329 (Bogotá: 2d ed., 1985).

ANNEX C

FULL POWERS

President of the Republic

To all recipients of these letters

GREETINGS:

In order to proceed to the execution of the [treaty]

I have decided to confer full powers on [name, title] in order that he, in the name of the National Government, will proceed to execute the above mentioned instrument.

In witness thereof, I set my hand and seal it with the Seal of the Republic, confirmed by the Minister of Foreign Affairs, in the City of Bogotá, D.C., on this _____ day of _____ of two thousand and _____.

_____

(signed) President of the Republic

_____

(signed) Minister of Foreign Affairs

ANNEX D

CONFIRMATION OF A TREATY BY THE PRESIDENT

Executive Branch of the Public Power-Presidency of the Republic
Bogotá, D.C., dated as of _____

Approved. Be it submitted to the Consideration of the Honorable National Congress for constitutional effects.

_____

(signed) President of the Republic

ANNEX E

MESSAGE TO THE LEGISLATURE ON PARTICULAR TREATIES

BY THE MINISTER OF FOREIGN AFFAIRS SUBMISSION OF A TREATY FOR CONSIDERATION OF CONGRESS

EXPOSITION OF REASONS

Honorable Senators and Representatives:

In the name of the National Government, and according to Articles 150, number 16; 189, number 2; and 224 of the Political Constitution, I have the honor to submit for your consideration the treaty entitled _____ done in _____ on the _____ day of 20___.

[Text of the reasons given by the Minister]

Honorable Senators and Representatives,

_____

(Signed) Minister of Foreign Affairs

ANNEX F

PUBLICATION OF A TREATY IN THE *GACETA DEL CONGRESO*

CONGRESSIONAL GAZETTE NUMBER _____

DATE _____

DRAFT LAW NUMBER _____ YEAR _____ by means of which is approved the Treaty _____ done in _____ on the _____ day of _____ 20___.

The Congress of Colombia, having seen the text of the treaty _____ done in _____ on the _____ day of _____ 20___.

[Text of the treaty]

ANNEX G

PUBLICATION IN THE *GACETA DEL CONGRESO* OF THE REPORT BY THE CONSTITUTIONAL SECOND COMMISSION OF THE SENATE

REPORT OF THE APPOINTED SENATOR OF THE SECOND CONSTITUTIONAL COMMISSION

Report for the first hearing to the draft law number_____, Senate, of 20 _____ by means of which is approved the treaty _____ done in _____ on the _____ day of _____ of 20____.

Honorable Senators:

I comply with the honorable task of giving a report on the Draft Law Number ____, Senate, 20 ___ by means of which is approved the treaty _____ done in _____ on the day of _____ of 20___, and filed before the Congress of the Republic on the day of _____ of 20___, with the purpose of complying with Articles 150, number 16, and 224 of the Political Constitution of Colombia.

The draft law number _____, Senate of 20___, was assigned to the Second Constitutional Commission of the Senate, and published in the *Gaceta Oficial del Congreso*.

[Examination and analysis of the treaty by the appointed Senator of the Second Commission]

For the consideration above made, I take the liberty of proposing to the Honorable Second Constitutional Permanent Commission of the Senate of the Republic,

"Second hearing shall be made to the draft law number 82, Senate, of 20____" by means of which is approved the Treaty _____ done in _____ on the day of _____ of 20___.

Respectfully submitted to the Honorable Senators,

_____

(Signed) Senator

ANNEX H

PUBLICATION OF THE LAW OF APPROVAL OF A TREATY IN THE *DIARIO OFICIAL*

DIARIO OFICIAL NUMBER _____ DATE _____
Poder Público – Rama Legislativa Nacional

LAW NUMBER _____ OF 20 ___
(date)

by means of which is approved the treaty for "_____" done in _____ on the _____ day of _____ of 20___.

[Text of the treaty]

DECREES:

Article 1. The treaty _____ between the Republic of Colombia and _____ is approved.

Article 2. According to Article 1 of Law 7 of 1944, the treaty _____ _____ between the Republic of Colombia and _____, done in _____ on the _____ day of _____, of 20____ shall definitely obligate the country, from the date when the international link is perfected with respect to said treaty.

Article 3. The present law will be in force from the date of its publication.

The President of the Honorable Senate of the Republic (signed).
The President of the Honorable Chamber of Representatives (signed).
The General Secretary of the Honorable Chamber of Representatives (signed).

Republic of Colombia – National Government
BE COMMUNICATED, PUBLISHED AND EXECUTED with its previous revision by the Constitutional Court, according to article 291–10 of the Political Constitution.

Given in Bogotá, D.C. on the _____ day of _____ of 20____.
President of the Republic (signed).
Minister of Foreign Affairs (signed).

ANNEX I

INTRODUCTION TO A DECISION BY THE CONSTITUTIONAL COURT

DECISION OF THE CONSTITUTIONAL COURT ON REVISION OF A TREATY AND THE LAW WHICH APPROVED IT

Republic of Colombia

GAZETTE OF THE CONSTITUTIONAL COURT

(year)(month)Volume _____.
Sentence Nº C – dated _____ of _____ of 20____.
Title of the Treaty and its contents.
Abstract of the Decision
Ref.: File Nº L.A.T. _____
Subject: Constitutional revision of the Law _____ of 20_____ by means of which the Congress of the Republic approves the treaty, _____ done in _____ on the day of _____ of 20___.
Appointed Justice, Mr. _____.
Approved in Bogotá, on the _____ day of _____ of 20 ____, according to Act of the whole Court Nº _____ on the _____ day of _____ of 20____.

[Example of Decision by the Justices]

FIRST. To declare constitutional the "Agreement between the Government of the Republic of Colombia and the Government of the United Kingdom of Great Britain and Northern Ireland, by means of which investments are promoted and protected," done in London on 9th March 1994 and Law 246 of 1995 which approves it, excepting its article 6th which is declared unconstitutional."

ANNEX J

INSTRUMENT OF RATIFICATION

I, _____, President of the Republic of Colombia, having seen and considered the precedent treaty, and considering that the Congress of the Republic approved it by Law Number _____ of the _____ day of _____, of 20_____ and the Constitutional Court gave its assent to such Law and Treaty by decision of the _____ day of _____ of 20 ____, by these presents ratify and confirm such Treaty in each one and all of its articles.

In witness thereof, I have ordered that the Great Seal of the Republic will be affixed hereto.

Given and signed by my hand, in the city of Bogotá, today the _____ day of _____ of 20___.

(Seal) (Signed) President of the Republic

(Signed) Minister of Foreign Affairs

ANNEX K

OFFICIAL PROCLAMATION OF TREATIES

DECREE OF PROMULGATION OF A TREATY

Decree Number _____ of 20 _____ (date)

"By means of which the treaty _____ is promulgated."

The President of the Republic of Colombia, in exercise of the faculties vested on him by Article 159, number 2 of the Political Constitution and in accordance with Law 7 of 1944, and

Considering: [ ]

* * *

Decrees: [ ]

Article 1st. It is promulgated the treaty _____ done in _____ on the _____ day of _____of 20 ___, whose text is the following:

[Text of the treaty]

Article 2nd. The present Decree is in force on the date of its publication.

Be it communicated and observed.

Given in Bogotá, D.C., on this day _____ of _____ of 20___.

(Signed) President of the Republic
(Signed) Minister of Foreign Affairs

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CHAPTER SEVEN

NATIONAL TREATY LAW AND PRACTICE: EGYPT

Nabil Elaraby, Mohammed Gomaa, and Lamia Mekhemar

I. Introduction

Until recently, international agreements were the only known legal instruments of transactions between States and introduced a modicum of regulation to their interstate conduct. Egypt prides itself on the historical fact that one of the earliest known treaties was concluded between Ramses II, King of Egypt, and Khetasar, King of the Hittites, in 1272 B.C. after the battle of Kadish.[1] With an active background of treaty relationships, Egypt has developed a practice in conformity with the Vienna Convention on the Law of Treaties of 1969.[2]

A quick review of the Egyptian constitutional system may help in understanding the law and practice of treaties in Egypt. The Constitution of the Arab Republic of Egypt (the Constitution), adopted in 1971 and amended in 1980, declares that Egypt is a republic. The executive branch is headed by the President of the Republic, who formulates and supervises the implementation of general State policy. He also acts as commander in chief of the armed forces. The Prime Minister supervises the work of the Government. The ministers are collectively responsible for the general policy of the State before the People's Assembly (the Parliament), and every minister is responsible for the performance of his ministry. The Assembly may withdraw confidence from the Cabinet or any Cabinet member.

The legislative branch consists of two houses. The first is the People's Assembly (Maglis al-Chaa'b) which is the legislative branch of the State. It approves general State policy, new laws, the budget and the development

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[1] "Harvard Draft Convention on the Law of Treaties," 29 *Am. J. Int'l. L. Supp.* 657, 666 (1935).

[2] Vienna Convention on the Law of Treaties, concluded at Vienna and opened for signature May 23, 1969, 1155 *U.N.T.S.* 331 (entered into force Jan. 27, 1980), *in* 8 *ILM* 679 (1969) ("1969 Vienna Convention").

plan.[3] The second is the "Advisory Council" or Shoura Council (Maglis al-Shura) which is Egypt's consultative council.[4] It offers advice and proposes new laws and regulations to the People's Assembly.[5]

Judicial authority is exercised through four categories of courts of justice: the Supreme Constitutional Court (whose competence is confined to pronouncement on the constitutionality of laws), the Court of Cassation (which is the highest judicial body in both civil and criminal cases), the seven courts of appeal in the various governorates,[6] and the summary tribunals in the districts. The Supreme Court and Council of State review the validity of administrative decisions.

Egypt's civil legal system is based on Islamic Shariaa (law), and the Napoleonic code.

II. Egyptian Treaty-Making Law and Practice

A. *What is an International Agreement?*[7]

1. *Definition*

The Vienna Convention of 1969 is generally considered a consolidation of the existing customary international law of treaties as well as containing elements of progressive development of international law.[8] Egypt relied on the Convention's provisions as an authoritative statement of international law, even prior to its entry into force in 1980 and prior to Egypt's accession in 1981.[9] The Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations of 1986[10] has been perceived likewise by Egypt.

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[3] According to the Constitution, the People's Assembly is made up of 444 directly elected members and ten members appointed by the President, who serve for a term of five years.

[4] The first Shoura Council was established in 1829 by Mohammed Ali. It is considered the origin of parliamentary life in Egypt.

[5] Shoura (Consultation) is one of the principles of Government in Islam.

[6] Administratively, Egypt is divided into 26 governorates, each headed by a governor who is appointed by the President.

[7] The term "agreement" is used generically to indicate all consensually-binding instruments.

[8] The I.L.C. asserted that its work on the law of treaties constituted both codification and progressive development of international law. In this connection, however, it stated that "it is not practicable to determine into which category each provision falls." [1966] 2 *Y.B. Int'l L. Comm'n* 177.

[9] By virtue of Presidential Decree No. 535 of December 22, 1981, Egypt acceded to the 1969 Vienna Convention. The Convention was published in the *Official Gazette.* 10 *Off. Gazette* No. 23 (July 10, 1982).

[10] Vienna Convention on the Law of Treaties Between States and International

Article 2(1)(a) of the 1969 and 1986 Conventions defines a "treaty" as an international agreement: (1) "concluded between states, or between one or more states and one or more international organizations, or between international organizations;" (2) "in written form;" (3) "governed by international law;" (4) "whether embodied in a single instrument or in two related instruments;" and (5) "whatever its particular designation."[11]

2. *Agreements Covered by the Definition of the Vienna Conventions*

The most common appellations for consensual instruments intended to create binding obligations are "agreements" and "treaties." Nonetheless, it is not always true that such denominations are sufficient proof of the binding or nonbinding character of the instrument. Some very formal agreements have been given names that do not necessarily reflect their binding character.[12] International agreements may take a number of forms and may be given a diversity of names.[13] The parties to a single agreement may even give different designations to it.[14] Therefore, the name given to an instrument has no direct relevance as to its legal

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Organizations or Between International Organizations, concluded at Vienna March 21, 1986, U.N. Doc. A/CONF.129/15 (not yet in force), *reprinted in* 25 *ILM* 543 (1986) ("1986 Vienna Convention"). The 1986 Vienna Convention was signed by Egypt on March 21, 1986.

[11] A more pragmatic definition for international treaties that covers the broad spectrum of legally binding consensual instruments recognized in customary law is that formulated by Paul Reuter. He rightly suggests that "a treaty is an expression of concurring wills attributable to two or more subjects of international law and intended to have legal effects under the rules of international law." Paul Reuter, *Introduction to the Law of Treaties* 23 (London: Pinter Publishers, English ed., 1989).

[12] For example, the historic Agreement of December 19, 1984 by which the question of Hong Kong was settled was called the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong. Draft Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong (Sept. 26, 1984), *in* 23 *ILM* 1366 (1984).

[13] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility (Judgment)*, 1994 I.C.J. 112, 120 para. 23. Article 2 of the Vienna Conventions of 1969 and 1986 provides that a "treaty" means "an international agreement . . . *whatever its particular designation*." (emphasis added). Myres, for instance, lists 39 different names of international instruments. Denys P. Myres, "The Names and Scope of Treaties", 51 *AJIL* 574, 576 (1957). See also the explanation provided in Sir Hersch Lauterpacht's report to the I.L.C. of 1953. Sir Hersch Lauterpacht-Special Rapporteur, "Report On The Law Of Treaties To The International Law Commission" (Mar. 24, 1953), U.N. Doc. A/CN.4/63, *reprinted in* [1953] *Y.B. Int'l L. Comm'n* 90, 101.

[14] The British called the tripartite "declaration" by France, the United Kingdom and Spain of 1907 a "declaration of policy," while the French spoke of it as an "*accord*," meaning "agreement" in French. Fritz Munch, "Comments on the 1868 Draft Convention on the Law of Treaties (Non-binding Agreements)," 29 *Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht* 4 (1969).

characterization.[15] This is, more or less, the view of the Legal and Treaties Department of the Ministry of Foreign Affairs, both in theory, as stipulated in the Department's *Manual of Treaty-Making*,[16] and in practice, as demonstrated in the *Treaty Series* published by the Foreign Ministry.[17]

3. *Nonconventional Agreements*

3.a. *Agreements Concluded by Simplified Procedure*: Articles 12(2) of the Vienna Conventions of 1969 and 1986 provide for agreements that can be concluded without having to go through elaborate constitutional requirements; signature in these cases expresses final consent.[18] The Egyptian constitutional system does not, however, authorize the executive to conclude such agreements. Article 151 of the Constitution of the Arab Republic of Egypt of 1980, like earlier Constitutions,[19] requires the President of the Republic to communicate *all* international agreements, after their conclusion, to the People's Assembly, accompanied by a suitable explanatory memorandum.

3.b. *Unilateral Acts*: Egypt has had recourse to unilateral acts in the past. A significant illustration is the Unilateral Declaration of Egypt of April 24, 1957, regarding the future operation of the Suez Canal. The Declaration was registered with the United Nations and published in the *United Nations Treaty Series*.[20]

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[15] *Régime douanier entre l'Allemagne et l'Autriche*, P.C.I.J., (Ser. A/B) No. 41, at 47. In the *Aegean Sea Continental Shelf case*, a case concerning a joint communiqué (the Brussels Communiqué of May 31, 1975), the I.C.J. said:

> it knows of no rule in international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement. . . .

Aegean Sea Continental Shelf (Judgment), 1978 I.C.J. 3, 39 para. 96, *in* 60 *I.L.R.* 562, 598 para. 96. *cf.* Krystyna Marek, *Retour Sur Yalta*, 86 *R.G.D.I.P.* 482.

[16] Ministry of Foreign Affairs, Legal and Treaties Department, *Manual of Treaty-Making* (Cairo: General Authority of Governmental Printhouse, May 1990) (Arabic).

[17] Ministry of Foreign Affairs, Legal and Treaties Department, *Treaty Series* (Cairo: General Authority of Governmental Printhouse) (Arabic).

[18] *2 Y.B. Int'l L. Comm'n* 196 (1966).

[19] Under the regime of Khedive Tawfik, the 1882 Constitution was issued on February 7, 1882, but was suspended with the British occupation which abrogated the Constitution, replacing it with the 1883 Regulative Law. Demands for the nation's right to independence led Britain to issue the declaration of February 28, 1922 abolishing the British Protectorate (which had been proclaimed in 1914 at the outset of the First World War) and recognizing Egypt as an independent and sovereign State. In April 1923, the new Constitution was proclaimed. On July 23, 1952, the Revolution broke out and a Republican Regime was declared and a new Constitution was approved by plebiscite in 1956. In March 1964, a provisional Constitution was proclaimed. On September 11, 1971, the Permanent Constitution was issued. On May 22, 1980, the Constitution was amended, providing for the creation of the "Shoura Council."

[20] 265 *U.N.T.S.* 299 (1957).

B. *Allocation of Treaty Power*

1. *The Executive and the Legislature*

The conclusion of treaties is vested in the President. Article 151, paragraph 1, of the Constitution provides that he shall conclude treaties which shall have the force of law after their conclusion, ratification and publication according to the established procedure. However, the President is, as explained above, required to communicate all concluded agreements to the People's Assembly accompanied with a suitable explanation.

In many instances, the Assembly simply takes note of the agreement; its approval is not required. However, the legislature must give its approval on certain types of agreements enumerated in Article 151, paragraph 2. Those agreements include: peace treaties, alliance pacts, commercial and maritime agreements,[21] and all treaties involving modifications in the territory of the State, having connection with the rights of sovereignty,[22] or which lay upon the Treasury of the State certain charges not provided for in the budget.[23]

Furthermore, Article 195, paragraph 4, provides that the Shoura Council has to be consulted in the conclusion of peace treaties, alliances and all agreements affecting the territorial integrity of the State or those concerning sovereignty rights.

2. *The Role of the Minister of Foreign Affairs and Other Branches of Government*

Notwithstanding the express allocation of treaty-making powers to the President, the cumulative effect of Article 151, together with Articles 138[24] and 153,[25] of the Constitution is that the President may delegate those powers to different authorities within the executive branch. In this frame-

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[21] In practice this covers maritime as well as aviation agreements. *Manual of Treaty-Making*, *supra* note 16, at 4.

[22] These include agreements providing legal or juridical immunities or privileges limiting the jurisdiction of the State over persons or property.

[23] In other words, those which lay upon the Treasury of the State certain *extraordinary* charges not provided for in the budget. Under Article 121 of the Constitution, the Executive Authority shall not contract a loan, or bind itself to a project entailing expenditure of funds from the State Treasury except upon the approval of the legislature. Thus, the approval of the People's Assembly of agreements concluded by the Executive Authority is a means of review and control.

[24] Article 138 stipulates that the President of the Republic, in conjunction with the Government, shall lay down the general policy of the State and supervise its implementation in the manner prescribed in the Constitution. Arab Republic of Egypt Constitution Art. 138 ("Egypt Const.").

[25] Articles 153 stipulates, *inter alia*, that: "The Prime minister shall supervise the work of the Government." Egypt Const. Art. 153.

work, Law No. 453 of 1955 on the organization of the Ministry of Foreign Affairs provides that the ministry shall undertake the communications, consultations and negotiations for concluding all international agreements, and the supervision of their implementation, interpretation and denunciation in conjunction with other ministries and departments. Furthermore, the Decree of the Cabinet of Ministers of September 21, 1955 on the organization of the Ministry of Foreign Affairs provides that the Legal and Treaties Department is entrusted with the preparation of the drafts of international agreements, all measures necessary for their conclusion, publication, and registration in the ministry or with other international organizations, and the procedures for their denunciation.

It is important to note, however, that despite the delegation of authority to other executive levels, agreements still have to be ratified by the President.[26] It is important to note also that officials other than the Prime Minister and the Minister of Foreign Affairs have to acquire full powers from the Minister of Foreign Affairs before they can sign agreements which they have negotiated.[27]

C. *Stages of Conclusion of Agreements*

The conclusion of agreements in the Egyptian legal system goes through different stages following those prescribed by international law. These stages may vary according to whether the agreements are bilateral or multilateral. Although many of the procedures described hereunder are applicable to both bilateral and multilateral agreements, there remain several important differences in the procedures for concluding multilateral agreements and bilateral ones – especially the negotiation phase and its mechanisms, the final consent to be bound, the entry into force, and the deposit of ratification, accession or other relevant instruments.

1. *Negotiation, Drafting, Revision and Adoption*

The negotiation of agreements is undertaken by the different departments of the Ministry of Foreign Affairs or the missions of Egypt abroad.[28] They are also carried out by other ministries, according to the subject of the agreement.

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[26] *See* Annex D.

[27] *See* Annexes B and C.

[28] Egypt has over 150 embassies and consulates and other diplomatic missions around the world.

1.a. *The Elements of the Agreement*: The Egyptian legal system has no particular requirements, except in limited cases, with respect to the different elements of an agreement. Nevertheless, there are some practical points which drafters are recommended to observe in Egyptian practice.

First, regardless of the fact that the name or title of an agreement does not necessarily determine its legal status, the label given to the agreement should, as much as possible, reflect its type and subject area.

Second, unlike preambles of multilateral agreements, most preambles of bilateral agreements include the names of the two contracting parties, an indication of the object and purpose of the agreement, the names of the representatives of each party and a reference to the exchange of documents of full powers.

Third, final provisions deserve special attention as they include provisions on ratification and entry into force which have to conform to constitutional requirements. For example, because Articles 121 and 151 of the Constitution require approval by the People's Assembly as a condition for the ratification of certain agreements, negotiators should make no reference in an instrument to the effect that it does not need ratification, nor should they include any reference implying that the parties waive their right to ratification. Equally, an agreement must not state that it will enter into force before ratification. If, in the case of bilateral agreements, the other party does not subject its agreements to ratification, the usual drafting formula in such cases is a reference to the effect that the agreement enters into force upon the completion of the constitutional procedures of the parties.

Multilateral agreements usually provide that final acceptance of the agreement occurs by any means expressing a party's consent to be bound by the agreement, which is interpreted by the Egyptian legal system as meaning ratification by the President and approval by the legislature.

1.b. *Language*: All bilateral agreements entered into by Egypt have to be in Arabic. If they were negotiated and drafted in a foreign language, they must have an authentic Arabic version. It is usually mentioned in the final provisions of an agreement that both parties' languages are equally authentic. The parties usually designate a common language that would prevail in case differences of interpretation arise.

Multilateral agreements represent a different case. For those concluded within the United Nations, we can distinguish between two different cases *ratione temporis*. Agreements concluded after the admission in 1976 of Arabic as one of the six official languages of the organization have an authentic Arabic version. As for those concluded before 1976, there is an ongoing effort by the Secretariat of the United Nations to produce official

translations of those agreements which were not concluded in Arabic. Similar efforts exist in other international organizations to which Arabic has become an official language.

As for multilateral agreements concluded in fora where Arabic is not one of the languages of the agreement, the Egyptian authorities are required to translate them into Arabic in order to proceed with the constitutional requirements.

1.c. *Consultation with the Public*: It is not common for the public to be consulted on the conclusion of agreements. However, sometimes the Government may wish to be guided or enlightened by the general public. For example, the Government sought public approval for the Treaty of Peace with Israel,[29] where the process of consultation was carried out through a referendum conducted on April 11, 1979. In the subsequent ratification instrument to the Treaty, President Sadat referred to the "approval of the people of Egypt expressed in the referendum."[30] A more recent example is the negotiation concerning the draft Agreement Establishing a Euro-Mediterranean Association between the European Communities and their Member States and the Arab Republic of Egypt. In view of the importance of the subjects covered by that multifaceted draft agreement, the Egyptian negotiator sought public comment by convening seminars and publicizing the draft in the press. The same procedure is equally applicable to multilateral agreements.

1.d. *Revision of Drafts*: All agreements are to be presented to the Permanent Committee for the Drafting and Revision of Treaties and International Agreements before their signature. According to Presidential Decree No. 117 of January 31, 1957, which established the Committee, the Committee is headed by the director of the Legal and Treaties Department of the Ministry of Foreign Affairs or one of his representatives, with membership made up from representatives of the ministries with competence in the subject matter of the agreement.[31] Although the opinion of the Committee is of a consultative, nonbinding nature, it must give its opinion on every agreement and suggest amendments if necessary.

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[29] Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, March 26, 1979, *in* 18 *ILM* 362 (1979).

[30] Unofficial translation of the instrument of ratification signed on April 21, 1979.

[31] The Prime Minister issued Order No. 148 (1984), *amended by* Order No. 395 (1984), nominating the members of the Committee for the revision of agreements and international loans.

2. *Signature*

According to the Constitution, the President of the Republic is the authority entrusted with signing agreements on behalf of Egypt. This power has been delegated to the Prime Minister and the Minister of Foreign Affairs. Ambassadors accredited to foreign States or international organizations can also sign agreements on behalf of Egypt. In practice it is the Minister of Foreign Affairs who signs agreements or issues full powers authorizing officials of other ministries or departments to conclude an agreement on behalf of Egypt. The documents of full powers are prepared by the Legal and Treaties Department.

In bilateral agreements, there is no uniform model for signature. As a practice, in addition to including the two signatures of the representatives of the contracting parties, agreements to which Egypt is a party usually stipulate that the empowered representatives have signed the agreement after the exchange of their documents of full powers. As to the precedence of the names of the parties in the preamble and the order of signature, the Egyptian drafter follows the conventional rule of alternation (each party's copy bears its name mentioned before the other party's name). After the exchange of full powers with the other party and the signature of the agreement, the Egyptian representative will submit the full powers of the other party together with the original of the agreement to the Legal and Treaties Department, which in turn will undertake the necessary preparations for constitutional procedures.

Egyptian practice acknowledges *ad referendum* initialing and signature. The Egyptian legal system does not, however, recognize final signature not requiring ratification.

3. *Ratification*

All agreements concluded in Egypt are generally subject to ratification. In Egypt it is the President who is vested with ratifying agreements to which the country will become a party in accordance with Article 151 of the Constitution. In practice, the process of ratification works through a set of procedures executed by the ministries or departments which have signed the agreement, the Legal and Treaties Department, and the Cabinet of Ministers.

After the original copy of the agreement is signed by the duly authorized representative, it is submitted to the Legal and Treaties Department. The Legal and Treaties Department then furnishes the Prime Minister with an explanatory memorandum containing a summary of the agreement and highlighting its important provisions. It also prepares a ratification document and a draft presidential decree for the approval of the

agreement.[32] These documents must first be signed by the Minister of Foreign Affairs and then sent to the Cabinet of Ministers. Copies are also sent to the ministry or department which signed the agreement, the relevant department within the Ministry of Foreign Affairs and the Egyptian embassy in the other party's country (or Egypt's representative to the concerned international organization).

The Cabinet of Ministers then submits the agreement to the People's Assembly or the Shoura Council,[33] as the case may require. After the approval of the Assembly, the Cabinet furnishes the Legal and Treaties Department with the Assembly's approval document, the ratification instrument, the presidential decree approving the agreement, and certified copies of the agreement. One certified copy of the agreement will be published in the *Official Gazette*.

There are, however, some agreements that are exempt from ratification. Those are agreements concluded to complement an earlier one (such as annexes or addenda to aerial transportation agreements) and implementation protocols of ratified agreements (like executive programmes of technical or cultural cooperation agreements). These agreements become binding from the date of their signature, and the Minister of Foreign Affairs issues an order for their publication in the *Official Gazette*.[34]

4. *Accession, Approval and Acceptance*

Accession, approval and acceptance are means of expressing consent to be bound by multilateral agreements.[35] They are treated by the Egyptian legal system exactly the same as ratification and approval by the legislature for purposes of constitutional procedures. Instruments of ratification, accession, approval or acceptance in multilateral agreements are naturally deposited with the depositary designated by the agreement. The notification of the deposit of the instrument is sent to the Legal and Treaties Department of the Ministry of Foreign Affairs, which in turn notifies the concerned ministries or departments.

5. *Bilateral Agreements Concluded by Exchange of Letters*

The conclusion of bilateral agreements through an exchange of letters entails a variation from the procedures described above. Its basic characteristic is that the signatures do not appear in one but two separate

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[32] *See* Annexes D and F.

[33] As a consultative body the Council is only consulted in certain cases, *see* Section I, *supra*.

[34] *See* Annex H.

[35] *See* Annex G.

documents. The agreement, therefore, lies in the combination of both instruments, each party being in possession of one signed by the representative of the other. In practice, the second letter generally, if not invariably, reproduces the text of the first one, to which it answers.[36]

Each party usually uses language to the effect that it accepts the proposal of the other party and that its letter and the answer to it constitute an agreement. Unlike many legal systems which do not subject agreements concluded by exchange of letters to legislative procedures, such agreements are subject to ratification in Egypt in accordance with Article 151 of the Constitution and are submitted to the legislature as far as they fall in the category of agreements that have to be approved by the People's Assembly.

D. *Reservations and Declarations*

Whenever a multilateral agreement to which Egypt may become a party is brought to the attention of the Legal and Treaties Department of the Ministry of Foreign Affairs, it will convene the Permanent Committee for the Drafting and Revision of Treaties and International Agreements with a view to obtaining its opinion on the adherence to the treaty and whether there is a need to formulate reservations or declarations.[37] If there is a decision to make reservations or declarations, the Department is responsible for the preparation (and, where appropriate, the formulation) of the instruments of reservation or declaration. It is also entrusted with their notification to the depositary and their withdrawal after consultation with the competent authorities. The Department is also responsible for notifying the depositary of the acceptance of or objection to reservations formulated by other parties.

E. *Entry into Force*

There are several ways in which an agreement may enter into force, the most frequent of which are the following.

First, an agreement may enter into force upon the exchange of instruments of ratification.[38] After each of the parties has notified the other that it has concluded its constitutional requirements, a date is fixed for the exchange of the instruments. If the event takes place in Egypt,[39] the

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[36] Reuter, *supra* note 11, at 48.
[37] *Cf.* note 31, *supra*, and accompanying text.
[38] *See* Annex E.
[39] Usually the exchange of ratification instruments takes place in the country where the agreement was concluded.

Director of the Legal and Treaties Department exchanges the instruments on behalf of Egypt. Sometimes, however, the Foreign Minister himself exchanges the documents to note the importance of the agreement. In either case, the Legal and Treaties Department prepares minutes for the event and keeps them with the instrument of ratification of the other party.

An agreement may also stipulate that it enters into force upon the conclusion of the constitutional requirements of the parties. In this case, the parties notify each other of the date of such conclusion. The later date is the one on which the agreement enters into force.

As mentioned above, the Egyptian legal system does not generally recognize final signature without ratification.[40] However, agreements may enter into force upon signature in specific cases. The Egyptian legal system does not, in principle, accept provisional application before ratification. The only exception is for cases of obvious special urgency where an agreement may enter into force temporarily upon signature pending its ratification. In cases where the application of agreements requiring parliamentary approval cannot suffer delay, the President may ratify them and issue a decree of approval having the "power of law" in accordance with Article 147 of the Constitution. He must, however, submit such decrees to the Assembly within 15 days from their date of issue. In case of parliamentary dissolution or recess, the President shall submit the decrees to the first meeting of the People's Assembly.[41]

F. *Publication and Entry into Force on the National Plane*

Egypt is among those States that have adopted a "dualistic" theory of the supremacy of international rules over internal, domestic rules. According to Article 151, paragraph 1, of the Constitution, agreements "shall have the force of law after their conclusion, ratification and publication according to the established procedure." This provision means that international agreements are passed into law on the internal level and applied by the courts as such without any previous transformation. The Court of Cassation[42] has ruled that agreements entered into by Egypt shall have the full authority of national legislation.[43] As a result of the conclusion of a treaty, the Government is under a legal obligation to adapt the relevant provisions of national law to be consistent with the international

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[40] *See* Section II.C.2, *supra.*

[41] Egypt Const. Art. 147, para. 2.

[42] Equivalent to the Supreme Court in the United States.

[43] "Judgment No. 137" (Mar. 8, 1956), Cass. Repertoire of Decisions, pt. III, at 274, *in* 23 *I.L.R.* 472 (1956).

obligations arising from the agreement. Egyptian courts have enforced treaty obligations with which earlier national legislation was incompatible on the basis of the rule *lex posteriori derogat lex priori*.

After all the preceding procedures have been exhausted, the Minister of Foreign Affairs issues an order – prepared by the Legal and Treaties Department – for the publication of the agreement in the *Official Gazette*, indicating the date of the agreement's entry into force.

G. *Registration*

1. *The United Nations*

Article 102 of the Charter stipulates that every treaty and international agreement shall be registered with the United Nations Secretariat. The Legal and Treaties Department of the Ministry of Foreign Affairs is responsible for such registration.

In practice the parties to an agreement either entrust one party to register their agreement or decide to register their agreement simultaneously. However, political difficulties may sometimes arise over this technicality. For example, in connection with the Treaty of Peace between Egypt and Israel, prolonged negotiations on the order of registration led to the separate registration of the Treaty by each party.[44]

2. *The League of Arab States*

According to Article 17 of the Charter of the League of Arab States, members are requested to register all international agreements with the Secretariat-General.[45] As in the case of registration with the United Nations, the Legal and Treaties Department of the Ministry of Foreign Affairs undertakes the preparations for registration with the League.

H. *Denunciation*

Law No. 453 of 1955 on the organization of the Ministry of Foreign Affairs provides, *inter alia*, that the Ministry shall undertake the denunciation of international agreements in conjunction with other ministries and departments. The Decree of 21 September 1955 on the organization of the Ministry of Foreign Affairs further provides that the Legal and Treaties

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[44] The registration of Egypt appears in *United Nations Treaty Series*, 1136 U.N.T.S. 100; the registration of Israel appears in the *United Nations Treaty Series*, 1138 U.N.T.S. 59.

[45] Arab League Charter (Mar. 22, 1945), *available at* http://www.192.203.180.62/mlas/charter.html.

Department, in particular, is entrusted with undertaking the procedures for denunciation.

Some particular applications of denunciation may reveal Egyptian practice in this respect.[46]

The power to denounce treaties is vested in the executive authority represented by the President. Article 151 of the 1980 Constitution, like earlier constitutions, stipulates that "[t]he President of the Republic shall conclude treaties and communicate them to the People's Assembly, accompanied with suitable clarifications. They shall have the force of law after their conclusion, ratification and publication according to the established procedure."[47] Although the article does not mention other activities related to the treaty-making power (such as responding to a breach) in particular, it is uncontroverted that all acts relating thereto are within the authority of the President. Accordingly, when President Sadat abrogated the Treaty of Friendship and Cooperation with the Soviet Union,[48] even those few members of the People's Assembly who voted against the decision never contested the President's powers to abrogate the treaty. They proceeded to explain their opposition on other substantive grounds.[49] Similarly, President Gamal Abdel-Nasser issued a Presidential Decree on January 1, 1957, abrogating the 1954 Agreement with the United Kingdom upon the latter's violation of the Agreement.

However, case law and practice demonstrate that the legislative body[50] may also exercise the right to terminate or suspend treaties.

Egyptian treaty practice reveals that, even before the adoption of the 1969 Vienna Convention, on numerous occasions Egypt, although an

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[46] The grounds for termination or suspension of treaties are included in Part V, Section 3 of the 1969 Vienna Convention on the Law of Treaties. These are termination of a treaty under its provisions or by consent of the parties (Article 54); reduction of the parties to a multilateral treaty below the number necessary for its entry into force (Article 55); denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal (Article 56); suspension of the operation of a treaty under its provisions or by the consent of the parties (Article 57); suspension of the operation of a multilateral treaty by agreement between certain of the parties only (Article 58); termination or suspension of the operation of a treaty implied by conclusion of a later treaty (Article 59); termination or suspension of the operation of a treaty as a consequence of its breach (Article 60); supervening impossibility of performance (Article 61); fundamental change of circumstances (Article 62); severance of diplomatic or consular relations (Article 63); and emergence of *jus cogens* (Article 64).

[47] Egypt Const. Art. 151.

[48] Union of Soviet Socialist Republics-United Arab Republic: Agreement On Friendship And Cooperation, May 27, 1971, Arts. 6, 8 (entered into force July 1, 1971), *in* 10 *ILM* 836 (1971).

[49] 39 People's Assembly of the Arab Republic of Egypt, Official Verbatim Records (Mar. 15, 1976) ("People's Assembly Mar. 15, 1976").

[50] When acting under an "extra-legislative" power.

injured party, has not proceeded to terminate or suspend a treaty *vis-à-vis* the defaulting party.[51] Sometimes, however, it has done so. For example, Egypt abrogated the Agreement of October 19, 1954 with the United Kingdom after the latter's attack was regarded by Egypt as a violation of the Agreement by Britain.[52]

In another example, Egypt considered the Soviet Union as having breached Articles 6 and 8 of the Treaty of Friendship and Cooperation concluded between them on May 27, 1971 – according to which the Soviet Union was duty-bound to help Egypt build its defense forces – by the former's reluctance to provide Egypt with more advanced weapons and spare parts for Soviet equipment already in Egypt's possession.

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[51] Before the Peace Treaty of 1979, Israel persistently violated the Fourth Geneva Convention of 1949 *vis-à-vis* Egypt by, *inter alia*, bombarding cities, killing civilians, and exploiting natural resources of occupied territories for purposes of the Israeli national economy. Egypt, however, did not terminate or suspend the operation of the Convention vis-à-vis Israel.

[52] The Egyptian Presidential Decree of January 1, 1957, abrogating the Agreement, declared that it "has been terminated by the said attack and with effect from the date on which it took place." Presidential Decree Abrogating 1954 Agreement With The United Kingdom (Jan. 1, 1957), *translation from the official source provided in* 51 *Am J Int'l L.* 672 (1957).

III. Basic Data and Documentation[53]

A. *National Legislation*

Annex A: Excerpts from the 1980 Constitution of the Arab Republic of Egypt

B. *Selected Examples of Treaty Documents*

Annex B: Model Full Power Authorizing Signature of any Agreements resulting from Negotiations
Annex C: Model Full Power Authorizing Signature of a Specific Agreement
Annex D: Model Instrument of Ratification
Annex E: Exchange of Instruments of Ratification
Annex F: Model Presidential Decree
Annex G: Model Instrument of Accession
Annex H: Model Order of Publication

[53] All documents hereunder constitute unofficial translations by the authors.

ANNEX A

THE 1980 CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT

Article 138

The President of the Republic in conjunction with the government shall lay down the general policy of the state and supervise its implementation in the manner prescribed in the Constitution.

Article 147

In case it becomes necessary, during the recess between the sessions of the People's Assembly, to take measures which cannot suffer delay, the President of the Republic shall issue decisions in their respect, which shall have the force of law.

Such decisions must be submitted to the People's Assembly within 15 days from their date of issuance if the Assembly is standing.

In case of dissolution or recess of the Assembly, they shall be submitted at its first meeting.

In case they are not submitted, their force of law disappears with retroactive effect, without need for issuing a decision to this effect.

If they are submitted and are not ratified, their force of law disappears with retroactive effect, unless the Assembly ratifies their validity in the previous period or settles their effects in another way.

Article 151

The President of the Republic shall conclude treaties and communicate them to the People's Assembly, accompanied with a suitable clarification.

They shall have the force of law after their conclusion, ratification and publication according to the established procedure.

However, peace treaties, alliance pacts, commercial and maritime and all the treaties involving modifications in the territory of the State, or having connection with the rights of sovereignty, or which lay upon the Treasury of the State certain charges not provided for in the budget, must acquire the approval of the People's Assembly.

Article 153

The government shall be the supreme executive and administrative organ of the State. It shall consist of the Prime Minister, his deputies, the Ministers and their deputies. The Prime Minister shall supervise the work of the government.

ANNEX B

FULL POWERS TO SIGN THE OUTCOME OF NEGOTIATIONS

The Minister of Foreign Affairs:

hereby AUTHORIZES/DELEGATES (name), (occupation), in signing agreements ensuing from the negotiations between the Arab Republic of Egypt and (name of other party) pending ratification.

He/She will be duly authorized with the necessary prerogatives therefor.

In witness thereof we signed this instrument at Cairo on the seventh day of the month of July 2004.

/s/The Minister of Foreign Affairs

ANNEX C

FULL POWERS TO SIGN AN AGREEMENT

The Minister of Foreign Affairs:

hereby AUTHORIZES/DELEGATES (name), (occupation), in signing the (name of the agreement) between the Arab Republic of Egypt and (name of other party) SUBJECT TO/PENDING ratification.

He/She will be duly authorized with the necessary prerogatives therefor.

In witness thereof we signed this instrument at Cairo on the seventh day of the month of July, 2004.

/s/The Minister of Foreign Affairs

ANNEX D

INSTRUMENT OF RATIFICATION BY THE PRESIDENT OF THE REPUBLIC

In the name of the People
Mohammed Hossni Mubarek
President of the Arab Republic of Egypt

After consulting the (name of the agreement) between the Arab Republic of Egypt and (name of other party) signed at (city) on (date) annexed to this instrument,

and the approval of the People's Assembly,[54]

whereas we accept agreement in whole and each of its articles,

there, by virtue of this instrument, we declare that we accept it, indorse it, and ratify it.

In witness whereof we signed this instrument and ordered that it receive the seal of the Republic.

Cairo on 11 of Ramadan 1401 (Higra) equivalent to 7 July 1981 (A.D.).

By the order of

the President of the Republic
/s/

the Minister of Foreign Affairs
/s/

[54] If the agreement does require the approval of the People's Assembly, this phrase does not appear in the ratification instrument. If the agreement requires the consulting of the Shoura Council the phrase "after consulting the Shoura Council" is added.

ANNEX E

EXCHANGE OF INSTRUMENTS OF RATIFICATION

The undersigned (name), Ambassador of (country) in Egypt, and (name), Director of the Legal and Treaties Department, have exchanged on Tuesday, 7 July 2004 the instruments of ratification of the (name of the agreement) between the Governments of (name of other party) and the Arab Republic of Egypt signed at (city) on (date).

Signed at Cairo, Wednesday, 2 July 2004 in two originals in (language of other party) and Arabic, both being equally authentic.

/s/On the behalf of the Government of (name of other party).

/s/On the behalf of the Government of the Arab Republic of Egypt.

ANNEX F

DRAFT PRESIDENTIAL DECREE

Decree
of the President of the Arab Republic of Egypt
no. . . . for the year 1981

in respect of the approval concerning the agreement of (name) between the Arab Republic of Egypt and (name of other party) signed at (city) on
(date)

The President of the Republic,

after consulting paragraph . . .[55] of Article 151 of the Constitution,[56]

decides

to accept the agreement of (name) between the Arab Republic of Egypt and (name of other party) signed at (city) on (date) pending ratification.

/s/The President of the Republic

[55] If the agreement does not require the approval of the People's Assembly, reference should be made to paragraph 1. If, however, the agreement requires such approval reference should be made to paragraph 2.

[56] If the Shoura Council has to be consulted the phrase "and in accordance with Article 195, paragraph 4, of the Constitution" should be added.

ANNEX G

INSTRUMENT OF ACCESSION

No. 78–32–2 21 September, 1998

Mr. Secretary-General,

I have the honour to inform you that the Government of the Arab Republic of Egypt has taken the decision to accede, pending ratification, to (name of the agreement) signed at (city) on (date).

The present notification is done in conformity with Article (number) of the above-mentioned agreement.

Please accept Excellency the assurances of my highest consideration.

/s/Minister of Foreign Affairs

H.E. (name)
Secretary-General of the United Nations
New York

ANNEX H

ORDER OF PUBLICATION

The Minister of Foreign Affairs,

After consulting Presidential Decree (No.) of (date) concerning the approval of the (name of the agreement) between the Arab Republic of Egypt and (name of other party) signed at (city) on (date),

the approval of the People's Assembly on (date), and

the ratification by the President of the Republic on (date),

decides

that the (name of the agreement) between the Arab Republic of Egypt and (name of other party) signed at (city) on (date) shall be published in the *Official Gazette*, and that it shall be effective from the date of (date).

Issued on (date),

/s/Minister of Foreign Affairs

IV. Bibliography

Abbreviations

Am J. Int'l L	American Journal of International Law
I.C.J.	International Court of Justice
I.L.C.	United Nations International Law Commission
ILM	International Legal Materials
I.L.R.	International Law Reports
Cass.	Repertoire of Decisions of the Egyptian Court of Cassation
P.C.I.J.	Permanent Court of International Justice
R.G.D.I.P.	Revue Générale de Droit International Public
U.N. Doc.	United Nations Document
U.N.T.S.	United Nations Treaty Series
Y.B. Int'l Comm'n	Yearbook of the International Law Commission

Agreements, Documents and Treaties

Draft Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong (Sept. 26, 1984), *in* 23 *ILM* 1366 (1984).

Lauterpacht, Sir Hersch, *Report on the Law of Treaties to the International Law Commission*, 2 *Y.B. Int'l L. Comm'n* 101 (1953), U.N. Doc. A/CN.4/63.

Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, March 26, 1979, *in* 18 *ILM* 362 (1979).

Union of Soviet Socialist Republics-United Arab Republic: Agreement on Friendship and Cooperation, May 27, 1971 (entered into force July 1, 1991) *in* 10 *ILM* 836 (1971).

Vienna Convention on the Law of Treaties, concluded at Vienna and opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) *in* 8 *ILM* 679 (1969).

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, concluded at Vienna March 21, 1986, U.N. Doc. A/CONF.129/15 (not yet in force), *in* 25 *ILM* 543 (1986).

CHAPTER EIGHT

NATIONAL TREATY LAW AND PRACTICE: FRANCE

*Pierre Michel Eisemann**
Raphaële Rivier

I. Introduction

The French Constitution of October 4, 1958[1] devotes an entire section (section VI) to treaties and international agreements. Section VI is composed of four Articles. Article 52 relates to the authorities of the President of the Republic. Article 53 provides for the intervention of the Parliament, which can however be replaced by direct consultation of the citizens in compliance with Article 11 of the Constitution. Article 54 indicates when the Constitution must be amended. Finally, Article 55 determines the status of international agreements in domestic law.

The Constitution has to be read in light of the guidelines issued by the Prime Minister, dated May 30, 1997, relating to treaty making.[2]

As of January 1, 2004, 6,730 international agreements to which France is party were in force: approximately 30 percent were multilateral agreements (1,620) and 70 percent were bilateral agreements (4,950); the remainder were EC treaties and agreements with international organizations (160). In 2003, 103 conventions were published (29 multilateral conventions, 2 agreements with an international organization and 72 bilateral treaties or agreements).

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* An earlier version of this contribution was written by Pierre Michel Eisemann and Catherine Kessedjian for Monroe Leigh and Merritt R. Blakeslee (eds.), *National Treaty Law and Practice (France, Germany, India, Switzerland, Thailand, United Kingdom)* (American Society of International Law, 1995).

[1] *See* text of the Constitution, Annex A.

[2] *See* text of the guidelines (*Circulaire du 30 mai 1997 relative à l'élaboration et à la conclusion des accords internationaux, Journal officiel de la République française*, 31 mai 1997, p. 8415), Annex B.

II. Discussion

A. *Definitions*

While French law does not contain a definition of treaty or international agreement, it draws a distinction between treaties (*traités*) and international agreements (*accords internationaux*).

The word "treaty" has a narrow meaning in French Constitutional law: treaties are negotiated and ratified by the President of the Republic on behalf of the State.[3] In contrast, "international agreements" are negotiated by the Government and further approved by it, rather than ratified. Thus, ratification is required only for treaties in solemn form concluded on behalf of the State. International agreements concluded in the name of the Government are subject to approval.

The Constitution does not specify which agreements must be ratified or approved. The option of concluding treaties in solemn form is guided by various criteria: the previous practice, the necessity of the other party to use such a procedure, or policy considerations that lead to granting solemnity to the engagement. Nevertheless, ratification and approval are subject to the same conditions: pursuant to Article 53, treaties as international agreements may require legislative authorization prior to their ratification or approval by the Executive. Moreover, since ratification and approval both express a consent to be bound, the international legal consequences are the same regardless of whether an international agreement is ratified or approved.

Ratification and approval are always preceded by a signature. This requirement excludes the category of simplified form agreements from French law (i.e., agreements that enter into force upon signature). Only accession to an agreement can occur without any signature. Accession, which is not referred to in the Constitution, is subject to the conditions mentioned in Article 53 for ratification and approval.

However, in practice, France is internationally bound by agreements in simplified form. But, a signature not being subject to ratification or approval is legally possible according to national law only if the agreement does not concern a matter which, under Article 53 of the Constitution, requires parliamentary authorization before ratification or approval.

Besides international conventions concluded on behalf of the State or the Government, French practice admits a category which is unknown under international law, called *arrangements administratifs*. These agreements

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[3] *See* Constitution of October 4, 1958, Art. 52.

are concluded by governmental agencies and their counterparts. They only deal with matters within the scope of activities of the agency concerned. In principle, the purpose of these *arrangements administratifs* is simply to implement or complement an existing agreement. They do not bind the State, only the signatory agency. As such, they are not registered with the United Nations Secretariat under Article 102 of the Charter.

Thus, in France, international conventions take the form of treaties, which are ratified on behalf of the State by the President of the Republic, and international agreements, which are approved on behalf of and by the Government.

B. *Authorities Vested with Treaty Making Power: The Monopoly of the Executive*

The Executive has a major role in the conclusion of international agreements and treaties: the President and the Ministry of Foreign Affairs on behalf of the Government are the sole authorities empowered to conclude international agreements.

1. *The President of the Republic*

Pursuant to Article 52 of the Constitution of 1958, "[t]he President of the Republic shall negotiate and ratify treaties. He shall be informed of any negotiations for the conclusion of an international agreement not subject to ratification."[4]

Thus the role of the President of the Republic is distinguished from that of the Government. The President has the power to negotiate treaties. However, Article 52 is construed to permit the President to delegate his negotiating power. He may do so by signing a document called a *lettre de pleins pouvoirs*, which, when countersigned by the Government, permits the President's delegate to negotiate a treaty on his behalf.[5] There has only been one case in which the President has personally negotiated a treaty: the negotiation of the Franco-German Cooperation Treaty dated January 22, 1963, between Général de Gaulle and Chancellor Adenauer. In practice, the President intervenes formally in negotiations only when necessary to settle a disagreement.

The President also has the power to sign treaties. In practice, the President rarely signs a treaty himself; he usually designates a representative

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[4] *See* Constitution of October 4, 1958, Art. 52 ("Le Président de la République négocie et ratifie les traités. Il est informé de toute négociation tendant à la conclusion d'un accord international non soumis à ratification.").

[5] *See* Annex D, delegation of *pleins pouvoirs* by the President to an Ambassador.

for that purpose to whom he grants full powers to act on his behalf.[6] He may also enter into non-binding agreements with other political representatives. In this case, it is understood that the parties to the agreement may decide, for practical reasons, not to be bound.[7]

Finally, the President of the Republic, as the head of foreign affairs, has the power to ratify treaties. The mere act of signing a treaty is not sufficient to bind the State; only the President's ratification, which expresses the consent of the State to be bound, can do so. However, a treaty need not be enacted into French domestic law in order to have binding force internationally. This prerogative of the President is consistent with worldwide practice, with the 1969 Vienna Convention,[8] and with French constitutional tradition.[9]

Letters of ratification take the form of a document in which the President declares his approval of the treaty and agrees to bind the State to its provisions.[10] After the President signs the document, it is countersigned by the Government,[11] the Seal of the Republic is affixed to it, and the text of the treaty is attached. Letters of ratification are exchanged between the parties to bilateral treaties; if the treaty is multilateral, the ratification document is sent to the depositary.

2. *The Government*

Pursuant to Article 52 of the Constitution, treaty-making power is vested in the President of the Republic. However, only treaties in solemn form are negotiated in the name of and ratified by the President. Most of the conventions concluded by France (about two thirds) are international agreements negotiated by the Government itself, the President being nevertheless "informed of any negotiations for the conclusion of an international agreement not subject to ratification."[12]

These international agreements are negotiated on behalf of the Government by plenipotentiaries authorized to do so by the Minister of Foreign Affairs. He empowers the negotiators through *pouvoirs simples*.[13] Such agree-

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[6] *See* Annex D.

[7] *See* Agreement on the European Monetary System, Moscow Declaration, dated October 17, 1975, on the development and cooperation of France and the USSR; the British-French declaration, dated June 23, 1976; Final Act of Helsinki, dated August 1, 1975.

[8] *See* Vienna Convention on the Law of Treaties, Art. 2.

[9] *See* Constitutional law of July 16, 1875, Art. 8 (Third Republic); Constitution of October 27, 1946, Art. 31–1 (Fourth Republic).

[10] *See* Annex F, Ratification of the Maastricht Treaty by the President of the Republic.

[11] *See* Constitution of October 4, 1958, Art. 19.

[12] *See* Constitution of October 4, 1958, Art. 52.

[13] *See* Annex E, delegation of *pouvoirs simples* by the Minister of Foreign Affairs to an ambassador.

ments are not ratified by the President of the Republic but only approved in the name of the Government by the Minister of Foreign Affairs.

Since the Decree of December 25, 1810, the Ministry of Foreign Affairs has a monopoly on international relations. Therefore, in principle, no Government member may enter directly into an international agreement pertaining to the operation of his agency or to the development of activities subject to international cooperation. Nevertheless, the above-mentioned practice of *arrangements administratifs* shows that there is some reluctance to follow this rule, especially in the case of the Ministries of Finance, Industry, or National Education.

The Government also decides when to submit to Parliament a bill authorizing the ratification of a treaty or the approval of an agreement if such a submission is required by Article 53 of the Constitution. The average lapse of time between the signature of a treaty or an agreement and the submission of a bill to the Parliament is about 12 months, and agreements are usually published in the *Journal officiel* within 15 months. These delays are due to technical, but rarely political, reasons.

3. *Other Authorities*

It is an established principle that, apart from the President of the Republic and the Government, no authority is entitled to enter into international agreements.

3.a. *Parliament.* Parliament never takes part in the negotiating process, nor does it play an official role in initiating negotiations leading to an international agreement. As discussed below, the Government's power to enter into negotiations and to sign a treaty may not be subject to prior authorization of the Parliament, which is only requested afterwards to give its consent to ratification or approval (where the object of the treaty or agreement is one of those listed in Article 53).[14] It is always the President or the Government that negotiates the international agreement and grants its final ratification or approval.

3.b. *Subnational entities.* France is divided among several territorial collectivities: *collectivités à statut particulier, collectivités d'outre-mer, régions, départements*, and *communes*. Nevertheless the *Conseil constitutionnel*[15] has affirmed that the powers of the State shall not be restricted[16] and the *Conseil d'Etat*[17] has

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[14] *See* Constitution of October 4, 1958, Art. 53, quoted below.

[15] The *Conseil constitutionnel* is the French constitutional court which safeguards observance of the Constitution during the law-making process.

[16] *See* Decision nº 82–137 of February 25, 1982, *Droits et Libertés des Communes, Départements et Régions, Recueil*, at 38.

[17] The French judicial system is divided into two jurisdictional orders: administrative

stated that no authority other than the State shall be authorized to enter into international agreements.[18]

As a result, the latter three territorial collectivities, are not authorized to negotiate international agreements. Statute nº 92–125 of February 6, 1992 on the administration of France[19] affirms this prohibition but provides that these authorities may enter into international agreements with other territorial collectivities within the scope of their authority and in compliance with international agreements.[20] Territorial collectivities may sometimes enter into agreements with contiguous foreign territorial collectivities. The executive of the territorial collectivities is authorized by law to negotiate and conclude conventions, which become effective upon their transmittal to the State representative (the *Préfet*).[21] The *Préfet* has no power to determine the content of the convention; he is, however, entitled to bring it before an administrative court to seek a ruling on its legality. Such conventions are not considered to be international agreements.

The situation of overseas territories is more complex. Some are considered as *départments et regions d'outre-mer* (Guadeloupe, Guyane, Martinique, Réunion) and other as *collectivités d'outre-mer* (French Polynesia, Wallis and Futuna, Mayotte, Saint-Pierre-et-Miquelon), New Caledonia having a specific status. Overseas collectivities are granted with some attributes of self-government but they have no autonomous treaty-making power, the advice of their assemblies having only to be obtained by the Government when negotiating an international commitment that will apply to them. In practice their political leaders are often included into the French delegation when negotiating an agreement specifically concerning their collectivity.

C. *Political Control: Legislative Approval*

1. *The need of legislative approval*

1.a. The negotiation of treaties and international agreements is the responsibility of the Executive. Because the legislative power is not in charge of negotiating international agreements, it does not receive official notification

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courts dealing with administrative law, of which the *Conseil d'Etat* is the highest court; and judicial courts, dealing with relations between individuals, of which the *Cour de cassation* is the supreme court.

[18] *See* Opinion nº 326.996 of May 16, 1980, *Notes et Etudes Documentaires*, nº 4803, 1986, at 109–11.

[19] *See J.O.*, February 8, 1992, at 2064.

[20] *Id.* Art. 131–I.

[21] *Id.*

of the proposed international agreements. Nevertheless, French institutions are in line with parliamentary principles pursuant to which the Parliament has powers to control the Government and foreign policy is included in this control. Members of Parliament have the right to submit written or oral questions to the Government concerning international agreements under negotiation. Traditionally, every two or three months the Government hands over a list of signed agreements to the Commission on Foreign Affairs of each House of Parliament, which may request the text of such agreements.

For internal political reasons, the Government can submit a declaration of general policy to Parliament. The declaration can include international matters. This was the case on July 3, 2003, when the Prime Minister, J.-P. Raffarin, submitted the declaration of its Government's policy to the Parliament, including its position on the European Union enlargement Treaty.[22]

1.b. Further, some treaties and international agreements require legislative authorization prior to ratification or approval by the Executive. Article 53 of the Constitution states:

> Peace treaties, commercial treaties, treaties or agreements relating to international organization, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons, and those that involve the cession, exchange or addition of territory, may be ratified or approved only by virtue of an Act of Parliament. They shall not take effect until they have been ratified or approved.
>
> No cession, exchange or addition of territory shall be valid without the consent of the population concerned.[23]

This Article is consistent with parliamentary principles in establishing cooperation between the executive and legislative powers. Article 53 defines the limits within which Parliament may act. In practice, however,

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[22] This was also the case on December 15, 1993, when the Prime Minister, Mr. Balladur, submitted the declaration of the general policy of its Government to the National Assembly, including its position on the Final Act of the Uruguay Round. This declaration was adopted by a margin of 466 to 90 votes. In the declaration of the Government's policy of June 19, 1997, the Prime Minister, L. Jospin, indicated his intention to review all Human Rights Conventions to which France was not party, with a view to French adhesion.

[23] *See* Constitution of October 4, 1958, Art. 53 ("Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'Etat, ceux qui modifient des dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en fonction d'une loi. Ils ne prennent effet qu'après avoir été ratifiés ou approuvés. Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées.").

the Executive seeks parliamentary approval more often than the Constitution requires.[24]

The scope of the legislative approval requirement is broad and open to interpretation. Peace treaties, agreements dealing with the status of individuals, and agreements dealing with territorial matters are not difficult to identify. The *Conseil constitutionnel* has taken a broad view of what constitutes an agreement modifying provisions within the ambit of legislative power.[25] The *Conseil*'s decision of June 19, 1970 interpreted Article 53 to include all agreements dealing with legislative matters, not just those dealing with the modification of existing legislation.[26] However, the *Conseil constitutionnel* has taken a narrower view of what is "relating to international organization" in order to exempt from the requirement most treaties and international agreements; only those agreements dealing with permanent international organizations with the power to take decisions or impose limitations on French sovereignty require parliamentary approval.[27] The *Conseil* decided that agreements involving State finances require parliamentary approval only if they concern matters which exceed the annual budget in terms of money or time. The *Conseil* did not require parliamentary approval for treaties on proprietary rights of French people abroad, for treaties of alliance, or for treaties of mutual assistance.

In 2003, of the 103 conventions published, only 44 were entered into with Parliament's authorization.

Legislative authorization does not take the form of a statute of normative content. It is a simple authorization given to the Executive formally presented as a statute. Legislative authorization, as required by Article 53, is not sufficient to give the agreement binding effect: ratification or approval by the Executive must follow. But the Executive's power to ratify or to approve the agreement is discretionary, since the statute grants an authorization, but imposes no duty to act.

2. *Modalities of legislative approval*

When an international agreement's ratification or approval requires a prior parliamentary authorization, the Government must seek Parliament's opinion. However, for limited cases set by the Constitution, the President of the Republic may consult French citizens through a referendum.

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[24] *See* Annex I.

[25] *See* Constitution of October 4, 1958, Art. 53.

[26] *See J.C.P.* 1970 I, 2354; *R.D.P.* 1971, at 1972; *R.G.D.I.P.* 1971, at 239. *See also*, Conseil d'Etat, Ass., March 5, 2003, *Aggoun, A.J.D.A.* April 16, 2003, at 728.

[27] *See* DC nº 92–308, April 9, 1992, *Recueil* at 55; DC nº 98–408, January 22, 1999, *Recueil*, at 29.

2.a. *Consultation with the Legislature*. The Government can submit to the Parliament (*Assemblée nationale* and *Sénat*) a bill authorizing the ratification of a treaty or the approval of an agreement. In compliance with the ordinary legislative process, the bill is first submitted to the State Council (*Conseil d'Etat*) for an opinion,[28] then adopted in *Conseil des ministres*[29] and finally scheduled in the Parliament.

The opinion of the *Conseil d'Etat* is confidential and non-binding for the Government. However, the *Conseil d'Etat* step is important since it involves a preliminary analysis of the agreement's constitutionality. This is the reason why the Government usually follows the State Council's opinion. If the Government decides to go through with the treaty, it undertakes the following steps for the adoption of the bill. A report on the agreement is presented by the Commission on Foreign Affairs of each House, and the bill is debated by both Houses of Parliament, after which legislative authorization is granted.[30]

Such authorization may not be granted prior to the negotiation of an international instrument. As mentioned above, the Executive is free to choose the moment of the submission of the treaty to the Parliament and Members of the latter are not entitled to initiate the authorization procedure nor to propose amendments to the bill, which requires only a simple majority for passage.

Article 10 of the Constitution requires the President of the Republic to promulgate the statute authorizing ratification or approval (as any other statute) within 15 days of its transmission to the Government. The statute must be published in the *Journal officiel de la République française*.[31] Then, it is completely up to the Executive to decide if and when the instrument of ratification or approval will be actually deposited or exchanged.

2.b. *Consultation with the public*. Under certain conditions, Article 11 of the Constitution permits the President to consult the citizens on the desirability of ratifying or approving a signed treaty through a referendum. The President of the Republic may submit to referendum any bill aiming at the ratification or approval of a treaty or international agreement "which, not being adverse to the Constitution, would have some bearing on the

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[28] The State Council (*Conseil d'Etat*) has a dual jurisdiction: it acts as an administrative judge, and it fulfils a traditional advisory function for the Government.

[29] The *Conseil des ministres* is composed of the President of the Republic and the members of the Government.

[30] *See* Annexes I and J. As a practical matter, Parliament rarely, if ever, withholds its authorization, although in theory it has the power to do so (the only example being, half a century ago, with respect to the European Defence Community).

[31] *See* Annex K.

operations of institutions."[32] Although a proposal from the Government or a joint resolution from the *Sénat* and the *Assemblée nationale* is required before a referendum may be called, the decision to call a referendum remains within the full discretion of the President. This procedure has been used twice since 1958: on April 23, 1972, with regard to the treaty dealing with the admission of the United Kingdom, Ireland, and Denmark to the EEC; and on September 20, 1992, with regard to the European Union Treaty.[33]

The scope of Article 11 may give rise to difficulties of interpretation. For example, it is questionable whether the 1972 Treaty fell within the scope of this Article, as it dealt only with the admission of certain countries to an existing institution, not with the creation or organization of a new institution. Because Article 11 may be used where a treaty would tend to deeply divide public opinion, it could be used for internal political reasons, *i.e.* to uphold the Executive's position.

3. *Control of legislative authorization*

The interpretation of matters in which parliamentary authorization is required has expanded over time, tending to increase the Parliament's role in the making of international agreements.

Previously, the Executive had total discretion in construing Article 53. The courts refused to sanction the violation of the rules governing parliamentary authorization with respect to international agreements.[34] The only sanctions were of a political nature. The violation of rules applicable to the treaty-making power were to be redressed only through the Government's political responsibility; that is, through a vote of distrust against the Government.

However, in 1998, the Government's discretion in applying the rule laid down in Article 53 was narrowed by a decision of the State Council. The *Conseil d'Etat* considered it had jurisdiction to examine an argument based on the lack of regularity of the ratification of a treaty or the approval of an agreement within the scope of Article 53.[35] The *Conseil d'Etat* ruled that treaties ratified or agreements approved without legislative authorization, when the treaty or agreement falls within the scope of Article 53, are not regularly implemented into domestic legislation. Later, the

[32] *See* Constitution of October 4, 1958, Art. 11.
[33] *See* Annex H.
[34] Conseil d'Etat, February 5, 1926, *Dame Caraco, Rec. Lebon*, at 125.
[35] Conseil d'Etat, Ass., December 18, 1998, *SARL du Parc d'activités de Blotzheim, Rec. Lebon*, at 483.

Conseil d'Etat eased its case law: it considered that a law authorizing the ratification or approval of an amendment to a treaty or an agreement can implicitly and retroactively authorize the initial treaty or agreement.[36]

D. *Assuring the Constitutionality of a Treaty or International Agreement*

The Constitution provides for two procedures before the *Conseil constitutionnel* to ensure that treaties and international agreements conform to the Constitution.[37] These procedures enable the *Conseil* to exercise oversight prior to the Executive's ratification or approval of the international commitment.

1. *Article 54*

Pursuant to Article 54 of the Constitution:

> [i]f the Constitutional Council, on a reference from the President of the Republic, from the Prime Minister, from the President of one or the other assembly, or from sixty deputies or sixty senators, has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution.[38]

The purpose of this Article is to assure the constitutionality of treaties and international agreements submitted to Parliament for approval, *i.e.*, agreements within the scope of Article 53 (which leaves aside most of the international agreements concluded by France). The *Conseil* does not have the power to modify the Constitution, but only to require its modification. If it declares that an international commitment contravenes the Constitution, the agreement shall not be ratified or approved by the Executive prior to revision of the Constitution. In other words, if the Constitution is not revised, the agreement cannot be entered into.

The provision entitling members of Parliament (outside the President of both Houses) to seek a determination by the *Conseil constitutionnel* was added to the Constitution by amendment only in 1992.[39]

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[36] Conseil d'Etat, Ass., March 5, 2003, *Aggoun*, *A.J.D.A.*, April 16, 2003, at 728.

[37] *See* Constitution of October 4, 1958, Arts. 54 and 61.

[38] *See* Constitution of October 4, 1958, Art. 54 ("Si le Conseil constitutionnel, saisi par le Président de la République, par le Premier Ministre ou par le Président de l'une ou l'autre assemblée ou par soixante députés ou soixante sénateurs, a déclaré qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de le ratifier ou de l'approuver ne peut intervenir qu'après la révision de la Constitution.").

[39] *See* Loi constitutionnelle nº 92–554 of June 25, 1992, *J.O.* June 2, 1992, at 8406.

The *Conseil constitutionnel* has been consulted eight times since 1958: once by the Prime Minister,[40] four times by the President of the Republic,[41] two times by the President of the Republic and the Prime Minister together,[42] and once by a group of senators under the 1992 amendment.[43] The *Conseil constitutionnel* has decided four of these times that modification of the Constitution was necessary prior to ratification of the treaty in question.[44]

2. *Article 61*

Pursuant to Article 61 of the Constitution,[45] the statute by which the Parliament authorizes ratification or approval of a treaty or international agreement may also be referred to the *Conseil constitutionnel*.[46] If an international agreement requiring parliamentary approval contains a provision that does not conform to the Constitution, the *Conseil* may declare the statute authorizing ratification or approval of the agreement – but not the agreement itself – unconstitutional. However, the result is the same, since in the absence of a statute, the Executive may not ratify or approve the agreement. This Article aims to ensure the constitutional conformity of the statute authorizing ratification or approval of an agreement before promulgation of the statute.

However, if the authorization is given by a statute enacted through a

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[40] *See* Decision nº 70–39 DC of June 19, 1970, *Budget des Communautés européennes*, *Recueil*, at 15.

[41] *See* Decisions nº 76–71 DC of December 30, 1976, *Election de l'Assemblée des Communautés européennes au suffrage universel direct*, *Recueil*, at 15; nº 85–188 DC of May 22, 1985, *Protocole additionnel nº 6 à la Convention européenne des droits de l'homme*, *Recueil*, at 15; nº 92–308 DC of April 9, 1992, *Traité sur l'Union européenne*, *J.O.* April 11, 1992, at 5354; and nº 99–412 DC of June 15, 1999, *Charte européenne des langues régionales ou minoritaires*, *Recueil*, at 71.

[42] *See* Decisions nº 97–394 DC of December 31, 1997, *Traité d'Amsterdam modifiant le Traité sur l'Union européenne*, *les Traités instituant les Communautés européennes et certains actes connexes*, *Recueil*, p. 344; nº 98–408 DC of January 22, 1999, *Traité portant statut de la Cour pénale internationale*, *Recueil*, p. 29.

[43] *See* Decision nº 92–312 DC of September 2, 1992, *Traité sur l'Union européenne*, *J.O.* September 3, 1992, at 12095.

[44] *See* Decisions nº 92–308 DC of April 9, 1992, *Traité sur l'Union européenne*, *J.O.* April 11, 1992, at 5354; nº 97–394 DC of December 31, 1997, *Traité d'Amsterdam modifiant le Traité sur l'Union européenne*, *les Traités instituant les Communautés européennes et certains actes connexes*, *Recueil*, p. 344; nº 98–408 DC of January 22, 1999, *Traité portant statut de la Cour pénale internationale*, *Recueil*, p. 29; nº 99–412 DC of June 15, 1999, *Charte européenne des langues régionales ou minoritaires*, *Recueil* at 71.

[45] *See* Constitution of October 4, 1958, Art. 61.

[46] *See* Decision nº 76–71 DC of December 30, 1976, *Election de l'Assemblée des Communautés européennes au suffrage universel direct*, *Recueil* at 15; Decision nº 80–116 DC of July 17, 1980, *Convention judiciaire franco-allemande*, *Recueil* at 36.

referendum, the *Conseil constitutionnel* has no jurisdiction to control its compliance with the Constitution.[47]

In both cases, the *Conseil constitutionnel* must intervene either before the statute authorizing the Executive to ratify or approve an international agreement (Article 54) is voted or before it is promulgated (Article 61). Its authority extends only to making prior determination of the constitutionality of the statute.[48] Both administrative[49] and judicial[50] courts have declared that the Constitution supersedes treaties or international agreements. However, there is no basis in French law for challenging the constitutionality of an agreement after its approval or ratification by the Executive. The *Conseil constitutionnel* does not have such a jurisdiction. For the same reason, administrative courts have refused to control the constitutionality of an agreement or a treaty after its approval or ratification by the executive power.[51]

E. *Domestic Effects of Treaties*

1. *Implementation into Domestic Law*

Pursuant to Article 55 of the Constitution, "[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party."[52]

Accordingly, treaties to which France is a party are automatically implemented in the domestic legal system, provided that they have been ratified or approved in compliance with constitutional requirements and that they have been published. No separate statutory or administrative instrument of implementation is required.

At the domestic level, publication of a treaty or international agreement is governed by French law. Thus, prior to publication, the international

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[47] *See* Decision n° 92–313 DC of September 23, 1992, *Traité sur l'Union européenne, Recueil* at 94.

[48] *See* Decision n° 75–60 DC of December 30, 1975, *Comptes de règlement résultant d'accords avec les gouvernements étrangers, Recueil* at 28; Decision n° 78–99 DC of December 29, 1978, *Système monétaire européen et fonds de stabilisation des changes, Recueil* at 36.

[49] Conseil d'Etat, Ass., October 30, 1998, *Sarran, Levacher et autres, R.F.D.A.* 1998, at 1081.

[50] Cour de cassation, Ass., June 2, 2000, *Melle Fraisse, J.C.P.* 2001–II, at 10454.

[51] Conseil d'Etat, Ass., December 18, 1998, *SARL du Parc d'activités de Blotzheim, Rec. Lebon*, at 483; Conseil d'Etat, November 3, 1999, *Groupement de défense des porteurs de titres russes, Rec. Lebon*, at 343.

[52] See Constitution of October 4, 1958, Art. 55 ("Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre pie.").

and domestic effects of a treaty may differ, since at the international level agreements and treaties become effective upon ratification[53] or approval, or as of the date specified in the agreement.

Pursuant to Decree nº 53–192 of March 14, 1953, modified by Decree nº 86–707 of April 11, 1986, on the ratification and publication of international agreements concluded by France,[54] the Minister of Foreign Affairs shall publish in the *Journal officiel de la République française* agreements "whose implementation may affect the rights or duties of individuals."[55] The order to publish an international agreement always takes the form of a presidential decree addressed to the Prime Minister and to the Minister of Foreign Affairs.[56] The treaty or agreement does not have to be included in a statute, even if it proves necessary for the Government or Parliament to take measures concerning the implementation of the agreement. In principle, the text of the treaty or international agreement is published in full together with all annexes and reservations.[57] Notice of termination of the agreement must also be published.[58] In addition to publication in the *Journal officiel de la République française*, treaties and international agreements are published in bi-monthly reports produced each year as a single publication in the *Recueil des traités et accords de la France*, published by the Direction des Journaux officiels. Publication in the *Journal officiel de l'Union européenne* (formerly *Journal officiel des Communautés européennes*) is equivalent to publication in the *Journal officiel de la République française*. France is quite up to date in publishing its treaties and international agreements.

Thus, not all international agreements and treaties are published, since publication is required only if they do affect individual rights or duties. The Government may or may not decide to publish an agreement. If a treaty or an international agreement has not been published, it is impossible for an individual to refer to it before a domestic court, even though the treaty or international agreement may have entered into force internationally. Lack of publication neutralizes the agreement's effect at the domestic level even if, upon publication, a court may apply a treaty or agreement retroactively.[59] The Government may therefore block the appli-

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[53] *See* Annex F, Ratification of the Maastricht Treaty.

[54] *In* Ministère des Affaires Etrangères, *Attributions – Organisation*, Paris, 1994; *J.D.I.* 1986, at 862; *see also* G. Burdeau, *Les engagements internationaux de la France et les exigences de l'Etat de droit*, *A.F.D.I.* 1986, at 837.

[55] *See* Decree nº 53–192 of March 14, 1953, Art. 4 ("de nature à affecter pas leur application les droits ou les obligations des particuliers").

[56] *See* Annex K.

[57] *See* Decree nº 86–707 of Apri1 11, 1986, Art. 4; *J.D.I.* 1986, at 862.

[58] *Id.* Art. 5.

[59] *See* Cour de cassation, 1ère ch. civ., February 16, 1965, *Dame Cader c. Cader*, *Bull.*

cation of an agreement at the domestic level by failing to publish it. Judges are compelled *ex officio* to raise the issue of a failure to publish;[60] they may not disregard the fact that an agreement has not been published.

Before 1998, administrative[61] and judicial[62] courts refused to consider the propriety of the ratification or approval of a treaty or international agreement. Administrative courts were limited to deciding whether ratification or approval had taken place.[63] Since 1998, administrative courts evaluate the propriety of the ratification or approval by controlling the validity of the decree of publication.[64] The legality of the decree of publication now concerns compliance with Article 53 of the Constitution. Through this criterion, two decrees were cancelled,[65] neutralizing each agreement's effect at the domestic level. Thus, improper ratification or approval can be contested through an action directed against the decree of publication. That action must be filed within two months from the publication of the decree. Nevertheless, the *Conseil d'Etat* declines jurisdiction to control the constitutionality of the decree if a statute has previously authorized the ratification or the approval.[66] If the two-month period has elapsed, the lack of regularity of the ratification or approval can only be contested in a concrete case involving the application of the treaty.[67]

2. Self-executing

The implementation of conventions to which France is a party is not subordinated to the existence of separate implementation measures. However, the sole implementation of a treaty or agreement is not, as such, sufficient to allow its invocability.

Civ., at 97; November 30, 1976, *Office de la jeunesse du cercle de Biberach-Riss c. Lacheny*, *J.D.I.* 1977, at 83; May 15, 1984, *Tran Tho Dong c. Procureur général près de la Cour d'appel de Paris, Bull. Civ.*, at 135. *See also* Conseil d'Etat, Ass., May 27, 1955, *Société Kovit, Rec. Lebon*, at 308; March 1, 1961, *Dame Frank, Rec. Lebon*, at 151; June 27, 1969, *Société Savana, Rec. Lebon*, at 703.

[60] *See* Conseil d'Etat, Ass., July 13, 1965, *Rec. Lebon*, at 422; *Semaine Juridique* 1965, ed. G, II, 14349; *Gazette du Palais* 1965, at 356; *R.G.D.I.P.* 1966, at 468. *See also* Conseil d'Etat, December 11, 1959, *Rec. Lebon*, at 674; Cour de cassation, 1ère ch. civ., May 16, 1961, *J.D.I.* 1962, at 416; *Dalloz* 1961, at 589; *A.F.D.I.* 1962, at 932.

[61] *See* Conseil d'Etat, July 13, 1965, *Société Navigator, Rec. Lebon*, at 423.

[62] *See* Cour de cassation, 1ère ch. civ., January 25, 1977, *Reyrol c. Office de la jeunesse de l'arrondissement d'Emmendigen, Bull. Civ.*, at 32; Cour de cassation, ch. crim., February 27, 1990, *affaire Touvier, Bull. Crim.*, at 251.

[63] *See* Conseil d'Etat, February 5, 1926, *Dame Caraco, Rec. Lebon*, at 125; Conseil d'Etat, Ass., November 16, 1956, *Sieur Villa, Rec. Lebon*, at 433.

[64] *See* Conseil d'Etat, Ass., December 18, 1998, *SARL du Parc d'activités de Blotzheim, Rec. Lebon*, at 483.

[65] *See* Conseil d'Etat, February 23, 2000, *M. Bamba Dieng, Dr. Adm.* 2000, nº 68; Conseil d'Etat, June 16, 2003, *M. X.*

[66] *See* Conseil d'Etat, July 8, 2002, *Commune de Porta, A.J.D.A.* October 21, 2002, at 1007.

[67] *See* Conseil d'Etat, Ass., March 5, 2003, *Aggoun, A.J.D.A.* April 16, 2003, at 728.

If a treaty or international agreement is not sufficiently clear, it cannot be applied by a judge.[68] This principle also applies where an agreement is not self-executing and where, for that reason, its implementation requires complementary measures.[69] In this regard judges have a great margin of appreciation. For example, the *Cour de cassation* has declared that the International Convention on the Protection of the Rights of the Child, signed in New York on January 26, 1990, has no direct effect on individuals and is binding only on States.[70] In 1997, the *Conseil d'Etat* refused to grant a direct effect to some specific provisions of that Convention.[71]

3. *Place of Treaties in Domestic Law*

Pursuant to Article 55 of the Constitution, treaties and international agreements "shall, upon publication, prevail over Acts of Parliament."[72] Hence, publication defines their status in national law. This is consistent with the monist view adopted in France on the relationship between international and domestic law.

This principle applies regardless of the form of the agreement (bilateral or multilateral instrument, ratified treaty, or approved international agreement).[73] However, such a principle does not automatically apply with regard to international custom and to general principles of international law, for which administrative courts are reluctant to give prevalence over statutes.[74]

Both judicial[75] and administrative[76] courts have recognized that treaties prevail over previous statutes. It is now also acknowledged that treaties

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[68] *See* Conseil d'Etat, Sect., January 10, 1958, *Bourgin, Rec. Lebon*, at 25; October 26, 1960, *Ministre des anciens combattants et dame Meriot, Rec. Lebon*, at 556; Sect., June 22, 1979, *Fasbender et Ding, Rec. Lebon*, at 284.

[69] *See* Conseil d'Etat, October 5, 1960, *Secrétaire d'Etat aux P.T.T. c. Evrard, Rec. Lebon,* at 510; Ass., March 10, 1961, *Union départementale des associations familiales de la Haute Savoie, Rec. Lebon*, at 172; November 20, 1964, *Bonnec, Rec. Lebon*, at 565.

[70] *See* Cour de cassation, 1ère ch. civ., March 10, 1993, *Dalloz* 1993 at 361.

[71] Conseil d'Etat, Sect., April 23, 1997, *G.I.S.T.I., Rec. Lebon*, at 142.

[72] *See* Constitution of October 4, 1958, Art. 55.

[73] *See* Conseil constitutionnel, September 3, 1986, *J.D.I.* 1987, at 289; *R.F.D.A.* 1987, at 128.

[74] *See* Conseil d'Etat, Ass., June 6, 1997, *Aquarone, Rec. Lebon*, at 206; Conseil d'Etat, July 28, 2000, *Paulin, Rec. Lebon*, at 317.

[75] *See* Cour de cassation, ch. crim., June 29, 1954, *Allgaier, Semaine juridique* 1954, éd. G, IV, 119; February 2, 1955, *Helmut Kahns, Semaine Juridique* 1955, éd. G, IV, 38; Cour de cassation, ch. com, November 19, 1957, *Société Ever Ready Co. c. Société La pile Leclanché, Gazette du Palais* 1958, at 139; *R.D.P.*, 1958, at 815; Cour de cassation, ch. réunies, November 16, 1966, *Société Ever Ready c. Société des accumulateurs fixes et de traction, Gazette du Palais* 1967, I, at 30.

[76] *See* Conseil d'Etat, Ass., July 7, 1978, *Croissant, J.D.I.* 1979, at 91; *AJDA* 1978 at 559; *Gazette du Palais* 1979, I, 34; February 15, 1980, Ass., *Gabor Winter, Rec. Lebon*, at 87; January 22, 1982, *Conseil régional de Paris de l'ordre des experts comptables, Rec. Lebon*, at 28; May 11, 1987, *Ministre de l'intérieur et de la décentralisation c. Guérid, Rec. Lebon*, at 548.

and international agreements prevail alike over subsequent statutes. The *Conseil constitutionnel* originally denied that it had the power to decide upon the conformity of a statute to a treaty or international agreement.[77] It decided that a statute that does not conform to a treaty is not necessarily contrary to the Constitution. The decision of the *Conseil constitutionnel* was interpreted to mean that the task of ensuring the prevalence of a treaty over a statute is left to the judicial and administrative courts.

Historically, judicial courts refused to allow a treaty to prevail over a subsequent statute. Only in 1975 did the *Cour de cassation* recognize the prevalence of treaties over subsequent statutes.[78] Likewise, the *Conseil d'Etat* first refused to declare unlawful an administrative act implementing a statute that did not conform to a precedent treaty.[79] In 1989, however, it adopted the same position as that taken by the *Cour de cassation*, acknowledging that a treaty prevails over subsequent statutes.[80] Thus, in the law-making process, the Parliament and the Government must respect international agreements entered into by France. However, the administrative judge has no obligation to declare that a treaty prevails over a statute if this argument is not raised by one of the parties to the case.[81] In addition, judges often construe statutes in a way to exclude contradiction with a treaty. Nevertheless, there is no legal presumption of compatibility.

Pursuant to Article 55, the prevalence of treaties or international agreements over statutes is subject to a reciprocity condition. Until now, the administrative courts currently have declared their lack of jurisdiction to control the execution of a treaty or agreement by the other party. The administrative courts refer to the opinion of the Ministry of Foreign Affairs to determine whether this condition has been satisfied.[82] However,

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[77] *See* Conseil constitutionnel, decision nº 74–54 DC of January 15, 1975, *Interruption volontaire de grossesse (conformity to the European Convention on Human Rights)*, *J.D.I.* 1975, at 249; *AJDA* 1975, at 134; *Dalloz* 1975, at 529; *Semaine Juridique* 1975, éd. G, II, 18030; *R.D.P* 1975, at 185; *Gazette du Palais* 1976, I, at 25. *See also* decision nº 77–83 DC of July 20, 1977, *Recueil*, at 39; *R.D.P.* 1978, at 827; *Dalloz* 1979, at 29; *AJDA* 1977, at 599; decision nº 77–92 DC of January 18, 1978, *Recueil*, at 21; *R.D.P.* 1978, at 83; decision nº 89–260 DC of July 28, 1989, *R.F.D.A.* 1989, at 682.

[78] *See* in the EEC context, Cour de cassation, ch. mixte, May 24, 1975, *Administration des douanes c. Société "Cafés Jacques Vabre"*, *J.D.I.* 1975, at 801; in a wider international context, *see also* Cour de cassation, Ass. plénière, October 14, 1977, *Bloch c. Société anonyme Filtex*, *Bull. Civ.*, at 9; Cour de cassation, ch. crim., June 3, 1988, *Barbie*, *Bull. Crim.*, at 637.

[79] *See* Conseil d'Etat, Sect., March 1, 1968, *Syndicat général des fabricants de semoules de France*, *Rec. Lebon*, at 149.

[80] *See* Conseil d'Etat, Ass., *Nicolo*, *Rec. Lebon*, at 384; *Semaine Juridique* 1989, éd. G., II, 21372; *J.D.I.* 1990, at 105; *R.C.D.L.P.* 1990, at 125; *Dalloz* 1990, at 135.

[81] *See* Conseil d'Etat, Sect., January 11, 1991, *Société Morgan*, *Rec. Lebon*, at 9; *a contrario* Conseil d'Etat, Ass, June 28, 2002, *Schneider Electric*, *R.J.F.* 2002.10, at 1082.

[82] *See* Conseil d'Etat, Ass, May 29, 1981, *Rekhou*, *Rec. Lebon*, at 220; April 9, 1999, *Mme Chevrol-Benkeddach*, *Rec. Lebon*, at. 115.

the European Court for Human Rights has considered this practice contrary to Article 6 of the European Convention,[83] a situation which should lead to a change in French practice.

4. *Interpretation of Treaties*

Courts have intended to expand their scope of authority in the matter of treaty interpretation. Until 1990, administrative courts stated that they were not empowered to interpret a treaty.[84] Instead, the *Conseil d'Etat* submitted questions of interpretation to the Minister of Foreign Affairs, except in cases where the meaning was clear *(théorie de l'acte clair)*. Only in 1990 did the *Conseil d'Etat* change its position: the Minister of Foreign Affairs is still consulted, but the administrative judge is no longer deemed to be bound by the interpretation provided by the Minister.[85] The Minister's interpretation is now considered merely as another piece of evidence with no conclusive value such as may be submitted by any party to a dispute.

Judicial courts have allowed themselves to construe treaties. The Civil Chamber of the *Cour de cassation* exercises this power where exclusively private interests are at stake. Where the public interest is at stake, however, the *Cour de cassation* refrains from interpreting the treaty.[86] Formerly, the Criminal Chamber of the *Cour de cassation* systematically sent questions regarding treaties' interpretation to the Minister of Foreign Affairs. Its case law is nowadays consistent with that of the Civil Chamber of the *Cour de cassation*.[87]

Where two (or more) international agreements contain contradictory provisions, judges enforce the provisions of the most recent agreement.[88] In determining the most recent international agreement, the judge refers to the date of entry into force.[89] The same principle applies where an international agreement and an EC regulation are contradictory.[90] More recently, administrative courts stated that in case of plural international

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[83] *See* European Court of Human Rights, February 13, 2003, *Chevrol c. France*, *Dalloz* 2003, at 931.

[84] *See* Conseil d'Etat, July 23, 1823, *Veuve Murat*, *Rec. Lebon*, at 545.

[85] *See* Conseil d'Etat, June 29, 1990, *Groupe d'information et de soutien des travailleurs immigrés*, *Rec. Lebon*, at 171.

[86] *See* Cour de cassation, 1ère ch. civ., June 7, 1989, *Société Cartours*, *Semaine juridique*, 1990, II, 21448.

[87] Cour de cassation, ch. crim., June 30, 1976, *Glaeser*, *Bull. Crim.*, at 620.

[88] *See* Cour de cassation, ch. crim., October 6, 1986, *Sander*, *Bull. Crim.*, at 679; November 5, 1986, *Beneducci*, *Bull. Crim.*, at 831.

[89] *See* Conseil d'Etat, September 5, 2001, *Préfet des Alpes-Maritimes c. M. Benkhnata*, *RFDA* 2002, nº 1, at 119.

[90] *See* Cour de cassation, ch. crim., November 30, 1982, *Arbelaiz Emazabel et Ruiz-Gonzalèz*, *Bull. Crim.*, at 724 and 729.

agreements which have a common scope, the determination of the agreement which must receive application is realized by referring to the general principles of international law on incompatible treaties.[91]

5. *Case of Decisions of International Organizations*

The Constitution of October 4, 1958 contains no specific provisions with respect to the decisions of international organizations, but the Constitution implicitly acknowledges the existence of such decisions in the French legal order. The Constitution refers to the Preamble of the 1946 Constitution, which states: "under conditions of reciprocity, France agrees to the limitation of its sovereignty necessary to the organization and defence of peace."[92] Article 53 lists "treaties and international agreements relating to international organization" among those for which legislative authorization is required.[93]

The Decree of March 14, 1953[94] lists those decisions of international organizations by which France is bound.[95] Such decisions must also be published in the *Journal officiel de la République française* if they affect individual rights, except if the decision has been published in the organization's official report.[96]

Decisions of international organizations have the same legal status as international agreements and treaties: they prevail over statutes as of the date of publication. In practice, however, judges have often been reluctant to give effect to them.

With regard to Community law, one must distinguish between regulations and directives. The *Conseil d'Etat* has decided that under Article 55 of the Constitution,[97] regulations prevail over domestic statutes.[98] EC regulations need not be transposed into domestic law by way of a specific procedure; they are automatically applicable. They may modify a domestic statute without consultation with Parliament. For this reason, the constitutional

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[91] *See* Conseil d'Etat, April 21, 2000, *Zaïdi, Rec. Lebon*, at 159.

[92] "Sous réserve de réciprocité, la France consent aux limitations de souveraineté nécessaires à l'organisation et à la défense de la paix."

[93] *See* Constitution of October 4, 1958, Art. 53.

[94] *See* Decree nº 53–192 of March 14, 1953 on the ratification and publication of international agreements to which France is a party, *in* Ministère des Affaires Etrangères, *Attributions – Organisation*, Paris, 1994; modified by Decree nº 86–707 of April 11, 1986, *eod. loc.*

[95] "Les règlements internationaux [. . .] par lesquels la France se trouve engagée." *Id.*, Art. l.

[96] *Id.*, Art. 3, 13.

[97] *See* Constitution of October 4, 1958, Art. 55.

[98] *See* Conseil d'Etat, September 24, 1990, *Boisdet, Rec. Lebon*, at 251 (Regulation nº 1035/72 of May 18, 1972 on apples).

amendment of June 25, 1992[99] enhances the informational procedure of Parliament where EC regulations are considered to be within the legislative scope.

EC directives are not subject to the principle of direct applicability in domestic law. Therefore, judges refuse to consider directives where they have not been transposed into French domestic law.[100] Nevertheless, the most recent case-law compels the administration to implement such directive in due time and to harmonize domestic law with such directives.[101] The *Conseil d'Etat* has now decided that a directive prevails over a subsequent domestic statute,[102] even when the directive was improperly implemented if it is sufficiently precise to be applied notwithstanding its improper implementation.[103] In addition, administrative courts cancel individual measures taken on the grounds of any domestic rule which is not in compliance with an EC directive.[104]

EC regulations must be published to be applicable in the domestic legal order. Publication in the *Journal officiel de l'Union européenne* is sufficient to meet this requirement. On the contrary, directives need not be published.

The difficulty with the decisions of international organizations is that their constitutionality cannot be controlled since Article 54 organizes a preventive control intended to assure only the constitutionality of treaties and international agreements whose ratification or approval is submitted to parliamentary authorization. However, if the implementation of the decision of an international organization implies a domestic statute, indirect control is possible. In such a case, based on Article 61 of the Constitution, the *Conseil constitutionnel* has jurisdiction to examine the statutory legislation adopted for implementation. If the statute is declared unconstitutional, it may not be promulgated unless the Constitution is to be amended. In addition, as mentioned above, during the legislative process, the *Conseil d'Etat* is invited to state its opinion upon the draft legislation. In the framework of the opinion of the *Conseil d'Etat*, a constitutional amendment may be advised. For example, the *Conseil d'Etat* suggested the

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[99] *See* Constitution of October 4, 1958, Art. 88–4 (Loi constitutionnelle n° 92–554 of June 25, 1992, *J.O.*, June 26, 1992, at 8406).

[100] *See* Conseil d'Etat, Ass., December 22, 1978, *Cohn-Bendit, Rec. Lebon*, at 524; *see also* Conseil d'Etat, Sect., July 27, 1990, *Ministère de l'agriculture c. Société coopérative agricole "Coop 2000", Rec. Lebon*, at 226.

[101] *See* Conseil d'Etat, Ass., February 3, 1989, *Compagnie Alitalia, Rec. Lebon*, at 44.

[102] *See* Conseil d'Etat, September 24, 1990, *Groupe environnement protection ornithologie en Picardie, LPA*, 1990, n° 124, at 5.

[103] *See* Conseil d'Etat, February 25, 1992, *Rothmans & Philip Morris, RFDA* 1992, at 251.

[104] *See* Conseil d'Etat, Ass., February 6, 1998, *Tête, Rec. Lebon*, at 30.

Constitution be amended for implementation of the European Union arrest warrant, which was done in March 2003.

EC directives and regulations are also the mechanisms by which France meets its obligations arising from treaties to which the European Community or the European Union is a party. Treaties to which the European Community or the European Union is a party are not implemented in the French domestic system as such, since they have not been ratified or approved by France. However, directives or regulations may be promulgated for the purposes of implementing the substantial provisions of such treaties in domestic orders.

F. *Implementation*

1. *Reservations to Treaties*

The Executive takes the position that Parliament is not entitled to make reservations to treaties. The power to make reservations is linked to the power to implement treaties: because the Executive may choose when to approve or to ratify a treaty (and thus decide when it becomes effective), it may also choose to limit the implementation of a treaty by making reservations or interpretative declarations.

Although the Executive has no legal obligation to inform the Parliament of its intention to make a reservation to a treaty, the Executive may nonetheless do so for political reasons. In such a case, the Government informs the Commission on Foreign Affairs attached to the *Assemblée nationale* and to the *Sénat* about intended reservations and interpretative declarations. Where this occurs, the Parliament's act of authorization makes no reference to the reservation or declaration so as not to bind the Executive.

The text of reservations and interpretative declarations must be published in the *Journal officiel* "when their implementation may affect the rights or duties of individuals."[105]

Thus, the Executive is responsible for making reservations. It is also responsible for withdrawing reservations and for lodging objections against reservations entered by other States.

2. *Termination of Treaties*

Unlike the Constitution of the Fourth Republic, the 1958 Constitution contains no provisions dealing with the suspension or abrogation of treaties.

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[105] *See* Decree n° 53–192 of March 14, 1953, modified by Decree n° 86–707 of April 11, 1986, Art. 4.

Thus, the Executive is deemed to have discretionary power in this regard. Parliament is not involved in the termination of treaties.

Decree n° 53–192 of March 14, 1953, modified by Decree n° 86–707 of April 11, 1986, provides that notice of France's termination of a treaty that was originally published in the *Journal officiel* at the time of its ratification or approval must also be published.

3. *Succession to Treaties*

The issue of succession does not arise in connection with France as a successor State; it arises only when France is a party to an agreement to which another State would like to succeed.

Because no general rule exists in this respect, the Government deals with this matter on a case-by-case basis. Given its right under international law to agree to, or to reject, a succession, the Government makes its decision based on its interest in the extension of the agreement. In practice, there has been no consultation with Parliament in matters of succession.

– April, 2004

III. Basic Data and Documentation

A. *National Legislation and Guidelines*

Annex A: French Constitutional Provisions (extracts)
Annex B: Guidelines of the Prime Minister Relating To Treaty Making (French text only)
Annex C: Decree on Ratification and Publication of International Agreements

B. *Selected Examples of Treaty Documents*

Annex D: Presidential Delegation of Full Powers (*pleins pouvoirs*)
Annex E: Governmental Delegation of Full Powers (*pouvoirs simples*)
Annex F: Instrument of Ratification
Annex G: Instrument of Approval
Annex H: Statute Authorizing Ratification (adopted by referendum)
Annex I: Statute Authorizing Ratification (adopted by Parliament)
Annex J: Statute Authorizing Approval of a Convention (adopted by Parliament)
Annex K: Decree of Publication of a Convention

ANNEX A

FRENCH CONSTITUTION OF OCTOBER 4, 1958

Title II – The President of the Republic

Article 10

The President of the Republic promulgates laws within 15 days following transmittal to the Government of a definitively-adopted law.

Before the end of such term, the President of the Republic may ask Parliament for a new deliberation on the law or of certain of its Articles. This request may not be refused.

Article 11

The President of the Republic, upon proposal of the Government, during the duration of the sessions or on a joint proposal of the two Chambers, published in the *Journal officiel*, may submit to referendum any proposed law relating to the organization of public authorities, concerning approval of a Community agreement or tending to the authorization of the ratification of a treaty, which, not being adverse to the Constitution, would have some bearing on the operations of institutions.

Where the referendum is favourable to the adoption of the project, the President of the Republic promulgates same within the time period specified in the previous Article.

Article 19

The Acts of the President of the Republic, other than those described in Articles 8 (paragraph 1), 11, 12, 16, 18, 54, 56 and 61, are countersigned by the Prime Minister and, if necessary, by the responsible ministers.

Title VI – On Treaties and International Agreements

Article 52

The President of the Republic shall negotiate and ratify treaties. He shall be informed of any negotiations for the conclusion of an international agreement not subject to ratification.

Article 53

Peace treaties, commercial treaties, treaties or agreements relating to international organization, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons, and those that involve the cession, exchange or addition of territory, may be ratified or approved only by virtue of an Act of Parliament.

They shall not take effect until they have been ratified or approved.

No cession, exchange or addition of territory shall be valid without the consent of the populations concerned.

Article 53–1

The Republic may conclude, with European States that are bound by commitments identical with its own in the matter of asylum and the protection of human rights and fundamental freedoms, agreements determining their respective jurisdiction in regard to the consideration of requests for asylum submitted to them.

However, even if the request does not fall within their jurisdiction under the terms of these agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France for some other reason.

Article 53–2

The Republic may recognize the jurisdiction of the International Criminal Court as provided by the treaty signed on 18 July 1998.

Article 54

If the Constitutional Council, on a reference from the President of the Republic, from the Prime Minister, from the President of one or the other assembly, or from sixty deputies or sixty senators, has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution.

Article 55

Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.

The President of the Republic negotiates and ratifies treaties. He is informed of all negotiations concerning the conclusion of an international agreement which has not been submitted for ratification.

Title VII – The Constitutional Council

Article 61

Organic laws, prior to their promulgation, and the regulations of the Chambers of Parliament, prior to their application, must be submitted to the Constitutional Council, which decides on the conformity of same with the Constitution.

To the same ends, laws can be deferred to the Constitutional Council before their promulgation by the President of the Republic, the Prime Minister or the President of one or the other Chambers of Parliament.

In cases described in the two foregoing paragraphs, the Constitutional Council must hand down a ruling on the law within one month. However, at the request of the Government, in a matter of urgency, the ruling can be rendered within eight days.

In such cases, deferment to the Constitutional Council suspends the promulgation term.

Title XV – On the European Communities and the European Union

Article 88–1

The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common.

Article 88–2

Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, France agrees to the transfer of powers necessary for the establishment of European economic and monetary union.

Subject to the same reservation and in accordance with the terms of the Treaty establishing the European Community, as amended by the Treaty signed on 2 October 1997, the transfer of powers necessary for

the determination of rules concerning freedom of movement for persons and related areas may be agreed.

Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted under the Treaty on European Union.

Article 88–3

Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither exercise the office of mayor or deputy mayor nor participate in the designation of Senate electors or in the election of senators. An institutional Act passed in identical terms by the two assemblies shall determine the manner of implementation of this Article.

Article 88–4

The Government shall lay before the National Assembly and the Senate any drafts of or proposals for acts of the European Communities or the European Union containing provisions which are matters for statute as soon as they have been transmitted to the Council of the European Union. It may also lay before them other drafts of or proposals for acts or any document issuing from a European Union institution.

In the manner laid down by the rules of procedure of each assembly, resolutions may be passed, even if Parliament is not in session, on the drafts, proposals or documents referred to in the preceding paragraph.

ANNEX B

GUIDELINES OF THE PRIME MINISTER RELATING TO TREATY MAKING

CIRCULAIRE DU 30 MAI 1997 RELATIVE À L'ÉLABORATION ET À LA CONCLUSION DES ACCORDS INTERNATIONAUX

(*J.O.R.F.* No. 125, MAY 31, 1997, AT 8415)

I. Typologie des accords internationaux

En droit international,[1] le terme « traité » désigne tout accord destiné à produire des effets de droit et régi par le droit international, conclu par écrit entre deux ou plusieurs sujets de droit international. Le droit international – qui n'est pas formaliste – laisse toute liberté aux parties quant à l'appellation donnée à leur engagement.

La pratique française distingue les accords dits en forme solennelle – désignés à l'Article 52 de la Constitution par le terme « traités » –, conclus au nom des chefs d'Etat, et les accords en forme simplifiée, conclus au niveau des gouvernements. Les pouvoirs de signature des accords en forme solennelle sont signés par le Président de la République. Ils doivent faire l'objet d'une ratification; l'instrument de ratification est également signé par le Président de la République. Les pouvoirs de signature des accords en forme simplifiée sont signés par le ministre des affaires étrangères de même que, le cas échéant, les instruments d'approbation de ces accords. Sous cette réserve, l'entrée en vigueur des accords de l'une et l'autre forme est soumise aux mêmes procédures constitutionnelles. Leur portée juridique est identique au regard du droit international comme du droit interne.

Le choix de la forme solennelle se fait en fonction des précédents, de la nécessité qu'a l'Etat étranger d'adopter cette forme en raison de son droit interne ou de considérations politiques qui conduisent à donner une plus grande solennité à l'engagement. L'Article 53 de la Constitution commande la forme solennelle dans un certain nombre de cas: traités de paix et traités de commerce.

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[1] Le droit des traités est codifié par la convention de Vienne du 23 mai 1969 à laquelle la France n'est pas partie, mais dont elle respecte celles de ses dispositions qui se limitent à codifier la coutume internationale ou des principes généraux du droit international.

Le terme de convention est souvent utilisé pour des accords bilatéraux et multilatéraux qui portent sur des matières techniques. Elle est traditionnelle pour certaines catégories d'accords: conventions consulaires, conventions fiscales.

Lorsqu'un accord complète ou modifie un accord existant, il peut être appelé « protocole additionnel », « protocole modifiant l'accord . . . » ou, à la rigueur, « avenant ».

En revanche, il faut éviter les expressions « mémorandum d'accord » ou « protocole d'accord », susceptibles de créer une confusion sur la portée de l'engagement souscrit.

Dans leurs contacts avec des pays anglo-saxons, les négociateurs français peuvent se voir proposer des « mémorandums d'entente » ou « memorandum of understanding ». Ces instruments ne sont pas toujours considérés par les juristes de ces pays comme des accords internationaux, mais comme des engagements de bonne foi qui ne lient pas les signataires. Or cette distinction est inconnue dans la conception française du droit international qui reconnaît à tout engagement pris au nom du gouvernement la valeur d'un accord international créant des obligations. Il faut donc éviter de conclure des textes portant l'appellation « memorandum of understanding », afin de ne pas aboutir à des situations où le gouvernement français se considérerait comme lié sans que la réciproque soit vraie. Si toutefois cette formule est imposée aux négociateurs français dans un cadre multilatéral par exemple, ils devront faire préciser par toutes les parties que ces instruments sont bien contraignants et que la France en exigera le respect.

A côté des accords internationaux conclus au nom des chefs d'Etat ou de gouvernement, la pratique internationale admet la conclusion d'arrangements administratifs, conclus avec leurs homologues étrangers par des ministres. Ces arrangements constituent une catégorie inconnue du droit international. En conséquence, tout en engageant l'Etat, ils présentent l'inconvénient de n'offrir aucune sécurité quant à leur exécution par l'autre partie. Il ne faut donc recourir à ces instruments que dans des circonstances particulières, pour compléter ou préciser un accord existant, ou, à la rigueur, pour organiser une coopération administrative de portée limitée. Dans tous les cas, les ministres ne peuvent s'engager que dans la stricte limite de leurs attributions et la compétence de la partie étrangère doit être vérifiée autant que possible. Pour un texte qui relèverait soit en France, soit en ce qui concerne la partie étrangère, de plusieurs ministres, il ne peut être fait usage de la technique de l'arrangement administratif.

II. Négociation des accords[2]

1. *La décision d'ouvrir une négociation*

La décision d'ouvrir une négociation ou de refuser la proposition qui est faite en ce sens par un Etat constitue un acte de politique étrangère engageant la France.

Lorsqu'un ministre autre que le ministre des affaires étrangères constate la nécessité de disposer d'un nouvel accord bilatéral ou multilatéral ou de modifier un accord existant, il lui incombe d'en informer le ministre des affaires étrangères. Il fait de même lorsqu'il s'agit d'un projet d'arrangement administratif. En effet, seul ce ministre dispose d'une connaissance précise de l'ensemble de nos relations internationales lui permettant de juger de l'opportunité d'une telle négociation. Lorsque des divergences de vues sur l'ouverture d'une négociation opposent plusieurs ministres, le ministre des affaires étrangères saisit le Premier ministre aux fins d'arbitrage.

2. *La définition du cadre de la négociation*

Lorsqu'un ministre autre que le ministre des affaires étrangères propose à celui-ci l'ouverture d'une négociation, il fait connaître à ce dernier la teneur de l'accord dont il souhaite la négociation dans des délais compatibles avec un examen approfondi. Cette information permet à la direction compétente du ministère des affaires étrangères, en relation avec la direction des affaires juridiques, de définir la nature de l'instrument, de procéder à une première mise au point de sa rédaction et de vérifier que les dispositions de celui-ci seront conformes au droit international, aux engagements conventionnels souscrits par la France et au droit interne. En cas de nécessité, les difficultés rencontrées lors de cette mise en forme font l'objet de réunions d'arbitrage sous l'autorité du cabinet du Premier ministre.

Le ministre des affaires étrangères procède à la consultation de tous les ministres pouvant être intéressés à la négociation.

Puis le ministre des affaires étrangères, en coopération, le cas échéant, avec le ministre principalement concerné, définit ou approuve le mandat des négociateurs et la composition de la délégation. Ce mandat est constitué par les positions que ceux-ci ont à soutenir durant la négociation.

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[2] Dans la présente circulaire, le terme accord » est utilisé pour désigner tous les engagements internationaux, que ce soient des traités ou des accords en forme simplifiée.

La pratique actuelle n'impose pas aux négociateurs d'être munis de pouvoirs formels au stade de la négociation, sauf si les parties à cette négociation ou l'organisateur de celle-ci l'exigent.

3. *L'agenda prévisionnel de la négociation et des procédures ultérieures*

Un agenda prévisionnel indicatif est établi conjointement par le ministre des affaires étrangères et, le cas échéant, le ministre en charge de la négociation, en même temps qu'est défini le cadre de la négociation. Il porte sur deux points:

– pour la phase de négociation, il comporte autant que possible une estimation du calendrier des rencontres, de la durée de la négociation et de la date envisagée pour la signature de l'accord. Il convient de tenir compte, dans le calcul de cette durée, des délais nécessaires aux consultations interministérielles et à l'examen des questions politiques, techniques et juridiques que soulève la négociation. Dès cette phase, il convient également de déterminer si l'accord pourrait entraîner une adaptation des dispositions législatives ou réglementaires nationales. Cet aspect est à prendre particulièrement en considération lorsqu'un projet de loi destiné à mettre en application l'accord est susceptible d'être présenté au Parlement concomitamment avec l'autorisation de ratification ou d'approbation de l'accord;

– pour la phase ultérieure, il convient de déterminer le plus tôt possible si l'accord devrait faire ou non l'objet d'une autorisation parlementaire de ratification ou d'approbation, en application de l'Article 53 de la Constitution. Il faut également déterminer, dès que possible, si l'instrument sera ou non applicable aux territoires d'outre-mer. A cet effet, le ministre chargé des territoires d'outre-mer est consulté sur la nécessité de recueillir l'avis des assemblées territoriales des territoires d'outre-mer. Les dispositions de la circulaire n° 4446/SG du 30 janvier 1997 (publiée au *Journal officiel* du 1er février 1997, page 1720) doivent, à cet égard, être respectées. Les délais de consultation des assemblées territoriales doivent impérativement être pris en compte pour l'établissement du calendrier précité. En tout état de cause, il convient de prévoir des délais suffisants pour éviter que les administrations et organes consultés n'aient à se prononcer, le moment venu, dans l'urgence.

4. *La conduite de la négociation*

Il est indispensable qu'une information précise sur le contenu et l'évolution des discussions soit diffusée à l'ensemble des ministères intéressés,

notamment lorsque ces discussions sont de nature à affecter sensiblement la teneur de l'accord. Lorsqu'un ministre autre que le ministre des affaires étrangères conduit la négociation, il doit veiller à ce que ce dernier dispose d'un suivi détaillé de la négociation.

Les corrections et ajustements souhaités doivent intervenir autant que possible avant la clôture de la phase officielle de négociation.[3] En effet, dès sa signature, la portée de l'accord ne peut plus être modifiée, sauf par voie de réserves s'il s'agit d'un accord multilatéral. Or, il est trop souvent constaté que c'est au moment où sont engagées par le Gouvernement les procédures en vue de la ratification ou de l'approbation que les administrations font valoir des objections.

Lors de l'examen des questions juridiques que soulève le projet en cours de négociation, une importance particulière doit être accordée à la conformité des dispositions de celui-ci avec la Constitution. Le secrétaire général du Gouvernement doit être tenu informé de toute difficulté d'ordre constitutionnel soulevée par la négociation d'un accord. Il lui appartient de saisir, si nécessaire, le Conseil d'Etat d'une demande d'avis sur la conformité du projet à la Constitution.

5. *Cas particuliers de consultation*

Les accords culturels comportant des clauses douanières ou fiscales conformes aux usages en la matière doivent être communiqués par le secrétariat général du comité interministériel pour les questions de coopération économique européenne (SGCI) à la Commission des Communautés européennes par le canal de notre représentation permanente à Bruxelles avant leur entrée en vigueur. Si ces clauses fiscales sont susceptibles d'être interprétées comme dérogatoires aux normes communautaires, il convient de fournir toutes les données utiles d'appréciation à la Commission qui informe les autres Etats membres dans un délai d'un mois. Le Conseil, statuant à l'unanimité sur proposition de la Commission, peut autoriser un Etat membre à conclure un accord pouvant contenir des dérogations à la directive 77/388 du Conseil du 17 mars 1977 (sixième directive TVA).

La décision du Conseil est réputée acquise dans un délai de deux mois si l'affaire n'est pas évoquée devant le Conseil.

Conformément à la décision du Conseil 74/393/CEE du 22 juillet 1974 (instaurant une procédure de consultation pour les accords de coopération des Etats membres avec les pays tiers), il convient égale-

[3] Les négociateurs, en apposant leur dernier paraphe, reconnaissent la rédaction comme étant le résultat définitif de leurs discussions.

ment d'informer la Commission et les autres Etats membres des accords relatifs à la coopération économique et industrielle qu'il est envisagé de négocier avec des pays tiers. Le texte de ces accords paraphés doit être communiqué à la Commission et aux autres Etats membres. A la demande de l'un d'entre eux ou à l'initiative de la Commission, une consultation peut être organisée afin de s'assurer que les accords envisagés sont conformes aux politiques communes et de favoriser, le cas échéant, une coordination des Etats membres à l'égard des pays tiers concernés.

III. Rédaction et présentation

1. *La langue des négociations et des accords*

La réforme constitutionnelle du 25 juin 1992 a inscrit dans notre charte fondamentale le principe selon lequel « la langue de la République est le français » (Article 2). Il appartient à nos représentants d'en tirer toutes les conséquences quant à la conduite de nos relations extérieures.[4]

a) Pour la négociation des accords bilatéraux, que celle-ci se déroule en France ou à l'étranger, les négociateurs s'expriment et rédigent en français, en faisant usage de l'interprétation et de la traduction si nécessaire. A l'étranger, en cas d'impossibilité d'utiliser le français dans les pourparlers, il convient d'utiliser une langue officielle du pays.

Dans les pays dont les négociateurs français ne pratiquent pas la langue ou une des langues officielles et lorsque leurs interlocuteurs ne pratiquent pas le français, l'usage d'une langue tierce est proscrit dans les phases officielles de négociation.

Dans tous les cas, les correspondances officielles relatives à la négociation sont rédigées en français. Ce principe, valable pour tous les pays, doit être respecté de façon particulièrement stricte pour les pays qui appartiennent aux institutions francophones;

b) Pour la négociation des accords multilatéraux, il incombe aux négociateurs français de s'exprimer et de rédiger en français et de faire usage de l'interprétation et de la traduction. Il ne peut être dérogé à cette

[4] Une circulaire du Premier ministre du 12 avril 1994 fait un rappel de ces responsabilités pour l'ensemble des agents publics tant dans leur activité en France que dans leur relation avec l'étranger. Une circulaire conjointe, du 30 novembre 1994, du ministre des affaires étrangères et du ministre de la culture et de la francophonie précise plus particulièrement les dispositions relatives à l'emploi de la langue française dans les relations internationales. Ces deux textes, en vigueur, demeurent d'actualité.

règle que dans l'enceinte des rares organisations internationales où le français n'a pas le statut de langue officielle (institutions financières créées à Bretton Woods).

Il faut veiller à ce que les documents préparatoires à une phase de négociation soient diffusés en temps utile en version française, par le secrétariat de l'organisation ou la présidence de la négociation;

c) La langue de l'accord:

Plusieurs cas de figure peuvent être distingués:

– celui de la négociation bilatérale qui aboutit à un seul texte en version française; celui de la négociation bilatérale qui aboutit à deux textes, l'un en français, l'autre dans une langue officielle de l'autre Etat. Dans la mesure du possible, il faut décourager l'autre Etat de demander une version supplémentaire en langue tierce. Il est en tout cas exclu que celle-ci soit désignée dans l'accord comme faisant foi;
– celui des accords multilatéraux pour lesquels un texte est établi dans chacune deslangues officielles de la négociation.

Dans tous les cas, les négociateurs français doivent exiger une version française faisant foi. Le strict respect des obligations de la présente circulaire doit conduire à éviter que la version française faisant foi ne procède d'une traduction. De telles traductions comportent en effet le plus souvent des impropriétés terminologiques et risquent même d'introduire des notions inconnues de notre ordre juridique national. Ces défauts de la traduction sont, l'expérience le montre, à l'origine de bien des difficultés lors de l'accomplissement des phases ultérieures de la procédure et dans l'application même de l'accord.

Lorsqu'une telle traduction ne peut être évitée, il revient aux négociateurs de veiller à ce que celle-ci soit parfaitement conforme tant aux usages du français qu'à notre tradition juridique. Cette surveillance doit s'exercer suffisamment tôt pour permettre la prise en compte des observations qu'appellera cette traduction.

2. *Eléments habituels d'un accord international*

D'une façon générale, les caractéristiques de la rédaction doivent être autant que possible conformes à la circulaire n° 4446/SG du 30 janvier 1997 relative aux règles d'élaboration, de signature et de publication des textes au *Journal officiel* et à la mise en oeuvre de procédures particulières incombant au Premier ministre, qui recommande notamment clarté, sobriété et correction grammaticale et pose le principe d'un énoncé par Article.

Le titre précise clairement l'objet du texte sous une forme aussi concise que possible, ainsi que les parties à l'instrument.[5]

Le préambule énonce les parties: « Le Président de la République française et le Président . . . », « La République française et le Royaume de . . . », « Le Gouvernement de la République française et le Gouvernement de . . . », ou, pour certains accords multilatéraux, « les Etats parties au présent accord », formules éventuellement complétées, selon la rédaction des Articles du dispositif de l'accord, par la formule ci-après dénommées : « Les Hautes Parties contractantes », s'agissant d'un accord en forme solennelle, ou « les Parties », s'agissant d'un accord en forme simplifiée.

Il rappelle en tant que de besoin les accords antérieurs dans le cadre desquels est conclu l'accord en cause. Il peut également fixer le principe de l'engagement et les intentions politiques auxquelles répond la conclusion de cet accord. L'ensemble se conclut par la formule : « sont convenus des dispositions suivantes ».

Il convient d'être attentif à la rédaction du préambule, dans la mesure où celui-ci peut éventuellement constituer un élément d'appréciation des intentions des parties en cas de difficulté d'interprétation des dispositions de l'accord.

Les Articles sont rédigés au présent, comme dans les textes de droit interne, pour marquer la permanence des dispositions. Ils doivent exprimer clairement les engagements des parties. Les formules du type « s'engagent à » sont rendues inutiles par la formule qui clôt le préambule (voir paragraphe précédent), sauf si les négociateurs souhaitent expressément exclure l'applicabilité directe des dispositions concernées.

La règle générale suivie par les publications officielles s'agissant des intitulés d'organismes et d'institutions consiste, lorsqu'il s'agit d'organismes et d'institutions dont la compétence s'étend à tout le territoire d'un Etat, à les traiter comme de véritables noms propres et donc à doter le premier mot nécessaire à l'identification d'une majuscule, ainsi que l'adjectif éventuel qui le précède, à l'exclusion de tout autre. Les sigles sont à proscrire, de même que l'emploi des mots d'une langue étrangère.

En dehors du cas des engagements correspondant à une opération entraînant nécessairement une dépense spécifique, l'accord doit contenir une clause de réserve budgétaire qui permet de limiter l'engagement financier de l'Etat aux crédits votés par le Parlement dans le cadre des

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[5] Pour la graphie des noms d'Etats, il est recommandé de se reporter à l'arrêté des ministres des affaires étrangères et de l'éducation nationale du 4 novembre 1993 relatif à la terminologie des noms d'Etats et de capitales.

lois de finances annuelles. Un accord n'a pas en principe à mentionner les services traitants chargés de mettre en oeuvre un instrument international. Cette mention lie inutilement alors que l'évolution des compétences et les circonstances commandent des adaptations fréquentes de l'organisation administrative. En sens inverse, la demande par des négociateurs étrangers d'une telle disposition peut être la marque d'une faiblesse de leur administration dans leur Etat et le signe de difficultés ultérieures d'application de l'accord projeté.

Une clause territoriale peut être nécessaire, en particulier dans le cas des conventions fiscales et des accords de protection et d'encouragement des investissements. A cet égard, trois formules, couvrant implicitement la mer territoriale qui n'a donc pas à être expressément visée, peuvent être utilisées pour la partie française :

- « le présent accord est applicable à l'ensemble du territoire de la République française », c'est-à-dire à ses départements européens et d'outre-mer, aux territoires d'outre-mer et aux collectivités territoriales de Saint-Pierre-et-Miquelon et de Mayotte;
- « le présent accord est applicable aux départements européens et d'outre-mer de la République française »;
- « le présent accord est applicable aux départements européens de la République française ».

Même dans les cas où l'Etat étranger ne souhaite pas définir le champ d'application territorial de l'accord en ce qui le concerne, l'accord doit explicitement mentionner le champ d'application territorial pour la France. Dans la désignation des territoires auxquels l'accord est applicable, il peut être ajouté, le cas échéant : « ainsi qu'à sa zone économique exclusive et à son plateau continental pour les activités relevant des droits souverains de la République française, conformément aux dispositions de la convention des Nations unies sur le droit de la mer du 10 décembre 1982 ».

Il convient, en tout état de cause préalablement au choix d'une de ces rédactions, de déterminer :

- si, eu égard à son objet, l'accord traitera de matières de la compétence des territoires d'outre-mer;
- dans l'affirmative, s'il y a lieu, d'exclure ceux-ci du champ d'application de l'accord.

Si la convention porte sur des matières de la compétence des territoires d'outre-mer et si son application dans ces territoires est souhaitée, il convient de consulter les assemblées territoriales (cf. II.3, V.2 et annexe VI.12).

La mention des mécanismes de règlement des différends sur l'interprétation des instruments est une faculté. Si de tels mécanismes ne sont pas mentionnés dans un accord, les différends sur son interprétation se régleront par la voie diplomatique. En cas d'échec, il peut être convenu de recourir à un autre mode de règlement des différends, par exemple l'arbitrage. Cela suppose l'accord des deux parties.

S'il est prévu dans l'accord de recourir à l'arbitrage, le soin de désigner les arbitres manquants peut être confié au secrétaire général des Nations unies, au président de la Cour internationale de justice ou aux présidents d'autres juridictions internationales. Pour certains types d'accord, notamment les accords sur la protection et l'encouragement des investissements, il est d'usage de prévoir des clauses ad hoc de règlement des différends, comme le recours au Centre international pour le règlement des différends relatifs aux investissements entre un Etat et une personne privée.

Toute mention relative au règlement des différends doit faire l'objet d'une consultation préalable de la direction des affaires juridiques du ministère des affaires étrangères.

Les clauses finales mentionnent les conditions nécessaires à l'entrée en vigueur de l'accord (cf. VI). Elles doivent aussi contenir les conditions de validité de l'accord : durée, clause de dénonciation, prolongement éventuel des opérations en cours au titre de l'instrument en cas de dénonciation . . . La durée de validité de l'accord peut varier, d'un an à une durée illimitée.

Elle peut être prorogée pour des périodes de même durée, soit tacitement, soit par accord exprès. En cas de prorogation tacite, il conviendra de s'assurer régulièrement que l'accord continue à produire des effets. Si une prorogation par accord exprès est choisie, il faudra l'effectuer le moment venu, faute de quoi l'accord sera automatiquement abrogé (cf. annexe I).

La formule finale mentionne la date et le lieu de signature, le nombre d'exemplaires originaux et les versions linguistiques. Elle se présente ainsi : « Fait à . . . , le . . ., en deux exemplaires originaux en langues française et . . ., chacun des textes faisant foi ». Chaque partie conserve un exemplaire original contenant les différentes versions linguistiques et dans lequel les textes la mentionnent en première place, aussi bien dans le titre, le préambule et les signatures que dans les dispositions où les deux parties sont citées (principe de l'alternat). Pour un accord en deux versions linguistiques par exemple, ce sont donc quatre textes différents qui auront été rédigés. Les signatures sont placées chacune sous la mention « Pour le Gouvernement de . . . » dans le cas d'un accord en forme simplifiée ou « Pour le Président de la République . . . » dans le cas d'un

accord en forme solennelle. Sous chaque signature sont dactylographiés le prénom, le nom et la qualité du signataire.

3. *Particularités selon les types d'accord*

a) Forme solennelle et forme simplifiée: Outre la formule précédant la signature, les accords en forme solennelle ne se distinguent des accords en forme simplifiée que sur quelques points. Il sont en principe intitulés « traités (. . .) entre la République française et . . . ». Il peut être agréé entre les parties de mentionner les plénipotentiaires qui ont négocié le traité (cf. annexe II). En outre, le texte doit prévoir une ratification.

b) Protocole de signature. Un protocole de signature est une annexe de nature interprétative. Il commence généralement par les mots : « Au moment de signer le présent traité (ou accord), les plénipotentiaires (ou les représentants des deux gouvernements) sont tombés d'accord pour donner l'interprétation suivante à l'Article . . . du traité (ou de l'accord) ». Il ne comporte pas de clauses finales, mais est signé comme le texte de base.

c) Echange de lettres ou de notes. Un échange de lettres est une forme particulière d'accord, en principe réservée à des engagements dont le texte est assez court. Il répond également à des règles de présentation particulière (cf. annexe III). Un accord peut aussi être conclu sous forme d'échange de notes, lequel se caractérise par le style impersonnel et les formules de politesse traditionnelles.

IV. Signature

1. *Compétence*

En dehors du Président de la République, du Premier ministre et du ministre des affaires étrangères, tous les signataires d'un accord, quelle que soit sa dénomination, doivent être munis de pouvoirs. A la différence des accords, les arrangements administratifs peuvent être signés sans pouvoirs. Toutefois, lorsqu'un ambassadeur procède à leur signature au nom d'un ministre, il doit être muni de l'autorisation de celui-ci. Par la circulaire n° 4251/SG du 17 juillet 1995, j'ai précisé qu'afin de valoriser la conclusion de nos accords auprès des Etats concernés, ces accords doivent être signés soit par les ministres, ministres délégués ou secrétaires d'Etat eux-mêmes à Paris ou dans les Etats concernés, soit, à défaut, par les ambassadeurs dans leur Etat de résidence. Le cas des protocoles financiers est traité dans la note n° 2561 du 17 juillet 1995. Dans tous les cas de figure, il convient d'informer ces derniers de l'immi-

nence d'une telle signature, afin qu'ils puissent s'assurer de la préparation de nos partenaires et apprécier l'écho donné à cet événement dans leur Etat de résidence.[6] Par ailleurs, la loi organique n° 96–312 du 12 avril 1996 modifiée portant statut d'autonomie de la Polynésie française (publiée au *Journal officiel* du 13 avril 1996, page 5724) prévoit, par son Article 40, que le président du gouvernement de la Polynésie française peut recevoir pouvoir pour négocier et signer des accords dans les domaines de compétence de l'Etat ou de la Polynésie avec un ou plusieurs Etats, territoires ou organismes régionaux du Pacifique et avec les organismes régionaux dépendant des institutions spécialisées des Nations unies.

2. *Procédure*

Lorsque le ministre principalement concerné n'est pas le ministre des affaires étrangères, il demande à ce dernier des pouvoirs. Ils sont établis par la direction des affaires juridiques (sous-direction des accords et traités) du ministère des affaires étrangères, à la demande du service traitant de ce ministère.

Ce dernier transmet à cette fin un dossier comprenant :

- une note précisant les nom, prénom(s) et qualité du bénéficiaire des pouvoirs (ainsi que son grade éventuel dans l'ordre national de la Légion d'honneur pour les pleins pouvoirs), le nom de l'agent compétent du service traitant, le nom de l'agent de la direction des affaires juridiques qui a suivi le dossier et, pour les accords entrant en vigueur à la signature, les lettres par lesquelles les ministres intéressés ont donné leur accord;
- une note explicative comportant une analyse sommaire de l'accord et indiquant, lorsque celui-ci doit entrer en vigueur du seul fait de sa signature, les raisons pour lesquelles il n'a pas à être soumis au Parlement;
- le texte définitif de l'accord ou à défaut sa dernière version, ainsi que les modifications susceptibles d'y être apportées (en un seul exemplaire pour les pouvoirs simples, en deux exemplaires pour les pleins pouvoirs).

Si la signature n'a pas lieu, le ministre concerné fait retour des pouvoirs, accompagnés d'une note explicative, au ministre des affaires étrangères.

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[6] Paragraphe 4.1.1 de la circulaire n° 4446/SG du 30 janvier 1997 (publiée au *Journal officiel* du 1er février 1997, page 1720).

Les délais nécessaires à la délivrance des pouvoirs sont normalement les suivants:

– une semaine pour des pouvoirs simples, délivrés par le ministre des affaires étrangères pour la signature d'un accord en forme simplifiée conclu au nom du Gouvernement;
– trois semaines pour des pleins pouvoirs, délivrés par le Président de la République pour la signature d'un accord en forme solennelle conclu en son nom.

Il est également d'usage de délivrer des pouvoirs pour la participation aux conférences diplomatiques destinées à élaborer un instrument international, lesquels permettent en général de « siéger, négocier et voter ».

3. *Dispositions protocolaires*

Le texte paraphé doit encore être soumis à un certain contrôle. La direction des affaires juridiques du ministère des affaires étrangères fait ses observations sur l'ensemble des dispositions de l'accord. S'il est bilingue, le service traitant en envoie copie au service de la traduction qui vérifie la concordance des textes. En aucun cas, le texte paraphé du projet, qui est seulement un document de travail des négociateurs, ne peut, pour cette raison, recevoir ultérieurement les signatures définitives.

Le ministre des affaires étrangères fait alors établir les versions du texte sur les supports appropriés pour recevoir les signatures. Dans le cas d'un engagement multilatéral, il assume également cette tâche si la France a été désignée pour en assurer la conservation, en prévoyant de faire imprimer les copies destinées aux autres parties.

En principe, la signature des accords bilatéraux se fait dans la capitale où la négociation ne s'est pas conclue. Toutefois, on ne tient pas compte de cet élément si elle doit intervenir à l'occasion d'un déplacement ministériel. La cérémonie de signature se déroule suivant un cérémonial précis dont l'organisation est confiée au Protocole du ministère des affaires étrangères de l'Etat où elle est effectuée. Dans le cas d'un accord multilatéral, cette organisation revient à l'Etat ou à l'organisation désigné comme dépositaire (cf. annexe IV).

4. *Conservation*

La conservation des originaux des accords bilatéraux ou multilatéraux dont la France est dépositaire, ou des copies certifiées conformes des accords multilatéraux dans les autres cas, est assurée par le ministère des affaires étrangères. Si l'accord a été signé à l'étranger, il revient à l'am-

bassade d'acheminer au Protocole, sous bordereau enregistré, l'original ou la copie conforme qui revient à la France. La direction des archives et de la documentation et la direction des affaires juridiques (sous-direction des accords et traités) sont informées de la signature de l'accord, par télégramme si elle a eu lieu à l'étranger ou par avis de signature si elle a eu lieu à Paris.

V. Autorisation de ratifier ou d'approuver

Le ministre des affaires étrangères est compétent pour mettre en oeuvre la procédure permettant à la France d'exprimer son consentement à être liée[7] par l'instrument international, y compris lorsque celui-ci a été négocié par un autre ministre. Il détermine, à partir des dispositions qui ont été signées, s'il convient ou non de solliciter une autorisation parlementaire pour approuver, ratifier l'accord ou y adhérer.

1. *La demande d'autorisation parlementaire de ratification ou d'approbation*

La Constitution prévoit que certains engagements internationaux sont soumis au Parlement avant leur ratification ou leur approbation. La liste en est donnée par l'Article 53, qui dispose que « les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'Etat, ceux qui modifient des dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en vertu d'un loi ».

Une fois la signature de l'accord effectuée, le ministre concerné prend l'attache du ministre des affaires étrangères afin que celui-ci examine si cet accord relève ou non de l'Article 53 de la Constitution. Il doit en être ainsi pour tous les accords, y compris pour ceux qui constituent des amendements ou des ajouts par rapport à un accord principal, dans la

[7] Terminologie : au regard du droit français, le consentement d'un Etat à être lié par un accord international peut s'exprimer par la signature, la ratification, l'approbation ou l'adhésion. La signature a cet effet lorsque l'accord prévoit l'entrée en vigueur à la signature ou lorsqu'il ne comporte, pour son entrée en vigueur, aucune condition relative à une procédure ultérieure (ratification, approbation, acceptation . . .). La ratification exprime ce consentement dans le cas des accords en forme solennelle, l'approbation dans le cas des accords en forme simplifiée. L'adhésion s'entend du consentement à être lié par un accord multilatéral après la période initiale d'ouverture à la signature. Dans un accord multilatéral, qui peut mentionner expressément dans ses clauses finales divers modes d'expression du consentement à être lié, il convient de s'assurer que l'un au moins de ces modes soit visé.

mesure où aucune règle de parallélisme des formes ne peut être invoquée pour appliquer à l'accord complémentaire le traitement réservé à l'accord principal. C'est précisément le cas lorsque l'accord principal ne comporte pas de dispositions de nature législative ou ayant une incidence sur les finances publiques et qui de ce fait ne relève pas de la procédure de l'Article 53, alors que l'avenant, comportant de telles dispositions, y sera soumis.

La direction des affaires juridiques du ministère des affaires étrangères procède à l'analyse requise en fonction du contenu propre de chaque accord et en examinant chacune de ses clauses. Sauf pour les traités de paix et de commerce, les accords relatifs à l'état des personnes et ceux qui comportent cession, échange ou adjonction de territoire, il n'est pas possible de définir a priori les accords dont l'objet les ferait entrer ou non dans les prévisions de l'Article 53. Quelques indications peuvent néanmoins être fournies, notamment à partir de la jurisprudence du Conseil constitutionnel et du Conseil d'Etat.

Les accords de siège sont d'ordinaire soumis à autorisation législative, dans la mesure où ils contiennent des dispositions sur les privilèges et immunités.

Les accords édictant une obligation financière directe et certaine sont considérés comme engageant les finances de l'Etat. Il en est ainsi lorsque cette contribution financière, qui peut prendre des formes variées (participation à un mécanisme de financement spécifique, mise à disposition de personnels ou de biens . . .) constitue pour le Gouvernement une obligation, dont l'inexécution serait considérée par les autres parties comme un manquement aux engagements internationaux de la France.

Dès lors que l'une au moins des stipulations d'un accord ressortit au domaine de la loi, tel qu'il est déterminé par l'Article 34 de la Constitution, l'autorisation du Parlement pour sa ratification ou son approbation doit être recherchée. Cette exigence s'applique même dans les cas où la législation en vigueur satisfait en l'état à toutes les obligations résultant du traité ou de l'accord en cause, sans qu'il soit besoin de la modifier ou de la compléter. Lorsque la réponse à la question de savoir si l'accord relève de la procédure prévue par l'Article 53 soulève une difficulté, il appartient au ministre des affaires étrangères de consulter le secrétaire général du Gouvernement.

2. *La procédure de ratification ou d'approbation*

Dans les cas où l'expression du consentement à être lié par l'accord nécessite la mise en oeuvre de la procédure prévue par l'Article 53, les

étapes de cette procédure se déroulent de la façon suivante: le dossier du projet de loi est constitué par le ministère des affaires étrangères avec le concours des autres administrations intéressées et adressé au secrétariat général du Gouvernement (service législatif) aux fins de saisine du Conseil d'Etat. Il signale, le cas échéant, la nécessité d'un prompt examen du texte.

Ce dossier doit impérativement comporter les pièces suivantes:

– le projet de loi;

– un exposé des motifs;

– l'étude d'impact, qui doit être établie le plus en amont possible de la rédaction de l'accord (circulaire du 21 novembre 1995 relative à l'expérimentation d'une étude d'impact accompagnant les projets de loi et de décret en Conseil d'Etat publiée au Journal officiel du 1er décembre 1995, page 17566);

– la liste des services du ministère des affaires étrangères et des autres ministères intéressés par l'accord avec l'indication du nom et des coordonnées de l'agent appelé à représenter son administration aux réunions au Conseil d'Etat et en séance publique à l'Assemblée nationale et au Sénat;

– les lettres des ministères intéressés exprimant leur adhésion à la poursuite de la procédure;

– une note de la direction des affaires juridiques du ministère des affaires étrangères indiquant en quoi cet accord relève de l'Article 53 de la Constitution;

– lorsque l'accord est applicable dans les territoires d'outre-mer, l'avis émis par les assemblées territoriales des territoires d'outre-mer ou au moins les lettres de saisine de ces assemblées ou, le cas échéant, une note faisant ressortir que la consultation desdites assemblées ne s'impose pas. Lorsque la saisine des assemblées territoriales des territoires d'outre-mer s'impose, il convient de veiller à limiter l'usage de la procédure de consultation en urgence aux cas exceptionnels;

– le texte de l'accord imprimé par le Journal officiel de la République française. Il incombe au ministère des affaires étrangères de veiller à la stricte conformité du texte imprimé avec l'original de l'accord. Toute erreur constatée ultérieurement à l'engagement des procédures par le Gouvernement devant le Conseil d'Etat aurait pour effet de retarder l'examen auquel celui-ci doit procéder;

– lors de l'examen du projet de loi par le Conseil d'Etat, qui se fait habituellement en trois réunions successives (avec le rapporteur, en section, en assemblée générale), les ministres intéressés doivent être représentés à chacune de ces réunions;

– lorsqu'une divergence apparaît entre l'avis rendu par le Conseil d'Etat et le projet présenté par le Gouvernement, le secrétariat général du Gouvernement et le cabinet du Premier ministre procèdent, préalablement à l'inscription à l'ordre du jour d'un conseil des ministres, à l'examen de la question et peuvent convoquer une réunion interministérielle de relecture à cet effet;

– la présentation du projet de loi, en partie A du conseil des ministres, est effectuée par le ministre des affaires étrangères;

– lors de l'examen du projet de loi par le Parlement, le ministère des affaires étrangères est chargé, en relation avec les administrations concernées, de suivre les procédures liées à cet examen: réponse à un éventuel questionnaire d'information de la commission compétente, examen du projet de loi par cette commission, discussion en séance et vote.

Lorsque les dispositions de l'accord n'imposent pas que soit mise en oeuvre la procédure de l'Article 53 de la Constitution, il appartient au ministre des affaires étrangères, après s'être assuré du consentement des ministres intéressés, de diligenter les procédures permettant à la France d'exprimer son consentement à être liée par les dispositions de l'accord.

Enfin, l'Article 11 de la Constitution permet de soumettre au référendum un projet de loi autorisant « la ratification d'un traité qui, sans être contraire à la Constitution, aurait des incidences sur le fonctionnement des institutions ».

VI. Entrée en vigueur

L'entrée en vigueur d'un accord a lieu conformément aux dispositions de cet accord prévues à cet effet.

1. *Les accords bilatéraux*

Les accords en forme simplifiée entrent en vigueur après remise à l'autre partie d'un instrument d'approbation ou, plus généralement, d'une notification de l'accomplissement des procédures exigées par le droit interne pour l'entrée en vigueur de cet accord. La clause finale habituellement retenue fixe l'entrée en vigueur au premier jour du deuxième mois suivant la remise du deuxième instrument d'approbation ou de la deuxième des notifications.

Les accords en forme solennelle entrent en vigueur par l'échange des instruments de ratification. L'instrument de ratification est un acte signé par le Président de la République, par lequel celui-ci fait sien l'engagement

souscrit en son nom, et contresigné par le Premier ministre et par le ministre des affaires étrangères. Les instruments de ratification peuvent être adressés à l'Etat cocontractant par une lettre du ministre des affaires étrangères, auquel cas, la remise n'étant pas simultanée, ils prennent effet à la date de réception du second instrument de ratification, ou à l'issue d'un délai à partir de cette date fixé dans l'accord. Il est également possible de recourir à la technique traditionnelle de l'entrée en vigueur le jour de l'échange des instruments de ratification. L'usage est alors de procéder à l'échange dans le cadre d'une cérémonie. Une variante de cette méthode consiste à prévoir un délai entre le jour de l'échange et celui de l'entrée en vigueur, le plus souvent fixé à un mois.

L'entrée en vigueur dès la signature est réservée aux accords en forme simplifiée qui n'entrent pas dans le champ de l'Article 53 de la Constitution et dont l'entrée en vigueur ne nécessite pas, de ce fait, de procédure parlementaire. Même pour ce type d'actes, il est néanmoins préférable de prévoir un délai entre la signature et l'entrée en vigueur, afin de pouvoir préparer la publication de l'accord. La clause finale fixe alors l'entrée en vigueur au premier jour du deuxième mois suivant la signature. Dans ces cas, le ministre des affaires étrangères doit se montrer très vigilant lors de la délivrance des pouvoirs de signature et s'assurer de ce que l'autorisation du Parlement n'a pas à être recherchée et que les ministres ont donné leur assentiment par lettres d'accord. Les arrangements administratifs peuvent entrer en vigueur dès la signature, dans la mesure où, par définition, ils sont conclus dans le cadre strict de la législation en vigueur et des disponibilités budgétaires de leur signataire, ne relèvent que des attributions de celui-ci et ne nécessitent d'autre procédure interne que la consultation du ministre des affaires étrangères qui en apprécie l'opportunité politique et la qualité de la rédaction.

2. *Les accords multilatéraux*

Un accord multilatéral entre habituellement en vigueur à partir du dépôt d'un nombre déterminé d'instruments exprimant le consentement de ces Etats à être liés par l'engagement, ou passé un certain délai après ce dépôt. Cette entrée en vigueur, dite générale, n'a cependant d'effet que pour les Etats ayant procédé à ce dépôt. La possibilité d'une entrée en vigueur pour l'ensemble des Etats à partir du dépôt des instruments d'une partie seulement d'entre eux doit être réservée aux amendements à certaines conventions multilatérales. L'inscription d'une disposition en ce sens, dans la convention de base, ne doit être acceptée qu'avec la plus grande prudence et après consultation de la direction des affaires juridiques du ministère des affaires étrangères.

3. *L'application provisoire*

L'application provisoire peut être prévue par les dispositions finales pour des raisons liées à des circonstances particulières, mais elle doit rester exceptionnelle. Elle s'explique pour des raisons avant tout d'ordre pratique et peut aboutir à des situations juridiquement incertaines si l'entrée en vigueur tarde. Elle est à proscrire en toute hypothèse, d'une part, lorsque l'accord peut affecter les droits ou obligations des particuliers, d'autre part, lorsque son entrée en vigueur nécessite une autorisation du Parlement.

VII. Réserves et déclarations interprétatives

Une réserve à un accord international est une déclaration unilatérale faite par un Etat lorsqu'il signe, ratifie ou approuve cet accord, par laquelle il vise à exclure ou à modifier l'effet juridique de certaines dispositions de cet accord en ce qui le concerne.

Une réserve ne peut être formulée lorsque l'accord la prohibe expressément. Elle doit rester en outre compatible avec le droit des traités. Ainsi une réserve qui consisterait purement et simplement à écarter telle ou telle disposition du traité ne serait pas admissible.

Si la convention de Vienne du 23 mai 1969 sur le droit des traités, qui, sur ce point, codifie le droit international coutumier, autorise les Etats à formuler des réserves à un accord, c'est en effet à certaines conditions, dont la plus importante est que ces réserves ne soient pas incompatibles avec le but et l'objet de l'accord. Les autres Etats contractants peuvent faire objection à la réserve. L'objection a une portée en fait essentiellement politique, sauf si l'Etat qui l'émet décide en même temps que l'accord dans son ensemble ne s'appliquera pas dans ses rapports avec l'Etat auteur de la réserve.

Il convient, dans ces conditions, d'être particulièrement prudent avant de recourir à cette faculté: on ne saurait en effet préjuger la portée qu'attribueraient à une réserve (le cas échéant, contraire à l'objet et au but d'un accord) les organes internationaux éventuellement chargés de l'application de cet accord, ou les juridictions qui seraient saisies de la validité d'une telle réserve.

En conséquence, le texte de toute réserve projetée doit être soumis en temps utile à la direction des affaires juridiques du ministère des affaires étrangères, afin que celle-ci en apprécie la validité. De façon générale, une réserve ne doit pas être considérée comme une manière de corriger des erreurs ou des oublis commis au cours de la négociation et ne doit être formulée que pour des raisons impératives. Bien qu'il n'y ait pas

de règle en la matière, il est souhaitable qu'elle soit rédigée avec précision et concision.

Bien que la convention de Vienne n'en fasse pas mention, le droit des traités autorise les Etats à émettre des déclarations interprétatives. Il s'agit de déclarations unilatérales par lesquelles l'Etat précise la portée qu'il attribue à telle ou telle disposition de l'accord. Comme pour les réserves, leur texte ne doit pas être incompatible avec le but et l'objet de l'accord. Il doit être également soumis à la direction des affaires juridiques du ministère des affaires étrangères.

Lorsque la nécessité de formuler des réserves ou des déclarations interprétatives a été établie, l'usage est d'y procéder au moment de la signature de l'accord mais elles peuvent être formulées ou modifiées jusqu'au moment de la ratification ou de l'approbation de cet accord. Elles sont ensuite confirmées lors de l'expression par la France de son consentement définitif.

La formulation de réserves relève de la seule compétence du pouvoir exécutif. Dans la pratique, le texte des réserves et des déclarations interprétatives dont a été assortie la signature d'un accord qui nécessite une procédure parlementaire est communiqué au Conseil d'Etat et au Parlement en même temps que le projet de loi autorisant la ratification ou l'approbation.

VIII. Publication

1. *L'obligation de publication*

La publication a pour objet:
- de rendre public le contenu de l'accord;
- d'introduire l'accord dans l'ordre juridique national.

Sauf cas exceptionnels, tous les accords doivent faire l'objet d'une publication au Journal officiel de la République française, conformément aux dispositions du décret n° 53–192 du 14 mars 1953 modifié relatif à la ratification et à la publication des engagements internationaux souscrits par la France. Cette obligation doit être respectée strictement, notamment dans la mesure où de nombreux accords peuvent affecter des intérêts privés. En cas de non-publication, en effet, l'accord, s'il est d'effet direct, n'est pas opposable aux personnes et, d'une manière générale, n'est pas invocable dans l'ordre juridique interne.

Le décret n° 86–707 du 11 avril 1986 a rendu obligatoire la publication dans les mêmes formes de l'acte portant dénonciation par la

France d'un accord publié conformément au décret de 1953. Cette publication est en effet nécessaire pour l'information des particuliers.

2. *L'initiative de la procédure de publication*

Elle relève du ministre des affaires étrangères qui, après avoir constaté la date de l'entrée en vigueur pour la France de l'accord et vérifié qu'aucun des ministres intéressés ne s'oppose à sa publication, saisit le secrétaire général du Gouvernement du décret portant publication, aux fins d'accomplissement des procédures de signature et de publication de celui-ci.

3. *Les délais de publication*

La publication de l'accord ne peut se faire avant l'entrée en vigueur de celui-ci afin d'éviter l'introduction dans l'ordre interne de dispositions dépourvues de portée juridique sur le plan international. Mais il importe qu'elle intervienne le plus vite possible après l'entrée en vigueur. Le ministre des affaires étrangères est chargé de veiller à ce que la publication soit quasi simultanée de l'entrée en vigueur et qu'en tout état de cause le délai n'excède pas un mois. Les ministres intéressés et le secrétaire général du Gouvernement lui apportent leurs concours pour respecter ces délais.

Il est à déplorer que la publication des traités et accords soit trop souvent tardive aujourd'hui. Plus de diligence doit désormais être observée en la matière.

4. *Le contenu de la publication*

Le décret portant publication est accompagné du texte in extenso de l'accord et des réserves ou déclarations interprétatives formulées par la France au moment de la signature ou lors du dépôt des instruments de ratification. Il mentionne la date d'entrée en vigueur pour la France.

Lorsqu'un engagement modifie ou complète un engagement précédent dont la publication n'aurait pas été effectuée, il est nécessaire de publier celui-ci simultanément avec sa modification.

Le décret portant publication est signé par le Président de la République, le Premier ministre et le ministre des affaires étrangères à l'exclusion de tout autre ministre. Pour les conventions internationales du travail, le ministre chargé du travail est également appelé à signer ce décret. La publication est toujours effectuée sous le timbre du ministère des affaires étrangères. Il incombe au ministre des affaires étrangères de procéder, une fois l'engagement publié au Journal officiel, à son enregistrement

auprès de l'Organisation des Nations unies en application de l'Article 102 de la Charte des Nations unies et, pour les accords aériens, auprès de l'Organisation de l'aviation civile internationale (OACI), en application de l'Article 83 de la convention de Chicago du 7 décembre 1944 relative à l'aviation civile internationale.

5. *Effets de la publication*

En vertu de l'Article 55 de la Constitution, « les accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie ».

Certains accords ne créent d'obligations qu'à la charge des Etats. C'est ce que le Conseil d'Etat (décision GISTI du 23 avril 1997) a déterminé pour certains Articles de la convention de l'Organisation des Nations unies relative aux droits de l'enfant. En revanche, comme le souligne le même arrêt à propos de la convention n° 118 de l'OIT du 28 juin 1962, les autres accords peuvent être invoqués par les particuliers et prévalent sur le droit interne, soit qu'ils soient d'effet direct, soit que les mesures de transposition en droit interne qu'ils appelaient dans un délai donné ne soient pas intervenues ou soient intervenues incomplètement, dans ce délai. Lorsqu'un ministre autre que le ministre des affaires étrangères considère qu'un accord cesse d'être adapté à l'évolution de nos relations avec un Etat, il lui incombe d'en saisir le ministre des affaires étrangères. Ce ministre est seul compétent, sous mon autorité, pour prendre les mesures qui s'imposent : dénonciation unilatérale par la France; abrogation sur la base d'une entente commune des parties; décision de suspension d'un accord ou de certaines de ses dispositions.

Les principes et les règles rappelés ci-dessus ont pour but de garantir la cohérence et l'unité de la politique étrangère de la France, lorsqu'elle conduit à prendre des engagements internationaux. Il convient de veiller strictement à leur respect. Le ministre des affaires étrangères, en liaison avec le secrétaire général du Gouvernement, fera rapport au Premier ministre sur leur mise en oeuvre.

Pour le Premier ministre et par délégation:
Le secrétaire général du Gouvernement,
Jean-Marc Sauvé

ANNEX C

DECREE ON RATIFICATION AND PUBLICATION OF INTERNATIONAL AGREEMENTS

DECREE No. 53–192 OF MARCH 14, 1953 RELATING TO THE RATIFICATION AND PUBLICATION OF INTERNATIONAL AGREEMENTS CONCLUDED BY FRANCE AS MODIFIED BY DECREE No. 86–707 OF APRIL 11, 1986 (*J.O.R.F.* MARCH 15, 1953 AND APRIL 13, 1986)

The President of the Council of Ministers,

Upon the report of the Ministry of Foreign Affairs,

In view of the *Arrêtés* of the Executive *Directoire* of 22 Messidor year VII and the Decree of December 25, 1810, relating to the authorities of the Ministry of Exterior Relations;

In view of a Decree of November 5, 1870, relating to the promulgation of Statutes and Decrees;

In view of the Statute of November 24, 1945, relating to the authorities of the Ministers;

In view of the Statute of August 17, 1948, for economic and financial improvement;

Having heard the Conseil d'Etat

Having heard the Council of Ministers

Decrees:

Article 1

The Ministry of Foreign Affairs is alone in charge of overseeing ratification and publication of conventions, agreements, protocols and international regulations of which France is a signatory or by which France is bound. This is also true for renewal or denunciation of same.

However, with regard to international conventions of labor law, the Ministry of Foreign Affairs ensures that ratification and publication of those conventions are done jointly with the Ministry of Labor.

Article 2

The Ministers, for their department and for the administrative services which are separate legal entities attached thereto, when they have participated directly or through the intermediary of their representatives in the elaboration or the denunciation of conventions, agreements, protocols and regulations binding on France vis-à-vis a State or an international organization, or within an international organization to which France is a party, are obliged to transmit to the Ministry of Foreign Affairs the text of those conventions, agreements, protocols and regulations, whatever importance they have, and whatever their nature, immediately after signature or adoption.

Article 3

After transmission to the Ministry of Foreign Affairs and if necessary, ratification, the conventions, agreements, protocols and regulations provided for in the preceding Articles which, by their application, might affect the rights and obligations of individuals, must be published in the *Journal officiel de la République française*.

However, these conventions, agreements, protocols or regulations may be inserted in full in an official and special bulletin printed by the *Journal officiel* available to the public.

In that case, the information in the *Journal officiel*, related to such insertion, with precise indication of the date and the number of a special bulletin, is deemed to constitute publication and enjoy the same effects.

The provisions of this Article are not applicable to regulations emanating from an international organisation when those regulations are published in full in the official bulletin of that organisation, available to the public and when this publication suffices, by virtue of the express provisions of a convention binding on France, to make those obligations affect individuals.

Article 4

Reservations and interpretative declarations which are potentially annexed to the French instruments of ratification or approval of conventions, agreements, protocols or international regulations published in accordance with the first two paragraphs of Article 3 must be published in the same form when they are of a nature to affect the rights and obligations of individuals.

Article 5

The act by which France denounces a convention, an agreement, a protocol or an international regulation published by virtue of the two first paragraphs of Article 3 must be published in the same form.

The act providing for the deletion of the reservation or of a published interpretative declaration by virtue of the provisions of Article 4 must be published in the same manner.

Article 6

The Minister of Foreign Affairs and Ministers and Secretary of State interested are charged, each within its own competence with implementing this decree which will be published in the *Journal officiel de la République française.*

Done in Paris,
March 14, 1953.

René Mayer
By the President of the Council of Ministers:
The Minister of Foreign Affairs,
Georges Bidault

ANNEX D

FULL POWERS (*PLEINS POUVOIRS*) DOCUMENT

Francois Mitterrand,
President of the French Republic

to all recipients of the present Letters,

greetings:

A TREATY OF GOOD NEIGHBORLINESS, FRIENDSHIP AND COOPERATION BETWEEN THE REPUBLIC OF FRANCE, THE KINGDOM OF SPAIN AND THE PRINCIPALITY OF ANDORRA IS TO BE SIGNED TO THESE ENDS

Being fully confident in the capability, the zeal and devotion of Mr. Alain Juppé, the Minister of Foreign Affairs.

We have named and constituted him our Plenipotentiary for the purpose of signing the Present Treaty.

We undertake to accomplish and execute all commitments stipulated and signed in Our Name by Our said Plenipotentiary, without permitting any contravention of same in any manner whatsoever subject to Our Letters of Ratification.

IN WITNESS WHEREOF, We have apposed our hand and the Seal of the Republic.

Done in Paris, this 14th day of June, 1993

By the President of the Republic:
/s/ François Mitterrand

The Prime Minister,
/s/ Edouard Balladur

ANNEX E

LETTER FROM THE MINISTER OF FOREIGN AFFAIRS GRANTING SIMPLE POWERS (*POUVOIRS SIMPLES*) TO THE AMBASSADOR OF FRANCE

FRENCH REPUBLIC

No. 167/93

POWERS

In the name of the Government of the Republic, WE, Minister of Foreign Affairs, hereby grant POWERS to Mr. Jean-Raphaël DUFOUR, Ambassador of France in Cuba,

to sign the aviation Agreement between the Government of the French Republic and the Government of the Republic of Cuba.

Done in Paris, this 25th day of August, 1993

The Minister of Foreign Affairs:
/s/ Alain Juppé

ANNEX F

INSTRUMENT OF RATIFICATION

RATIFICATIONS BY THE PRESIDENT OF THE FRENCH REPUBLIC OF THE TREATY ON EUROPEAN UNION SIGNED AT MAASTRICHT ON FEBRUARY 7, 1992

Francois Mitterrand,
President of the French Republic

to all recipients of the present Letters,

greetings:

A TREATY ON EUROPEAN UNION HAVING BEEN SIGNED AT MAASTRICHT ON FEBRUARY 7, 1992, CONTAINING THE FOLLOWING:

Having viewed and examined said treaty, we have approved it and approve each and all of its parts, by virtue of the provisions contained therein and in accordance with Article 52 of the Constitution, declare that it is accepted, ratified and confirmed, and we undertake to hold it inviolable.

In witness whereof, we have presented this document bearing the Seal of the Republic.

At Paris, this 15th day of October, 1992

/s/ François Mitterrand
By the President of the Republic

The Prime Minister
/s/ Pierre Bérégovoy

The Minister of State, Minister of Foreign Affairs,
/s/ Roland Dumas

ANNEX G

APPROVAL OF A CONVENTION BY THE MINISTER OF FOREIGN AFFAIRS

THE FRENCH REPUBLIC

The Minister of Foreign Affairs
Paris, May 18, 1993

Your Excellency,

I refer herein to Article 50 of the Protocol between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the border controls and to the police, judicial and penal cooperation, civil security and mutual assistance, concerning the permanent trans-Channel liaison, signed at Sangatte on November 25, 1991, I have the honor of informing you that the procedures required by the Constitution of the Republic for the implementation of said Protocol have been accomplished.

The present letter constitutes the Instrument of Approval intended by the provision cited above.

I would appreciate your advising me of the date on which you will receive same.

Respectfully yours,

Done in Paris, May 18, 1993

/s/ Alain Juppé

His Excellence
The Honorable Douglas Hurd
Minister of Foreign Affairs
London

ANNEX H

STATUTE AUTHORIZING RATIFICATION
(Referendum)

LAW No. 92–1017 OF SEPTEMBER 24, 1992 AUTHORIZING RATIFICATION OF THE TREATY ON EUROPEAN UNION
(*J.O.R.F.* No. 223, SEPTEMBER 25, 1992, AT 13294)

The President of the Republic has submitted to referendum,

In view of the decision of the Constitutional Council No. 92.312 DC dated September 2, 1992, relating to the Treaty on European Union;

The Constitutional Council has proclaimed the results of the referendum on September 23, 1993;

The French People have adopted;

The President of the Republic promulgates the following text of the law:

Single Article – The ratification of the Treaty on European Union concluded among the Kingdom of Belgium, the Kingdom of Denmark, The Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of The Netherlands, the Republic of Portugal, the United Kingdom of Great Britain and Northern Ireland, has been signed at Maastricht on February 7, 1992.

The present law shall be executed as a Law of the State.

Done in Paris, this 24th day of September, 1992

/s/ François Mitterrand
By the President of the Republic

The Prime Minister,
/s/ Pierre Bérégovoy

The Minister of State, Minister of Foreign Affairs,
/s/ Roland Dumas

The Ministerial Delegate to European Affairs,
/s/ Elisabeth Guigou

ANNEX I

STATUTE AUTHORIZING RATIFICATION
(Parliament)

LAW No. 2004–149 OF FEBRUARY 16, 2004 AUTHORIZING RATIFICATION OF THE PROTOCOLS TO THE NORTH ATLANTIC TREATY ON THE ACCESSION OF THE REPUBLIC OF BULGARIA, THE REPUBLIC OF ESTONIA, THE REPUBLIC OF LATVIA, THE REPUBLIC OF LITHUANIA, THE REPUBLIC OF ROMANIA, THE REPUBLIC OF SLOVAKIA AND THE REPUBLIC OF SLOVENIA
(*J.O.R.F.* No. 40, FEBRUARY 17, 2004, AT 3168)

The National Assembly and the Senate have adopted,

Single Article. Ratification is authorized of the Protocol to the North Atlantic Treaty on the accession of the Republic of Bulgaria, the Protocol to the North Atlantic Treaty on the accession of the Republic of Estonia, the Protocol to the North Atlantic Treaty on the accession of the Republic of Latvia, the Protocol to the North Atlantic Treaty on the accession of the Republic of Lithuania, the Protocol to the North Atlantic Treaty on the accession of the Republic of Romania, the Protocol to the North Atlantic Treaty on the accession of the Republic of Slovakia and the Protocol to the North Atlantic Treaty on the accession of the Republic of Slovenia, signed at Brussels on March 26, 2003, the texts of which are annexed to the present Law.

The present law will be executed as a Law of the State.

Done in Paris, February 16, 2004

/s/ Jacques Chirac
By the President of the Republic

The Prime Minister,
/s/ Jean-Pierre Raffarin

The Minister of Foreign Affairs,
/s/ Dominique de Villepin

ANNEX J

STATUTE AUTHORIZING APPROVAL
(Parliament)

LAW No. 2004–110 OF FEBRUARY 6, 2004 AUTHORIZING APPROVAL OF THE AGREEMENT BETWEEN THE GOVERNMENT OF THE FRENCH REPUBLIC AND THE GOVERNMENT OF ROMANIA CONCERNING COOPERATION IN MATTERS OF DEFENCE
(*J.O.R.F.* N° 32, FEBRUARY 7, 2004, AT 2615)

The National Assembly and the Senate have adopted,
The President of the Republic promulgates the following text of the law:

Single Article. Approval is authorized of the agreement between the Government of the French Republic and the Government of Romania concerning cooperation in matters of defence, signed at Bucharest on October 24, 1998, the text of which is annexed to the present Law.

The present law will be executed as a Law of the State.

Done in Paris, February 6, 2004

/s/ Jacques Chirac
By the President of the Republic

The Prime Minister,
/s/ Jean-Pierre Raffarin

The Minister of Foreign Affairs,
/s/ Dominique de Villepin

ANNEX K

DECREE OF PUBLICATION OF A CONVENTION

DECREE No. 2004–75 OF JANUARY 15, 2004, ON PUBLICATION OF THE AGREEMENT BETWEEN THE FRENCH REPUBLIC AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND RELATING TO FISHERIES IN THE BAY OF GRANVILLE, SIGNED AT SAINT-HÉLIER ON JULY 4, 2000.

(*J.O.R.F.* No. 18, JANUARY 22, 2004, AT 1622)

The President of the Republic,

Upon report of the Prime Minister and the Minister of Foreign Affairs,

In view of Articles 52 to 55 of the Constitution;

In view of the Statute n° 2003–232 of March 17, 2003, authorizing the ratification of the agreement between the French Republic and the United Kingdom of Great Britain and Northern Ireland relating to fisheries in the Bay of Granville, signed at Saint-Hélier on July 4, 2000.

In view of the Decree n° 53–192 of March 14, 1953, as amended, for the ratification and publication of international engagements undertaken by France.

Decrees:

Article 1

The agreement between the French Republic and the United Kingdom of Great Britain and Northern Ireland relating to fisheries in the bay of Granville, signed at Saint-Hélier on July 4, 2000, will be published in the *Journal Officiel* of the French Republic.

Article 2

The Prime Minister and the Minister of Foreign Affairs are entrusted, each on his own part, with the execution of the present Decree, which will be published in the *Journal Officiel* of the French Republic.

Done in Paris, this 15th day of January 2004

/s/ Jacques Chirac
By the President of the Republic

The Prime Minister,
/s/ Jean-Pierre Raffarin

The Minister of Foreign Affairs,
/s/ Dominique de Villepin

IV. Bibliography

Abbreviations

A.F.D.I.	Annuaire Français de Droit International
A.J.D.A.	Actualité Juridique – Droit Administratif
Ass.	Assemblée
Bull. Civ.	Bulletin des Arrêts de la Cour de cassation, Chambres civiles
Bull. Crim.	Bulletin des Arrêts de la Cour de cassation, Chambre criminelle
Ch.	Chambre
Ch. civ.	Chambre civile
Ch. com.	Chambre commerciale
Ch. crim.	Chambre criminelle
J.C.P.	Jurisclasseur Périodique
J.D.I.	Journal du Droit International (Clunet)
J.O.	Journal Officiel de la République Française (Lois et Décrets)
L.P.A.	Les Petites Affiches
R.C.D.L.P.	Revue Critique de Droit International Privé
R.D.P.	Revue de Droit Public et de la Science Politique
Rec.	Lebon Recueil des Décisions du Conseil d'Etat (Lebon)
Recueil	Recueil des Décisions du Conseil constitutionnel
R.F.D.A.	Revue Française de Droit Administratif
R.F.D.C.	Revue Française de Droit Constitutionnel
R.G.D.I.P.	Revue Générale de Droit International Public
R.J.F.	Revue de Jurisprudence Fiscale
Sect.	Section

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CHAPTER NINE

NATIONAL TREATY LAW AND PRACTICE: FEDERAL REPUBLIC OF GERMANY

Dr. Hubert Beemelmans
Dr. Hans D. Treviranus

I. Introduction

A. *Basic Constitutional Structure*

Under the German Constitution – the Basic Law (*Grundgesetz*) – international agreements[1] of the Federal Republic of Germany are concluded by the Executive, which consists of the Federal President and the Federal Government. The Basic Law for the Federal Republic of Germany, enacted on May 23, 1949, places the treaty-making power, as part of the foreign-relations power, in the hands of the Executive, which alone is entitled to act within the province of the international legal system (i.e., the "conduct of foreign relations" according to Article 32(1) of the Basic Law; *see* Part II.A.). Any rights of the legislature (*see* in particular Part II.B.) and the judiciary (*see* Part II.C) to participate in the conclusion and implementation of treaties, however significant and important they may be in doctrinal and practical respects, are a mere qualification of the Basic Law rule that it is the Executive which decides on its own responsibility and initiative on foreign affairs and hence also on the conclusion, implementation, and termination of treaties.

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[1] "International agreements" signifies treaties according to Art. 2(1) of the two Vienna Conventions on the Law of Treaties of 1969 and 1986, both ratified by the Federal Republic of Germany. Agreements on foreign aid, sales (or lease) contracts, and similar agreements follow the general rules on international agreements if governed by international law. Agreements on financial or technical assistance are usually concluded in two stages: an intergovernmental agreement frequently in the form of an exchange of notes (*see infra* note 12) serves as a cover for an agency-to-agency contract between the German executing agency – parastatal or private – and the agency or ministry of the other state. These contracts usually contain a clause submitting them to German (private) law and jurisdiction. Oral agreements occur very seldom in quite exceptional circumstances. Unilateral acts are not considered to be international agreements, though they may generate international obligations. Agreements governed by municipal law are being dealt with according to the relevant rules of Conflict of Laws. For non-legal arrangements, *see* Part II.E.

As regards the federal structure of the Federal Republic of Germany, the treaty-making power of the *Länder* (*see* Part II.D) is of little practical importance. However, within the framework of the federal legislation, the *Länder* as members of the Federal Council (*Bundesrat*) play a significant role in the approval and national implementation of treaties.

B. *Incorporation of Treaties into National Law and their Implementation*

While under Article 25 of the Basic Law, the general rules of public international law are an integral part of the body of federal law, a corresponding general provision on the transformation of treaty law is lacking. Treaties requiring parliamentary approval are incorporated into national law by bills of approval[2] that establish the internal validity and applicability of a given treaty. Normative treaties regulating matters of legislation can also be executed on the basis of statutory regulations (*Rechtsverordnungen*) issued by the Federal Government or a single federal ministry, if there exists a special ad hoc authorization laid down in a regular law. Other treaties are internally applied solely on the strength of their publication, without an express authorization or application order, or on the basis of instructions to the administrative authorities required to carry out international commitments.

Implementation of multilateral – and bilateral – agreements does not often come under the jurisdiction of a single authority or office (governmental department); if necessary, implementation is assured by the competent department within the government.[3]

C. *Exclusive and Mixed Competence of the European Community*

The competence of member states of the European Community (EC) to conclude international agreements on subjects covered by the EC Treaty has passed to the Community itself according to Article 300 (1) of the EC Treaty.[4] This applies for instance to customs and trade agreements (EC Treaty Article 133), monetary agreements (Article 111), environmental policy (Article 175) and agreements on economic, financial and technical cooperation (Article 181a). Other competences of the EC follow from its competence to regulate the internal régime of the Community: where a subject has been regulated internally by the Community, the EC

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[2] *See* Annex A (Basic Law, Art. 59(2) lst cl.); *see also infra* Part II.B.

[3] As to the application of treaties concerning legislation of the Länder, *see* Part II.D.

[4] Court of Justice of the European Communities, Judgment of March 31, 1971 (AETR-Case) 1971, at 263.

is entitled to harmonize its external relations with the internal situation achieved (the principle of the "parallelism of the internal and external competence"). Member states have to respect these competences of the EC in their national treaty practice by providing for clauses of denunciation, adaptation or succession in favor of the Community.

If only part of the subject matter of a treaty falls under the exclusive competence of the Community, the treaty has to be concluded and applied jointly by the Community and its member states.[5] Normally the negotiations are conducted entirely by the EC Commission, in contact with the member states through the EC Council and joint committees. Such treaties are signed first by the member states and then by the EC Presidency or the EC Commission.

Treaties concluded by the European Union, according to Articles 24 and 38 of the EU Treaty, are binding only on the member states, since the European Union has no legal personality in International Law.[6]

II. Treaty Law and Practice in Germany

A. *The Treaty-Making Power of the Executive*

1. *Executive Responsibilities*

The exercise of the treaty-making power, as outlined below, is the responsibility of the two supreme organs of the Executive.

1.a. The Federal President (*Bundespräsident*) represents Germany as Head of State in its international relations and concludes treaties with foreign states.[7] However, the functions of the Head of State, according to the Basic Law, are of a merely formal and representative nature. The Federal President confers full powers to negotiate and sign treaties and he signs instruments of ratification[8] or accession, functions which he generally

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[5] Court of Justice of the European Communities, Opinion 1/94 WTO/GATS/TRIPS, 1994 I 5267.

[6] Kugelmann Regelsberger, Article 24 EU treaty note 2 *in* Rudolf Straunz and Christoph Ohler, *EUV/EGV – Vertrag über die Europäische Union und Vertrag über die Gründung der Europäischen Gemeinschaft* (Verlag C.H. Beck, 2003); Stephan Marquard, Article 24 EU treaty note 1s. *in* Hans von der Groeben and Jürgen Schwarze, *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (Nomos Verlagsgesellschaft, 6th ed. 2003).

[7] *See* Annex A (Basic Law, art. 59(1) cls. 1–2.).

[8] The term "ratification" is restricted, according to German usage, to the act of ratifying treaties by deposit or exchange of a formal instrument of ratification signed by the Federal President. *See* Annex G (Instrument of Ratification.)

only performs in the case of (formal) state treaties (*Staatsverträge*); i.e., treaties which, according to German treaty practice, are concluded on behalf of the states involved (and not of their governments or of individual ministries). As a rule, all international agreements of special significance, or where the contracting parties so desire, are concluded as formal (state) treaties with the Head of State participating. Like every other important act by the Federal President, any grant of full powers or ratification of a treaty needs to be countersigned by the Federal Government[9] which has both substantive and political responsibility for treaty-making policy.

1.b. Insofar as the Federal President does not act himself, treaties are handled by the Federal Government (Cabinet), consisting of the Federal Chancellor (*Bundeskanzler*), who as Head of Government determines the policy guidelines,[10] including those for treaties, and the federal ministers, of whom the Foreign Minister, in accordance with normal practice, plays a leading and coordinating role with regard to treaty relations.

The Federal Government concludes on its own responsibility international agreements in the form of inter-governmental agreements (*Regierungsabkommen*), i.e., agreements in which the governments, not the states or Heads of State, are referred to as contracting parties, although these agreements equally establish international obligations on the part of the states involved. According to German practice, intergovernmental agreements are generally only concluded where no parliamentary approval is required. Intergovernmental agreements are in principle not ratified but are given effect by mere signature or by notification unless the other contracting party wants ratification. Full powers for the signature of intergovernmental agreements are generally given by the Federal Minister for Foreign Affairs.[11] The exercise of these powers by the Federal Government is a matter of international usage and national practice; they are not set out in detail in the Basic Law.

Another group of agreements are ministerial agreements (*Ressortabkommen*) that are concluded by a federal minister within the exclusive sphere of competence of his federal ministry and are applicable to the administrative sector it covers. These agreements are not political treaties, nor do they affect legislative matters. The other party to the agreement is, in general, also a departmental minister or a corresponding high authority (agency). This is the form in which agreements are concluded on administrative

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[9] Basic Law, Art. 58.
[10] Basic Law, Art. 65.
[11] *See* Annex B (Joint Rules, § 82(2)); *see also* Annex F.

matters and in particular on the administrative implementation of existing treaties. Before initiating negotiations on a ministerial agreement, it is necessary to inform the Federal Foreign Office and obtain its consent. If full powers are required for the signing of a ministerial agreement, they are conferred by the competent departmental minister himself. Ministerial agreements can also be concluded through an exchange of letters between the competent departments of the contracting states.

Intergovernmental agreements, and, in exceptional cases, formal state treaties, may be concluded in the form of an exchange of notes on behalf of the Federal Government; ministerial agreements are, in many cases, also given the form of an exchange of notes.[12] The competence of the Federal Government to conclude agreements on the government level and the competence of departments to conclude agreements on their level are not expressly mentioned in the Basic Law of the Federal Republic of Germany or in statutory law. Those competences are based on tradition going back to the German Empire and are firmly entrenched and recognized by constitutional practice and precedents. The competences are spelled out in part in several para-constitutional instruments.

2. *The Role of the Federal Foreign Office*

The Joint Rules of Procedure of the Federal Ministries[13] contain, in addition to the Rules of Procedure of the Federal Government, administrative provisions regarding the initiation of treaty negotiations, the participation of federal ministries, the issue of full powers, and the further treatment of existing agreements. The Federal Foreign Office (*Auswärtiges Amt*) is responsible for coordinating the treaty policy of the other federal ministries. Through its missions and posts abroad, it attends to the Federal Republic's administrative affairs abroad. It conducts treaty negotiations at home and abroad without formally consulting Parliament and in agreement with the competent federal and *Land* agencies unless it delegates the chairmanship of the conference delegation to the federal ministry which is competent for the operative part of the agreement. In the same way, treaties, conventions, and agreements, with the exception of ministerial agreements,[14] are signed by the Federal Minister for Foreign Affairs, the State Secretaries for Foreign Affairs, other members of the Federal Foreign Office, or by the Head of Mission abroad. Members of

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[12] In German terminology the word "note" means a verbal note as well as a formal diplomatic letter signed by the Head of Mission or by the Minister for Foreign Affairs or on his behalf.

[13] *See* Annex B ("GGO" – *Gemeinsame Geschäftsordnung der Bundesministerien*).

[14] *See* Part II.A.l.b.

the competent ministries, mostly the chairmen of delegations, may add their signature to agreements, and in many cases do so. Exchanges of notes and notes verbales are conducted by the Federal Foreign Office and its missions abroad through diplomatic channels.

International agreements are to be drafted in accordance with the Guidelines on the Conclusion of Treaties issued by the Federal Foreign Office.[15]

3. *Publication and Listing of International Agreements*

International agreements, when completed, are published in German by the Federal Ministry of Justice in Part II of the Federal Law Gazette (*Bundesgesetzblatt*); if they are subject to parliamentary approval, they are published before their entry into force, together with the enacting law.[16] There are exceptions to publication, e.g., in the case of short-term project agreements in the field of development aid. Foreign language texts are not reproduced in all cases. Non-published (confidential) intergovernmental agreements are brought to the attention of the parliamentary committees.

Annual lists[17] provide information on the number and nature of treaties applicable to Germany, including the sphere of application of multilateral conventions. The original texts of bilateral agreements and certified copies of multilateral conventions are deposited in the archives of the Federal Foreign Office, together with all accessory documents (full powers, instruments of ratification, and others).

Binding agreements with the exception of exchanges of notes on development aid projects and similar agreements of minor importance are registered with the UN Secretary General under Article 102 of the Charter of the United Nations by the Federal Foreign Office.

4. *Depositary Functions*

The Federal Foreign Office executes the obligations of the depositary. Germany has assumed such functions in regard to relatively few multilateral treaties.

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[15] *See supra* note 13 (GGO § 72(6)). These guidelines, the *Richtlinien für die Behandlung völkerrechtlicher Verträge (RvV)*, were redrafted in August 2004. They have not been published.

[16] *See* Annex I.

[17] *Bundesgesetzblatt Fundstellennachweis B Völkerrechtliche Vereinbarungen* ("Reference List B of International Agreements"). International agreements in force for Germany (including prewar treaties of the German Reich, but not counting the numerous exchanges of notes on financial aid and technical assistance to developing countries) can be estimated at about 6,800. Among those agreements about 1,500 have been approved by the legislature before entering into force. Germany concludes about 150 agreements per annum.

B. *Participation of Parliament in Treaty Policy and Practice*

The Basic Law for the Federal Republic of Germany follows the lines of the parliamentary system. Accordingly, Parliament not only establishes the government by electing the Chancellor but, over and above its legislative functions, controls the government's activities at home and abroad. The Basic Law provides that only the Federal Chancellor as the Head of Government, not the Foreign Minister alone or any other federal minister, may be the object of a vote of no confidence.[18] The opposition can only overthrow the Government if a new Chancellor is elected with the necessary absolute majority of votes. These particular features of the Constitution do not detract from the principle that the Federal Government is held responsible by Parliament for the foreign policy it pursues and hence the treaties it concludes. The legislative bodies observe this responsibility using normal parliamentary means: questions, debates, and resolutions. The Government, on the other hand, is interested in keeping the Parliament informed so as to secure its cooperation. In the context of this general participation of Parliament in the treaty-making power, parliamentarians quite often attend important treaty negotiations at the invitation of the Federal Government, and matters of treaty policy are the subject of critical and detailed discussion in the foreign affairs committees of the two chambers.[19] Conflicts on treaties between the executive and the legislative branches are therefore very rare.

The fact that Parliament is generally entitled to be informed about, and to take an active interest in, foreign policy matters so as to be able to perform its control function in accordance with the Constitution is not incompatible with the concentration of foreign relations power in the hands of the Federal Government, which alone has the right to initiate and conclude treaties. Strictly speaking, there is no parliamentary control of the treaty-making process prior to ratification.

Although the Federal Government cannot be given instructions by Parliament regarding the conclusion or termination of treaties, it is responsible to it. This was stated as follows in an early decision by the Federal Constitutional Court on a dispute about a treaty: "The powers of the Bundestag remain restricted to the general constitutional possibilities of control. It has not itself a governing and administrative function, but it controls the government. . . . It cannot itself conduct policy."[20]

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[18] Basic Law, Art. 67.

[19] The establishment of a foreign affairs committee within the *Bundestag* (Federal Parliament) is expressly regulated in Article 45a(l) of the Basic Law; Art. 45 (new) creates a Committee on European Union. *See* Annex A.

[20] Judgment of Ju1y 29, 1952, 1 BVerfG 372, at 394; *see* also Judgment of December 18, 1984, 68 BVerfG 1, at 85–89.

Apart from the general participation of Parliament in foreign affairs, the Basic Law regulates most significant participatory functions to be performed by Parliament in the conclusion of certain categories of treaties.[21] These categories, in terms of their contents and effects for Germany, are either:

- normative treaties, which cannot attain binding effect within Germany without a special order by the legislature or which cannot be enforced without a legal basis because they affect federal legislation.[22] This traditional category of agreements requiring consent corresponds to the legislature's exclusive power to legislate; or
- political treaties, a category which in German state practice is closely restricted to treaties of a highly political character.[23] As early as 1952, the Federal Constitutional Court laid down in the decision quoted above the following guidelines which have since become authoritative: an agreement can only be deemed to be a political treaty within the meaning of the Basic Law if it affects the existence of the state, its territorial integrity, its independence, its status, or its very role in the community of nations. This category includes above all treaties designed to assert, consolidate, or increase the power of a state in relation to other states.[24]

For other treaties, no legislative approval is required, not even for treaties involving financial obligations, notwithstanding the need to have contractual financial commitments authorized by Parliament by way of the budget. The conclusion of peace is the subject of a federal law.[25]

Parliament's consent to a treaty is, where necessary, given in the form of an accessory law (law of approval, enacting law) on which both chambers, the *Bundestag* and the *Bundesrat*, cooperate. The question of whether they have to approve as equal partners or whether the *Bundesrat's* participation is restricted is governed by complicated provisions of the Constitution on the relationship between the two legislative chambers[26] and cannot be described within the scope of this chapter. In the case of political treaties that do not affect legislative matters, the *Bundesrat* does not have the veto power of the *Bundestag*, which can be an important fact if the majority in the *Bundesrat* is represented by parties different from those in the *Bundestag*.

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[21] *See* Annex A (Basic Law, Art. 59(2), 1st sentence).
[22] *See id.* (Basic Law, Art. 59(2), lst sentence, 2d cl.).
[23] *See id.* (Basic Law, Art. 59(2), lst sentence, lst cl.).
[24] *See supra* note 20.
[25] Basic Law, Art. 115*l*(3).
[26] Basic Law, Arts. 50, 77(2)–(4).

For the conclusion and modification of treaties on the European Union, an ordinary federal law is sufficient; however, it requires the consent of the *Bundesrat*.[27] If such a treaty changes or amends the content of the Basic Law, a two-thirds majority of both chambers is required. Even such a majority cannot adopt a law or approve a treaty "affecting the division of the Federation into *Länder*, the participation on principle of the *Länder* in legislation, or the basic principles laid down in Articles 1 and 20 . . ."[28]

The procedure for consultations on laws of approval differs in part from normal legislative procedures. There are only two readings; neither amendments to the treaty nor conditions imposed by Parliament regarding the bill of approval introduced by the Executive are permissible.[29] The legislative bodies are not competent to instruct the Federal Government to make reservations or object to reservations made by other states when ratifying multilateral conventions.

Laws of approval are of a double nature: they authorize the Federal President to sign the instrument of ratification (and the Government to deposit it) and they transform the treaty into German national law. In their first role, they normally enter into force the day after their publication, whereas the day on which the treaty itself enters into force both internationally and nationally according to its final clauses is announced separately.[30]

If the provisions of a treaty affect existing laws or require new legal provisions, a separate bill (*Ausführungsgesetz*, law of execution) is introduced. Such laws are published in Part I of the *Bundesgesetzblatt* reserved for the national legislation whereas the laws of approval are to be found in Part II, International Agreements.[31]

If an international agreement requiring consent stipulates a simplified procedure for its amendment or for the conclusion of implementing arrangements, Parliament may authorize the Federal Government to enforce it at the national level by way of a statutory ordinance, and to enforce in the same way amendments to such agreements, or the addition of more specified details without having to reinitiate the approval procedure.[32] In

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[27] *See* Annex A (Basic Law, Art. 23(1)).

[28] *See* Annex A (Basic Law, Arts. 23(1), 79(2s.)). The quotation is from Art. 79(3). *See also* the Maastricht decision of the Federal Constitutional Court of October 12, 1993, 89 BVerfG 155 (The Court ruled that the Treaty of February 7, 1992 on European Union (BGBI.1992 II, at 1251) did not violate the principle of democracy as set out in Articles 20 and 38 of the Basic Law, the necessary legitimization of and influence on the authority of the state by the people).

[29] Rules of Procedure of the Federal Parliament, § 82(2).

[30] Federal Constitutional Court, Judgment of July 30, 1952, 1 BVerfG 396, at 410. *See also* Annex I.

[31] *See supra* Part II.A.3.

[32] "Anticipated approval"; *see* Basic Law, art. 80.

view of the competences of the *Länder*, such ordinances often require the approval of the *Bundesrat*, so that, irrespective of the delegation of the legislative power, a certain amount of parliamentary control with regard to such agreements remains possible. Amendments and extensions of approved treaties are also subject to approval by Parliament, even if the amendments do not relate to normative elements of the treaties concerned and could therefore, taken by themselves, be made by the Executive alone.

The denunciation (suspension or termination in agreement with the other contracting party) of international agreements is solely the responsibility of the Executive, irrespective of whether or not the agreement contains an express termination clause; approval (authorization) by the legislature is in no case necessary. Parliament is not consulted.[33]

The competent department, in cooperation with the Federal Foreign Office, the Federal Ministry of Justice, and the Federal Ministry of the Interior, decides whether a given treaty should be submitted to Parliament in accordance with the rules of the Basic Law referred to above and, in so doing, interprets the Constitution in light of the guidelines given by the Federal Constitutional Court. Parliament is not consulted on this question. Positive decisions are confirmed by the Cabinet. (All proposed bills are subject to Cabinet decision.)

Apart from the constitutional participation of the elected representative body in the treaty-making power, the Basic Law provides no room for the immediate participation of the people ("direct democracy"). The Federal Constitution, unlike those of some of the *Länder*, contains no provisions on plebiscites.[34]

There are, however, contacts with citizens, and of course Parliament, where the substance of a matter so requires. The public is consulted by the Federal Government department that commences negotiations on a given subject with a foreign state or government. Such consultation takes place as the need arises, e.g., to ascertain whether interested groups have special wishes that should be taken into account in the conclusion of an agreement. Consultations are held with representative bodies, for instance, chambers of commerce, associations, trade unions, and other organizations representing the public interest.

C. *Treaties and the National Judge*

In Germany the authority to conduct foreign relations, including treaties, is subject to control by the courts, as are all political or government

[33] Federal Constitutional Court, Judgment of December 18, 1984, 68 BverfG 1, at 85 s.

[34] The only two exceptions are Arts. 29(2) and 118 on the delimitation of *Länder* boundaries.

acts. The judge applies treaties and interprets them without, in the event of doubt, having to consult the Federal Government on the meaning and implications of the wording. In addition to the right of control, which every judge has to a limited extent, a special competence for the control of treaties lies with the constitutional jurisdiction. The Federal Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe examines, upon request, acts of the Executive and acts of the legislature (including laws enacting treaties under Article 59(2), first sentence, Basic Law) as to their conformity with the Constitution. Like any other question of constitutional law, conformity with the Constitution can be the subject matter of a constitutional dispute between state organs (the Parliament as a whole, parliamentary groups, the Federal President, the Federal Government, a *Land*), the abstract or concrete control of constitutional norms, or an individual complaint with the Constitutional Court.[35] In the course of its decision-making, the Federal Constitutional Court has repeatedly reviewed laws approving international agreements[36] and has, thus, regardless of its judicial self-restraint in political matters, indirectly brought a strong influence to bear on the shaping of bilateral agreements in particular. Although decisions taken by the Federal Constitutional Court cannot claim to be effective in terms of international law, all state organs, according to Article 31 of the Law on the Federal Constitutional Court, are bound by the decisions of this court. They are therefore obliged to bring about a change in the agreement so as to make it compatible with German law. Special mention should be made of the Federal Constitutional Court's power in a dispute to regulate provisionally through the use of an interim injunction if the need to avert serious harm or if another important reason makes this imperative.[37] The Court's power to use the interim injunction arises under Article 32(1) of the Law on the Federal Constitutional Court.

When examining the constitutionality of a law enacting a treaty, the Court, in choosing among several possibilities of interpretation, gives preference to the one that allows the agreement to be consistent with the Constitution; it also takes into account the political situation that is the basis of the treaty and the realities the treaty purports to shape or

[35] *See* Annex A (Basic Law, Art. 93).

[36] Judgments of July 30, 1952, 1 BVerfG 396, at 410; May 4, 1955, 4 BVerfG 157, at 162; March 21, 1957, 6 BVerfG 290; March 26, 1957, 6 BVerfG 309, at 326; June 25, 1968, 24 BVerfG 33; October 16, 1968, 24 BVerfG 203; December 9, 1970, 29 BVerfG 348, at 358; March 10, 1971, 30 BVerfG 272.

[37] In the Maastricht Treaty case, *supra* note 28, such an injunction had been asked for, but not granted, since the Federal President promised the Court not to sign the Instrument of Ratification of the Treaty until the Court had judged the Treaty not to be unconstitutional. The Court did, however, allow the Bill of Approval to be signed and promulgated.

alter.[38] Along these lines, the Federal Constitutional Court has in the past been able, in general, to avoid conflicts with all Federal Governments, so that its comments on the validity of treaties have not unreasonably restricted the Federal Government's freedom of action in international relations. Although its functions keep within the limits of the judiciary, the Federal Constitutional Court has played a major political role in disputes between the Government and the opposition on matters of foreign policy.[39]

D. *Treaties Concluded by the* Länder

1. *The Treaty-Making Power of the* Länder

The treaty-making power of the Federal Republic of Germany – a federal state acting as an entity in its international relations – is handled in principle by the Federation, it being the sole institution to handle administrative affairs abroad and conduct diplomatic and consular relations.[40] However, the *Länder* as federal components have a limited power to conclude treaties in their own name and in their own right. Under Article 32(3) they may (though not exclusively, as will be seen below) conclude, with the approval of the Federation, agreements on subject matters relating to their *Land* legislation. From 1949 to 1994, at least 79 treaties not including concordats[41] with neighboring European countries have been concluded, all of minor importance, mostly technical arrangements in connection with boundaries. The approval of the Federal Government, normally through Cabinet decision, authorizing the *Land* to conclude the treaty has never been denied. The development of the European Union leads to an intensified regional cooperation across national boundaries and thus increases the importance of the treaty-making power of the *Länder*.[42] The institutions authorized to conclude treaties and those entitled to participate are determined by the individual *Land* constitutions. In general, it is the Executive which concludes treaties through the Premier of the *Land* or the *Land* government. Parliamentary approval in the form of a law is given by the *Land Diets*.[43]

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[38] Judgment of May 4, 1955, 4 BVerfG 157, at 168–75.

[39] *See* the cases quoted in notes 20 and 38 and the judgment of July 12, 1994 in the so-called Adria, AWACS and Somalia cases, 90 BVerfG 286.

[40] Basic Law, Arts. 32(1), 73(1) and 87(1).

[41] Concordats do not fall under Arts. 32 and 59 of the Basic Law. The *Länder* can conclude concordats within the sphere of their constitutional competence without interference of the Federation. Federal Constitutional Court, Judgment of March 26, 1957, *supra* note 36, at 362.

[42] *Cf.* Annex A (Basic Law, Art. 24(1.a), transfer of state powers to transfrontier institutions).

[43] *See* Annex D.

Under Article 32(2) of the Basic Law, a *Land* must be consulted prior to the conclusion of a treaty by the Federation if that treaty affects the special circumstances of the *Land*. This provision is to be seen within the context of the constitutional structure which provides for the participation of the *Länder* through the *Bundesrat*, the second legislative chamber.

2. *The Role of the Länder in Federal Treaty-Making*

More important than the autonomous treaty-making power of the *Länder* under Article 32(3) is the fact that the Federation often concludes treaties which in part affect the legislative competence of the *Länder*, a case for which the Basic Law contains no provision. It has proved necessary – contrary to the view held by some *Länder* that *Land* legislation includes an exclusive treaty-making power of the *Länder* – for certain treaties to be concluded by the Federation, in particular cultural agreements, while at the same time ensuring their implementation by the competent *Länder*. This gap in the Constitution has been filled by an arrangement concluded between the Federal Government and the *Länder* governments on November 14, 1957, the so-called Lindau Arrangement,[44] which has proven to be a valuable instrument, although in it both sides uphold their different opinions as to the legal questions underlying the *modus vivendi*. Under paragraph 3 of this arrangement, the Federal Government, prior to the final conclusion of a treaty affecting in part legislative competences of the *Länder*, seeks the agreement of the *Länder* which, for their part, fulfill the obligations assumed under such treaties, if necessary by enacting corresponding *Land* legislation. The Federal Government in such cases also mostly avoids clauses in the treaty which would be legally binding on the *Länder*, limiting itself to promise "best efforts" to ensure their cooperation in the execution of the treaty.

Provision for the participation of representatives of the federal *Länder* in treaty negotiations conducted by the Federation and in international bodies was made in an arrangement of July 5, 1968 regarding cooperation between the Federation and the *Länder* within the framework of the power to conduct external relations (the Kramer-Heubl-Papier).[45]

E. *Non-legal Arrangements*

The necessity for the *Länder* to obtain the prior consent of the Federal Government for the treaties they want to conclude has led them to conclude non-legal arrangements such as Joint Declarations or Protocols

[44] *See* Annex C.
[45] Reproduced in RvV (*supra* note 15) *Anlage* D.

with foreign states, provinces or international organizations. In these cases, clauses constituting legal obligations are being carefully avoided, as well as expressions characteristic of legal language. The same practice is applied for example in town twinning agreements and cross-border cooperation on a provincial or local level. Such arrangements have become very popular in Europe in the framework of interregional relations and especially in the field of East-West relations during the Cold War period. The Federal Foreign Office sees to it that the Federation's monopoly to conduct foreign relations is not violated by the form and the content of such arrangements.

Similarly, declarations of intent or unilateral assurances of reciprocity are not legally binding where the parties involved had no intention to conclude an international agreement. This must, however, be clear not only by the content agreed upon but also by the language used.

F. *Succession to Treaties*

Germany's position in the case of state succession, especially in the cases of the dissolution of the Soviet Union, Yugoslavia, and Czechoslovakia, is that all treaties, both bilateral and multilateral, remain in force between Germany and the successor states, irrespective of whether these have been diplomatically recognized or not, until they have been abrogated or modified by mutual consent between Germany and the successor state. To make sure that this viewpoint is shared by the successor states, Germany has sought agreement with these states through Joint Declarations or exchanges of notes which are understood to be merely declaratory and which are published in the *Federal Law Gazette Part II*.

The reunification of Germany on October 3, 1990 was a case of incorporation of one state into another. The German Democratic Republic (GDR) acceded to the Federal Republic of Germany according to Article 23 (old) Basic Law. The treaties of the GDR are considered to have terminated in the moment of reunification according to customary international law. Through consultations with 135 states, practically all the treaty partners of the former GDR, Germany settled the legal consequences of these treaties such as the succession to debts and properties and territorial arrangements. The expiration of more than 2,200 GDR treaties as of October 3, 1990, was published in the *Federal Law Gazette Part II*.

The treaties of the Federal Republic of Germany were extended to the new *Länder* according to the moving frontier rule.[46]

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[46] On this section, *see* Hubert Beemelmans, "State Succession in International Law:

III. Basic Data and Documentation

A. *National Legislation and Arrangements*

Annex A: Constitutional Provisions Excerpts from the Basic Law of May 23, 1949
Annex B: Regulations and Orders Relating to Treaties
Annex C: Arrangement of 1957 between the Federation and the Länder (the Lindau Arrangement)
Annex D: Selected Constitutional Provisions of the Länder

B. *Selected Examples of Treaty Documents*[47]

Annex E: Presidential Full Powers
Annex F: Governmental Full Powers
Annex G: Instrument of Ratification (Convention not requiring Parliamentary approval)
Annex H: Instrument of Accession (Treaty requiring Parliamentary approval)
Annex I: Bill of Approval with Substantiation (*Gründe*) and Message to Legislature (*Denkschrift*)
Annex J: Official Promulgation of Treaties in the Federal Law Gazette

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Remarks on Recent Theory and State Praxis," 15 *B.U. Int'l L.* J. 71–123 (1997); on the bilateral consultations of the GDR treaties, *see* Dieter Papenfuß, The Fate of the International Treaties of the GDR within the Framework of German Unification, 92 *Am. J. Int'l L.* 469–488 (1998).

[47] The translations of these texts are from various sources that are difficult to access. The author assumes the responsibility as to their correctness.

ANNEX A

CONSTITUTIONAL PROVISIONS
EXCERPTS FROM THE BASIC LAW OF MAY 23, 1949

Article 23

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union, which is committed to democratic, rule-of-law, social and federal principles, as well as the principle of subsidiarity, and ensures protection of basic rights comparable in substance to that afforded by this Basic Law. To this end, the Federation may transfer sovereign powers by law with the consent of the *Bundesrat*. The establishment of the European Union, as well as amendments to its statutory foundations and comparable regulations which amend or supplement the content of this Basic Law or make such amendments or supplements possible, shall be subject to the provisions of paragraphs (2) and (3) of Article 79.

(2) The *Bundestag* and, through the *Bundesrat*, the *Länder* shall be involved in matters concerning the European Union. The Federal Government shall inform the *Bundestag* and the *Bundesrat* comprehensively and as quickly as possible.

(3) The Federal Government shall give the *Bundestag* the opportunity to state its opinion before participating in the legislative process of the European Union. The Federal Government shall take account of the opinion of the *Bundestag* in the negotiations. Details shall be the subject of a law.

(4) The *Bundesrat* shall be involved in the decision-making process of the Federation in so far as it would have to be involved in a corresponding internal measure or in so far as the *Länder* would be internally responsible.

(5) Where in an area in which the Federation has exclusive legislative jurisdiction the interests of the *Länder* are affected or where in other respects the Federation has the right to legislate, the Federal Government shall take into account the opinion of the *Bundesrat*. Where essentially the legislative powers of the *Länder*, the establishment of their authorities or their administrative procedures are affected, the opinion of the *Bundesrat* shall insofar prevail in the decision-making process of the Federation; in this connection, the responsibility of the Federation for the country as a whole shall be maintained.

In matters which may lead to expenditure increases or revenue cuts for the Federation, the approval of the Federal Government shall be necessary.

(6) Where essentially the exclusive legislative jurisdiction of the *Länder* is affected, the exercise of the rights of the Federal Republic of Germany as a member state of the European Union shall be transferred by the Federation to a representative of the *Länder* designated by the *Bundesrat*. Those rights shall be exercised with the participation of and in agreement with the Federal Government; in this connection the responsibility of the Federation for the country as a whole shall be maintained.

(7) Details regarding paragraphs (4) to (6) shall be the subject of a law which shall require the consent of the *Bundesrat*.

Article 24

(1) The Federation may by legislation transfer state powers to international organizations.

(l.a) Where the *Länder* have the right to exercise state powers and discharge state functions they may, with the consent of the Federal Government, transfer state powers to transfrontier institutions in neighboring regions.

Article 32

(1) Relations with foreign states shall be conducted by the Federation.

(2) Before a treaty that affects the special circumstances of a *Land* is concluded, that *Land* shall be consulted in good time.

(3) Insofar as the *Länder* have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states.

Article 45

The *Bundestag* shall appoint a Committee on European Union. It may empower the Committee to exercise the *Bundestag*'s rights in relation to the Federal Government in accordance with Article 23.[48]

[48] Law of March 12, 1993, on the Cooperation between the Federal Government and the *Bundestag* in matters of the European Union, BGBl.1993 I, at 311, and the law of the same day on the Cooperation between the Federation and the *Länder* in matters of the European Union, BGBl.1993 I, at 313 (not reproduced).

Article 59

(1) The Federal President shall represent the Federation in its international relations. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.

(2) Treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the approval or participation, in the form of a federal statute, of the bodies competent in any specific case for such federal legislation. As regards administrative agreements, the provisions concerning the federal administration shall apply *mutatis mutandis*.

Article 79

(2) Such law must be carried by two-thirds of the members of the *Bundestag* and two-thirds of the votes of the *Bundesrat*.

(3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited.

Article 93

(1) The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in disputes concerning the extent of the rights and obligations of a supreme federal institution or other institutions concerned that have been vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal institution;
2. in case of disagreement or doubt as to the formal and material compatibility of federal legislation or *Land* legislation with this Basic Law, or as to the compatibility of *Land* legislation with other federal legislation, at the request of the Federal Government, of a *Land* government, or of one-third of the members of the *Bundestag*;
3. in case of disagreement on the rights and obligations of the Federation and the *Länder*, particularly in the implementation of federal legislation by the *Länder* and in the exercise of federal supervision;
4. on other disputes involving public law, between the Federation and the *Länder*, between *Länder* or within a *Land*, unless recourse to another court exists;

4a. on constitutional complaints, which may be filed by anybody claiming that one of their basic rights or one of their rights under paragraph (4) of Article 20 or under Articles 33, 38, 101, 103, or 104 has been violated by public authority. . . .

ANNEX B

REGULATIONS AND ORDERS RELATING TO TREATIES

a) *Rules of Procedure of the Federal Government (GOBReg)*

§ 11 (2)
Negotiations with or in foreign states shall only be conducted with the consent of the Federal Foreign Office or, if it so wishes, only with its participation.

b) *Joint Rules of Procedure of the Federal Ministries (GGO)*
Chapter 6 – law-making
Section 8 – International Agreements and issues in the framework of the European Union

§ 72: International Agreements
(1) Prior to the elaboration and the conclusion of international agreements (state treaties, conventions, governmental agreements, ministerial agreements, exchanges of notes and letters) the competent federal ministry always has to examine whether an arrangement under international law is inevitable or whether the aim pursued can be reached by other means, especially through agreements below the level of an international agreement.
(2) Prior to the initiation of negotiations and participation in conferences on international agreements with foreign states, their organs, or international organizations, the competent ministry shall inform the Federal Foreign Office in good time and obtain its consent, if no other special regulation has been established.
(3) For the participation of federal ministries in the elaboration and conclusion of international agreements §§ 45, 46, 49 and 62 shall apply *mutatis mutandis*.
(4) The Federal Ministries of the Interior and of Justice shall be consulted during the preliminary drafting of international agreements for the purpose of verifying their constitutionality. International agreements to which Article 59(2) 1st sentence Basic Law may apply or which may need a statutory ordinance to be internally enforceable shall always be consulted with the Federal Ministries of the Interior and of Justice. For certain subject matters or for certain kinds of agreements the Federal Ministries of the Interior and of Justice may, together with the competent federal ministry, establish particular regulations.

(5) Where international agreements affect exclusive competences or vital interests of the *Länder*, the latter shall be consulted in accordance with the "Lindau Arrangement" of November 14, 1957. If the special circumstances of a *Land* are affected, Article 32(2) of the Basic Law shall be observed. If the competent federal ministry therefore deems that *Länder* should be consulted, it informs thereabout in the consultations under paragraph 4, indicating which rule of the agreement makes in its opinion this consultation necessary and for what reason.

(6) International agreements shall be drafted in accordance with the Guidelines on the Conclusion of Treaties issued by the Federal Foreign Office. Where deviations from these guidelines are necessary in individual cases, they shall be agreed upon with the Federal Foreign Office in good time.

(7) The originals of international treaties, and intergovernmental agreements shall be deposited in the archives of the Federal Foreign Office together with the full powers and other supporting instruments.

ANNEX C

ARRANGEMENT OF 1957 BETWEEN THE FEDERATION AND THE *LÄNDER*
("*Die Lindauer Absprache*")

1. The Federation and the *Länder* adhere to their familiar legal interpretations concerning the competence to conclude and transform international treaties which affect exclusive competences of the *Länder*.
2. The *Länder* consider that . . . the competence of the Federation could be acknowledged for
   A. consular treaties;
   B. treaties on commerce and on navigation, treaties on establishment, as well as treaties on exchange of goods and payments;
   C. treaties on accession to or the establishment of international organizations, even if these treaties contain provisions where there might be doubt as to whether, within the scope of an international treaty, they lie within the exclusive legislative competence of a *Land* if such provisions:
      (a) are typical of such treaties and are customarily contained in them, or
      (b) form a minor part of a treaty which otherwise concerns matters that clearly lie within the competence of the Federation.

   This includes provisions on privileges regarding foreign states and international organizations with respect to tax, police, and expropriation law (immunities), as well as provisions defining more precisely the rights of foreigners in treaties on commerce and on navigation and treaties on establishment.
3. When concluding international treaties which, in the opinion of the *Länder*, affect their exclusive competences and do not lie within the competence of the Federation in accordance with number 2 above – cultural agreements in particular – the following procedure shall be adopted:

   Where international treaties on subjects lying within the exclusive competence of the *Länder* are intended to create an obligation for the Federation or the *Länder*, the consent of the *Länder* should be obtained. Such consent should be obtained before the obligation becomes binding under international law. If the Federal Government submits such a treaty to the *Bundesrat* in accordance with Article

59(2) of the Basic Law, it shall request the consent of the *Länder* at this stage at the latest. In the case of treaties specified in the first sentence of paragraph 1 above, the *Länder* shall be consulted on the preliminary drafting at the earliest date possible and at all events in good time prior to the final drafting of the treaties.

4. Furthermore, it is agreed that, in the case of treaties which affect vital interests of the *Länder*, irrespective of whether or not they lie within their exclusive competence,
   1. the *Länder* shall be informed at the earliest date possible of the proposed conclusion of such treaties so that they can make their wishes known in good time;
   2. a permanent body[49] of *Länder* representatives shall be set up which shall be available for consultation by the Federal Foreign Office or the competent federal ministry during negotiations on international treaties;
   3. the arrangements under number 3 above shall not be affected by the fact of this body having been consulted or statements made by it . . .
5. The special case of Article 32(2) of the Basic Law is not covered by Number 1 above.

[49] The "Permanent Treaty Commission" instituted in Berlin.

ANNEX D

SELECTED CONSTITUTIONAL PROVISIONS OF THE *LÄNDER*

THE FREE STATE OF BAVARIA CONSTITUTION OF DECEMBER 2, 1946

Article 47
The Premier presides over the state government and conducts its business. He decides the guidelines of the policy to be pursued and is responsible for it to the *Landtag*. He represents Bavaria in its external relations.

Article 72
Legislation is adopted by the *Landtag* or the people by plebiscite. Formal treaties are concluded by the Premier subject to previous approval by the *Landtag*.

THE FREE AND HANSEATIC CITY OF HAMBURG CONSTITUTION OF JUNE 6, 1952

Article 43
The Senate represents the Free and Hanseatic City of Hamburg in relation to . . . foreign countries. It is responsible for ratifying formal treaties. Such ratification requires the approval of the Municipal Assembly insofar as the treaties relate to legislative matters or to expenditures not provided for in the budget.

NORTH-RHINE/WESTPHALIA CONSTITUTION OF MAY 28, 1969

Article 57
The *Land* Government represents *Land* North-Rhine/Westphalia in its external relations. It can delegate this power to the Premier or another member of the *Land* Government or to subordinate authorities.

Article 66
Its Legislation is adopted by the *Landtag*. Formal treaties require the approval of the *Landtag*.

ANNEX E

PRESIDENTIAL FULL POWERS

THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY FULL POWERS

The Ambassador of the Federal Republic of Germany in . . .,
Mr . . .,
is hereby authorized to sign on behalf of the Federal Republic of Germany the Treaty between the Federal Republic of Germany and . . .
concerning . . .
Berlin, . . .

_____
The Federal President

_____
(Countersignature of)
The Federal Minister
for Foreign Affairs

(Large Federal Seal)

ANNEX F

GOVERNMENTAL FULL POWERS

THE MINISTER FOR FOREIGN AFFAIRS OF THE FEDERAL REPUBLIC OF GERMANY

The Permanent Representative of the Federal Republic of Germany with the . . .

Ambassador . . .

is hereby authorized to sign on behalf of the Federal Republic of Germany the Convention on . . .

Berlin, . . .

_____

The Federal Minister
for Foreign Affairs

(Large Federal Seal)

ANNEX G

INSTRUMENT OF RATIFICATION (CONVENTION NOT REQUIRING PARLIAMENTARY APPROVAL)

INSTRUMENT OF RATIFICATION
of
the Federal Republic of Germany
to the Convention concerning . . .

I hereby declare that I confirm the
Convention of . . . concerning . . .,
signed by the Federal Republic of Germany on . . . at . . ., the text of which is appended hereto.
Berlin, . . .

_____
The Federal President

_____
(Countersignature of)
The Federal Minister
for Foreign Affairs

(Large Federal Seal)

ANNEX H

INSTRUMENT OF ACCESSION (TREATY REQUIRING PARLIAMENTARY APPROVAL)

INSTRUMENT OF ACCESSION
of
the Federal Republic of Germany to the Convention
concerning . . .

The Convention concerning . . ., signed in . . . on . . ., the text of which is appended hereto, having been approved in due statutory form in accordance with the Constitution, I hereby declare that the Federal Republic of Germany accedes to the Convention.
Berlin, . . .

_____
The Federal President

_____
(Countersignature of)
The Federal Minister
for Foreign Affairs

(Large Federal Seal)

ANNEX I

BILL OF APPROVAL WITH SUBSTANTIATION (GRÜNDE) AND MESSAGE TO LEGISLATURE (DENKSCHRIFT)

(1) *Bill of Approval*

Bill of Approval

for the treaty of . . .
between the Federal Republic of Germany
and . . .
concerning . . .

The *Bundestag* (with the approval of the *Bundesrat*) has passed the following Bill:

Article 1

The Treaty signed on . . . at . . . between the Federal Republic of Germany and. . . .
concerning . . . has been approved. The Treaty is published below.

Article 2

(1) This Bill shall enter into force on the day after its promulgation.
(2) The date on which the Treaty shall enter into force pursuant to Article . . . thereof shall be announced in the Federal Law Gazette.

(2) *Substantiation of the Bill of Approval*

ad Article 1

The first sentence of Article 59(2) of the Basic Law shall apply to the treaty because it relates to matters of federal legislation.
(in the case of political treaties . . . . . .)
because it regulates the political relations of the Federation.

ad Article 2

Pursuant to paragraph 2, the date on which the treaty shall enter into force pursuant to Article . . . thereof shall be announced in the Federal Law Gazette.

(3) *Message to Legislature* (not reproduced)

[The message (Denkschrift) contains a description of the treaty with a list of states parties to the treaty, eventual reservations expressed by other states and such reservations the Federal Government intends to transmit to the depositary of a convention on ratification (accession) by the Federal Republic of Germany.]

ANNEX J

OFFICIAL PROMULGATION OF TREATIES IN THE FEDERAL LAW GAZETTE

(1) *Treaty Requiring Parliamentary Approval*

Promulgation
on the entry into force of the Treaty
between the Federal Republic of Germany
and . . .
concerning . . .

Pursuant to Article . . . of the Bill of Approval of . . . for the Treaty of . . . between the Federal Republic of Germany and . . . concerning . . . (Federal Law Gazette 2 . . . II p . . .)
it is hereby notified that the Treaty entered into force, pursuant to Article . . . thereof,

on . . .

The instruments of ratification have been exchanged
on . . . at . . .
Berlin, . . .

For the Federal Foreign Office

(2) *Intergovernmental Agreement*

Promulgation
of the Agreement between the Government
of the Federal Republic of Germany and
the Government of . . .
concerning . . .

An Agreement has been signed on . . . at . . . between the Government of the Federal Republic of Germany and the Government of . . . concerning . . .

The Agreement has entered into force, pursuant to Article . . . thereof, on . . .;

the Agreement is published below.
Berlin, . . .

For the Federal Foreign Office

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CHAPTER TEN

NATIONAL TREATY LAW AND PRACTICE: INDIA

Dr. K. Thakore

I. Introduction

India is a "Union of States."[1] The Indian Constitution, which is written and federal in structure, distributes legislative, executive, and judicial powers between the Union and the States. However, unlike Australia, Canada, and the United States, the Indian federation is not the result of any compact between states with constitutions of their own, federating on the basis of an agreed Constitution. The units of the Indian federation differ in their historical origins and their political development. The Constitution of India, like that of Canada, prescribes the Constitution of the Union, as well as those of the States. Although there is a division of powers between the Union and the States, the Constitution envisages a federal structure with unitary features.

The powers of the Union and of the States are enumerated in three exhaustive legislative lists in the Seventh Schedule to the Constitution. The Union Parliament (the Indian national parliament) has exclusive power to make laws on matters enumerated in List I (the "Union List").[2] Matters included in List I can be described as being of national importance. The State legislatures have exclusive power to make laws on matters enumerated in List II (or the "State List"). The matters included in List II can be described as matters essentially of provincial or local interest. Both the Union Parliament and the State legislatures have power to make laws on matters enumerated in List III (or the "Concurrent List").[3] The subjects included in List III can be described as having an important national aspect in which local variations might be desirable.[4] In the case of a conflict between the Union law and the State law on a matter

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[1] Indian Constitution Art. l(1) (hereinafter "Const").
[2] Const. Art. 246(1).
[3] Const. Art. 246(3).
[4] Const. Art. 246(2).

in the Concurrent List, the Union law prevails and the State law becomes void to the extent of the inconsistency.[5]

The Union Parliament has exclusive power to make laws with respect to any matter not found in the State List or in the Concurrent List.[6] In other words, the Union Parliament has the residuary powers of legislation. Moreover, although the Indian Constitution presents a federal system for normal times, it has the unique feature of flexibility in that it converts itself into a unitary system in times of emergency.

Unlike in the United States, there is no dual system for the administration of justice under the Constitution of India. There is one integrated system of courts for the administration of both the Union and State laws, with the Supreme Court as the final court of appeal in all matters, whether they relate to Union or State laws.[7] The Constitution endows the Supreme Court with the exclusive power to declare central and State laws unconstitutional.[8]

Insofar as the allocation of the treaty power is concerned, the Constitution of India confers on the Union both legislative and executive powers covering the entire field of foreign affairs. Under Articles 245 and 246, when read with List I in the Seventh Schedule to the Constitution, Parliament has exclusive power to legislate on foreign affairs and on all matters which bring the Union into relations with a foreign country.[9] The same is true with regard to participation in international conferences, associations and other bodies as well as implementation of decisions made there,[10] and with regard to entrance into treaties and agreements with foreign countries and the implementation of treaties, agreements, and conventions with foreign countries.[11] Under Article 253 of the Constitution, the Union Parliament has the exclusive power to make any law (1) affecting the whole or any part of the territory of India, (2) implementing any treaty, agreement, or convention with any other country or countries or (3) executing any decision made at any international conference, association, or other body. Thus, the limitations imposed by Article 245 (which empowers a State legislature to make laws for the whole or any part of the State) and by Article 246(3) (which grants the legislature of a State the exclusive power to make laws for such State or any part thereof with respect to any matters enumerated in List II in the Seventh Schedule) are removed, and the total field of legislation is open to the Union Parliament. In the federal scheme of the Indian Constitution, leg-

[5] Const. Art. 254.
[6] Const. Art. 248.
[7] Const. Arts. 132–36.
[8] Const. Art. 131–A.
[9] Const. List I, Entry 10.
[10] Const. List I, Entry 13.
[11] Const. List I, Entry 14.

islative powers of the States cannot operate as a bar to Parliamentary legislation involving treaties.

Under the Indian Constitution, the President is the chief executive of the Union of India, and the executive power of the Union is vested in him.[12] He acts on the advice of the Council of Ministers, whose members are collectively responsible to the House of the People (or *Lok Sabha*, the lower chamber of the Union Parliament).[13] Article 73 of the Constitution provides that the executive power of the Union is co-extensive with its exclusive legislative power.

In the absence of any legislation on the subject of entering into treaties and agreements, the treaty-making power is exercised and treaty-making procedure regulated by the Executive (Cabinet). The treaty-making procedure, by and large, follows the British model. The negotiation, signature, and ratification of treaties are all executive acts. Under the Indian Constitution, there is no condition precedent requiring approval by the Union Parliament before agreements are concluded or enter into force. Implementing legislation will, however, be necessary to give effect to some treaties – such as those relating to cession of Indian Territory, or those affecting individual rights by, for example, creating obligations – and this may require that the Parliament adopt the necessary legislation before the treaty in question may be ratified.

There is no provision in the Indian Constitution similar to that in the United States Constitution proclaiming treaties the supreme law of the land.[14] Article 253, which enables the Union Parliament to enact laws for implementing treaties, conventions, and the like, emphasizes the fact that treaties may not by themselves be self-executing, as referred to above. The importance attached to treaties and international obligations is, however, emphasized by Article 51 of the Constitution, which makes it a directive principle of state policy to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another."

II. Discussion Items

A. *What is an International Agreement?*

Not all international agreements to which India is a party are specifically called "treaties." Indeed very few are so described. Most have other

[12] Const. Arts. 52, 53.
[13] Const. Arts. 74, 75.
[14] U.S. Const. Art. VI(2).

nomenclatures such as conventions, agreements, arrangements, protocols, declarations, or statutes. Generally "treaties" are concluded in inter-state form, "agreements" are concluded in intergovernmental form, and "arrangements" are concluded between the departments or agencies of the government, such as postal arrangements. There are also many agreements that have been recorded, not in formal instruments, but in notes or letters exchanged between the parties, which recite the terms agreed upon and specifically indicate that they are to constitute and be evidence of the agreement reached. Oral agreements and unilateral acts are not resorted to in Indian practice. Foreign aid, technical assistance, and cooperation agreements between India and other states or international organizations are also regarded as international agreements. Internal procedures leading to the decision to be bound by such treaties and agreements, by and large, are uniformly applicable to all kinds of agreements, irrespective of the nomenclature used. The contracts that are governed by municipal law in India are not, however, considered to be international agreements *stricto sensu*.

B. *Executive Branch Authorization and Approval Procedures*

Due to the comprehensive structure of the government and tradition, there is, as yet, no system of centralized negotiation and conclusion of treaties and agreements. Subject to approval by the Government (Cabinet), and within the powers allocated to it, the ministry or the department concerned with the subject matter, in consultation with the Ministry of External Affairs (including the Legal and Treaties Division), decides the form of agreement to be concluded in each case. Political treaties and agreements are, however, concluded by the Ministry of External Affairs. The Ministry of External Affairs also coordinates and directs the work relating to treaties and agreements.

In Indian practice, there is a recognized distinction between governmental-level agreements and agency or departmental-level agreements. In the case of the latter category of agreements, internal treaty procedures dispense with the requirement of full powers, ratification, etc., unless the parties decide otherwise. Such agreements, more often, are intended to give effect to or to implement a decision already recorded in a more formal document.

Although India has not yet become a party to the 1969 Vienna Convention on the Law of Treaties, it follows the Convention's provisions as guidelines in actual practice. Under the Indian Constitution, Parliament has exclusive power to make laws with respect to "entering into treaties and agreements with foreign countries and implementing of treaties,

agreements and conventions with foreign countries."[15] The executive power of the Union is coextensive with the legislative competence of Parliament.[16] Parliament has not, however, made any laws on the subject of entering into treaties and agreements, although many laws implementing treaties and agreements have been enacted. In the absence of such legislation, the treaty-making power is exercised, and its procedure regulated, by the Executive. No detailed regulations such as those set forth in the U.S. State Department's Circular No. 175 have been laid down. The treaty-making procedure, by and large, follows the British model. The negotiation, signature, and ratification of treaties and agreements are all executive acts. The practice followed in these matters is set out below.

1. *Negotiation*

It is, of course, obvious that all treaties require negotiations. Most, if not all, multilateral treaties are negotiated at international conferences. In the case of bilateral treaties, negotiations sometimes take place around a conference table and are sometimes undertaken through the normal diplomatic channels. When the negotiation of a treaty takes place at an international conference, credentials signed by the Minister of External Affairs are normally issued to the Indian delegation to the conference. In the case of bilateral negotiations, it is not the Indian practice to issue credentials. The delegates generally carry with them preliminary instructions from the Government and remain in touch with the Government. At any stage, delegates may consult with and obtain fresh instructions from the Government, if necessary.

It also occasionally happens that at the conclusion of negotiations for a bilateral treaty the terms of the agreement are initialed by the negotiators. Unless, of course, the treaty otherwise provides, the purpose of such initialing is essentially to authenticate the text of the agreement reached. In such cases, formal signature is left to a later occasion after both sides have obtained the required approvals of their respective Governments. A formal authorization to initial an agreement is not required.

2. *Signature*

As treaty making involves the exercise of the executive power, it is necessary to secure approval from the Cabinet before any treaty is signed.[17]

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[15] Const. Art. 246, read with Entry 14 of the List.

[16] Const. Art. 73.

[17] For details *see* Rule 7 of the Second Schedule of the Transaction of Business Rules, 1961. According to Rule 7, the approval of the Cabinet is imperative for all treaties/agreements. However, it may be dispensed with in the following cases:

This is true even in those cases where signature is to be followed by ratification before the treaty becomes binding upon the signatories. Before the Cabinet's approval is sought, consultations invariably take place between various ministries and departments of the government concerned with the subject matter of the treaty.

After a decision to sign the treaty is taken by the Government, full powers are obtained from the President, confirming that the person who is to sign the treaty has the authority of the Government to do so.

Existing rules govern the selection of the person or persons appointed to sign a treaty for India. When a treaty is negotiated outside India, such a person commonly is the leader of the negotiating delegation or the head of the Indian Diplomatic Mission in the country in which the treaty is negotiated or opened for signature. In cases where a political treaty is signed in India, the Minister of External Affairs or other designated official may sign for India. In other cases, the minister directly concerned with the subject matter of the specific treaty or other designated officials may also be authorized to sign it for India. In Indian practice, the Prime Minister and the Minister of External Affairs do not need full powers authorizing them to sign a treaty.

The Full Powers, executed by the President, are forwarded to the person appointed to sign the treaty, and they are, in due course, exchanged with the Full Powers of the representative of the other party to the treaty (in the case of a bilateral treaty) or deposited with the depositary (in the case of a multilateral treaty). Occasionally, if time is short, authorization by telegraph or fax may also be sent. In such event, the formal documents are forwarded at the first opportunity.

3. *Ratification*

Many treaties come into force upon signature. Others expressly provide that they shall be ratified by the signatory states in accordance with their constitutional procedures before binding obligations are assumed. Ratification in such cases involves the confirmation of a prior signature and compliance with constitutional requirements. In Indian practice, ratification is an executive act and does not involve approval by Parliament.

There are, however, some treaties, notably conventions adopted at international labor conferences, in which provision is made for ratification,

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- Cultural Agreements and Agreements on Science and Technology, which are duly approved by the Minister concerned and the Foreign Minister, may only be circulated to the Cabinet for information;
- Foreign Aid Agreements and Commercial Agreements, which are duly approved by the Ministers concerned and as or within the broad framework already approved by the Cabinet, need not be formally placed before the Cabinet.

even though the instruments are not, in fact, signed on behalf of the states or governments. In such cases, ratification involves approval of the text drawn up at the conference. In a few instances, moreover, the terms "acceptance" or "approval" have been used to describe a process which, in Indian practice, is similar to ratification, with this difference: all instruments of ratification are signed by the President, whereas a notification or a note confirming the "approval" or "acceptance" of the agreement is exchanged with the other party.

There is no constitutional requirement that treaties be ratified before they enter into force. It is thus a matter of agreement between India and the other party or parties to a treaty as to whether a clause providing for ratification or approval is to be included in the treaty. In treaties of major significance, it is common to insert a clause requiring ratification.

Ratification involves two steps. On the domestic side, a formal instrument is executed. On the international side, the instrument is either exchanged (in the case of a bilateral treaty) with the instrument of ratification of the other party, or it is deposited (in the case of a multilateral treaty) with the depositary. A *proces-verbal* may also be executed as evidence of the exchange of instruments of ratification.

4. *Accession*

Most multilateral treaties nowadays contain provisions enabling non-signatory States to accede to them. Accession, like ratification and other treaty-making processes, is an executive act. The practices and procedures followed in India with respect to accession are similar to those followed with respect to ratification.

C. *Legislative Approval*

Under the Indian Constitution, there is no condition precedent requiring approval by the legislature before agreements enter into force. Agreements are, however, laid on the table of the House after signature or ratification, as the case may be. The Constitution of India confers on the Union of India legislative and executive powers covering the entire field of foreign affairs. In the federal scheme devised by the Constitution of India, the power to make and implement treaties rests exclusively with the center. Under Articles 245 and 246, read in conjunction with the relevant entries in the Seventh Schedule to the Constitution, Parliament has exclusive power to legislate (1) on foreign affairs and all matters which bring the Union into relations with a foreign country;[18] (2) on participation in

[18] Const. List I Entry 10.

international conferences, associations, and other bodies, and on the implementation of decisions made there;[19] and (3) on the entering into of treaties and agreements with foreign countries and the implementation of treaties, agreements, and conventions with foreign countries.[20] By virtue of Article 253, Parliament has the exclusive power to make any law for the whole or any part of the territory of India with a view to implementing treaties and international agreements, notwithstanding the fact that the laws may refer to subjects that, under the Constitution, are assigned to constituent units for legislative purposes. Nevertheless, the Constitution, by itself, does not establish clear procedures for the making of treaties. Because the executive power of the Union is coextensive with its legislative powers, the treaty-making function is exercised and regulated by the Executive in the absence of legislation on the subject.

It may be useful to refer to the following statement of the Government of India on national laws and practices in the matter of the conclusion of treaties, which was made in response to a circular letter addressed by the Secretary-General of the United Nations to governments in January 1951:

1. Under Article 73 of the Constitution of India, "the Executive power of the Union shall extend to the matters in respect of which Parliament has power to make laws," and under Article 53 the Executive power of the Union "is vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution." Under Article 246(1), "Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List')." List I, clause 14, contains the item: "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."
2. Parliament has not made any laws so far on the subject, and, until it does so, the President's power to enter into treaties (which is after all an executive act) remains unfettered by any "internal constitutional restrictions."
3. In practice, the President does not negotiate and conclude a treaty or agreement himself. Plenipotentiaries are appointed for this purpose, and they act under full powers issued by the President. It is, however, the President who ratifies a treaty.
4. Apart from treaties made between heads of States, agreements of a technical or administrative character are also made by the Government of India with other governments. Such agreements are made in the name of the signatory governments, and are signed by the representatives of these governments. Full powers are granted, and ratification is effected on behalf of the Government.[21]

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[19] Const. List I Entry 13.
[20] Const. List I Entry 14.
[21] U.N. Doc. ST/LEG/SER.B/3, at 63–64 (Dec. 1952) (Memorandum of April 19, 1951).

The position stated above remains unchanged.

The scope and extent of the executive power of the Union in relation to treaty making and implementation have been judicially considered in important cases. The question whether the Union executive can exercise its treaty-making power without authorizing legislation from Parliament was considered by the Calcutta High Court in *Union of India vs. Manmull Jain*.[22] In that case, the Court was concerned with the validity of the treaty by which the former French possession of Chandernagore was transferred by France to India, where the argument was that without parliamentary legislation the treaty was not valid. Rejecting this argument, the Court declared:

> Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty. Thus if a treaty, say, provides for payment of a sum of money to a foreign power, legislation may be necessary before the money can be spent; *but the treaty is complete without the legislation*.[23]

Referring to Entry 14 of the Union List, the Court said:

> Undoubtedly, this provides for all legislation in connection with entering into treaties. This cannot, however . . . justify the conclusion that the makers of the Constitution intended that no treaty should be entered into unless the Parliament has legislated on the matter . . . The President makes a treaty in exercise of his executive power and no Court of law in India can question its validity.[24]

Reference may also be made to the case of *Maganbhai Ishwarbhai Patel vs. Union of India*,[25] decided by the Supreme Court, in which the petitioners sought to restrain the Government of India from ceding, without the approval of Parliament, areas in Rann of Kutch to Pakistan in accordance with the Indo-Pakistan Western Boundary Case Tribunal award dated February 19, 1968. M. Hidayatullah, CJ., in his judgment, and Shah, J., in his separate judgment concurring, held that the decision to implement the award by an exchange of letters, treating the award as an operative treaty after the boundary had been marked in this area, was within the constitutional competence of the Union Executive. Shah, J., observed:

> By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision

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[22] A.I.R. 1954 Calcutta, at 615.
[23] *Id.* at 616 (emphasis added).
[24] *Id.* at 616–17.
[25] A.I.R. 1969 S.C. at 784.

> making legislation a condition of the entry into an international treaty in times either of war or of peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is *qua* the State competent to represent the State in all matters international and which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon the Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.
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> The effect of Article 253 is that, if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power; thereby power is conferred upon the Parliament, which it may not otherwise possess. But it does not seek to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation; where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power.[26]

More recently, the question of implementation of international agreements by executive act was considered by the Supreme Court of India in the case of *Union of India and Others vs. Sukumar Sengupta and Others*.[27] It was held that the implementation of international agreements is not dependent on suitable amendment of the Constitution where the question of cession of territory is not involved.

The dispute arose in respect of the implementation of a land boundary agreement signed in 1974 and the letters exchanged in 1982 between the Governments of India and Bangladesh. Under this agreement, the Government of India agreed to lease to the Government of Bangladesh in perpetuity a strip of land in the district of Cooch-Behar in West Bengal known as the "Tin Bigha" corridor.

The lease in Tin Bigha was challenged in the Calcutta High Court, and the petitioners sought restraint on the grounds that the lease in perpetuity amounted to a cession of Indian territory and a dilution of Indian sovereignty and that it prevented the petitioners from exercising their

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[26] *Id.* at 784.
[27] A.I.R. 1990 S.C. 1692.

guaranteed right to move freely in the territory of India. The Division Bench of the Calcutta High Court held that the agreement necessitated suitable changes in the laws of India, and the Respondent (Government of India) was directed to suitably amend the Constitution. The Government of India appealed this decision by Special Leave Petition to the Supreme Court of India. The Supreme Court held that the implementation of international agreements is not dependent on the steps prescribed by the Calcutta High Court. Hence, the judgment was amended by the Supreme Court, which held that the lease in perpetuity to Bangladesh does not amount to a dilution of Indian sovereignty. The Supreme Court further observed:

> This was really a fight over non-issues. The Division Bench categorically held that there was no cession of territory and no lease in perpetuity. If that is so, without the change in the law or change in the Constitution, the agreement should have been implemented fully and we hope that will be done for the restoration of the friendly relations between India and Bangladesh.[28]

It can be seen that in accordance with the observation of the Supreme Court, the implementation of international agreements, where there is no cession involved, is through an executive act. Mention may also be made of the case of *C.R.V. Committee, S.L.S.R.C.C.L. vs. Union of India*,[29] wherein the Court held:

> If Parliament does not enact any law for implementing the obligations under a treaty entered into by the Government of India with foreign countries, Courts cannot compel Parliament to make such law. In the absence of such law, Courts cannot also enforce obedience of the Government of India to its treaty obligations with foreign countries.

D. *Legislative Aspects of Treaties*

There is no provision in the Indian Constitution similar to Article VI (2) of the United States Constitution, which proclaims treaties the supreme law of the land. Article 253 of the Indian Constitution, which confers legislative powers on Parliament, does not give clear direction as to whether enactment by Parliament is required for the implementation of treaties and agreements. There is also no specific requirement for parliamentary approval of treaties corresponding to approval by the Senate in the United States. However, before bringing a treaty into force, the

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[28] A.I.R. 1990 S.C., at 1708.
[29] A.I.R. 1983 Kant, p. 85.

Indian Government ensures that it has the necessary statutory power to enable it to give effect to the provisions of the treaty. It obtains enabling legislation if existing law is inadequate. The question whether a particular treaty or agreement calls for implementing legislation depends very much upon its subject matter. The question of legislative implementation has figured prominently in connection with the settlement of boundary problems with neighboring countries, and under an advisory opinion given by the Supreme Court of India in the *Beru Bari* Case, it is now settled that treaties involving a cession of Indian territory cannot be implemented without the appropriate legislative sanction.[30]

Again, the implementation of multilateral conventions and treaties to which India becomes a party may call for legislative action if the treaty affects the application of existing laws, imposes financial obligations, or otherwise requires specific legislative authority for execution. For example, the United Nations (Privileges and Immunities) Act, 1947, was enacted to give effect to the 1946 Convention on the Privileges and Immunities of the United Nations. The Geneva Conventions Act, 1960, was enacted to give effect to the four Geneva Conventions of August 12, 1949 for the Protection of War Victims. The Diplomatic Relations (Vienna Convention) Act, 1972, was enacted to give effect to the 1961 Vienna Convention on Diplomatic Relations. The Tokyo Convention Act, 1975, was enacted to give effect to the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft. The Anti-Apartheid (United Nations Convention) Act, 1981, was enacted to give effect to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. The Anti-Hijacking Act, 1982, was enacted to give effect to the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft. The Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982, was adopted to give effect to the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Domestic legislation has also been enacted in India to give effect to various conventions on narcotic drugs or anti-terrorism, which require specific acts to be included as criminal offences under domestic law.

E. *Reservations Questions*

Generally speaking, it is not the practice of the Government of India to make reservations as a condition of the acceptance of bilateral treaties. Reservations to multilateral treaties have sometimes been made if the

[30] A.I.R. 1960 S.C., at 845.

treaties' provisions are at variance with the national policy, legislation, or interests in an important respect and if the government intends to exclude or modify the relevant provisions to that extent. Sometimes declarations are made with reference to a multilateral treaty, clarifying its provisions or reflecting the understanding of the Government of India in that respect.

Thus, reservations have been made to the provisions in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which contemplate compulsory reference of disputes arising thereunder to the International Court of Justice. The Indian reservation stipulates that for submission of disputes to the Court, the consent of all the parties to the dispute is required in each case. Along the same lines, a reservation to the 1980 Convention on the Physical Protection of Nuclear Material is to the following effect: "In accordance with Article 17, paragraph 3, the Government of the Republic of India does not consider itself bound by the procedure for the settlement of disputes provided for under Article 17, paragraph 2 of the Convention." Similarly, in a reservation to the 1986 Convention on Early Notification of a Nuclear Accident, the Government of India declared that it does not consider itself bound by the dispute settlement procedures provided for in paragraph 2 of Article 11. Finally, the Indian Reservation to the 1986 Convention on Assistance in the case of Nuclear Accident or Radiological Emergency provides that "the Government of India declares that it does not consider itself bound by the dispute settlement procedures provided for in paragraph 2 of Article 13 of the Convention."

Reservations have also been made to some of the earlier conventions on narcotic drugs, such as the 1953 Protocol for Limiting and Regulating the Cultivation of Poppy Plant; the Production of, International and Wholesale Trade in, and Use of Opium, and the 1961 Single Convention on Narcotic Drugs, to permit temporarily, *inter alia*, the use of opium for quasi-medical purposes and to permit the production and export of opium for such purposes and for opium smoking. Reservations have also been made to certain articles of the 1961 Protocol amending the Single Convention on Narcotic Drugs.

In addition, India had entered reservations to some of the commodity agreements such as the 1973 International Sugar Agreement and the 1977 International Sugar Agreement. The reservation to the 1973 Agreement is to the following effect:

> Without prejudice to the general obligations under the present Agreement, the Government of India undertakes to discharge its obligations under Article 28 relating to customs duties, internal taxes and fiscal charges and

> quantitative or other controls only to the extent consistent with its policy in the fields of controls, taxation and pricing which it is pursuing in the process of developing its economy on a planned basis.[31]

In a similar vein, the reservation to the 1977 Agreement stipulates as follows:

> Without prejudice to the general obligations under the present Agreement, the Government of India undertakes to discharge its obligations under Article 46 relating to special stocks, Article 48 relating to maximum stocks, Article 64 relating to support measures and Article 65 relating to measures to encourage consumption, only to the extent consistent with its policy in the fields of controls, taxation and pricing which it is pursuing in the process of developing its economy on a planned basis.[32]

India has made further declarations/reservations to some of the conventions on human rights with a view to safeguarding its national interests and the personal laws and customs of various communities and where the provisions of these conventions conflict with them or are at all at variance with those of the Indian Constitution. Thus, India made declarations to the 1966 International Covenant on Economic, Social and Cultural Rights and the 1966 International Covenant on Civil and Political Rights as follows:

1. With reference to Article 1 of the International Covenant on Economic, Social and Political Rights . . . the Government of the Republic of India declares that the words "the right of self-determination" appearing in (this Article) apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.
2. With reference to Article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the Article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India. Further under the Indian Legal system, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.
3. With respect to Article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners.
4. With reference to Articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said [Article] shall be so

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[31] *See Multilateral Treaties Deposited with the Secretary-General*, Status as of 31 December 1992, U.N. Doc. ST/LEG/SER.E/11, at 653 (1993).

[32] *Id.* at 677.

applied as to be in conformity with the provisions of Article 19 of the Constitution of India.

5. With reference to Article 7(c) of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said Article shall be so applied as to be in conformity with the provisions of Article 16(4) of the Constitution of India.

With regard to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, India declared upon signature that:

(i) With regard to Articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent.

(ii) With regard to Article 16(2) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.

India also made a reservation to the following effect:

> With regard to Article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this Article.[33]

Mention may also be made of the 1989 Convention on the Rights of the Child, to which India considered it necessary to make a declaration on account of its capacity constraints, although in principle, it fully subscribed to its substantive provisions. Thus, on accession to this Convention, the Government of India declared:

> While fully subscribing to the objectives and purposes of the Convention, realizing that certain of the rights of the child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international cooperation; recognising that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for

[33] *Id.* at 165.

> employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India – the Government of India undertakes to take measures to progressively implement the provisions of Article 32, particularly paragraph 2(a), in accordance with its national legislation and relevant international instruments to which it is a State Party.[34]

Finally, reservations have further been made to international maritime and nuclear conventions. Thus, a reservation made to the 1976 Convention on Limitation of Liability for Maritime Claims reads as follows: "In accordance with Article 18, paragraph 1 of the Convention, the Republic of India reserves the right to exclude the application of Article 2, Paragraph 1(d) and (e) of the Convention."

The Reservation made to the 1986 Convention on Early Notification of a Nuclear Accident stipulates as follows:

1. The Government of India considers that the Convention suffers from serious and inherent defects in as much as it differentiates between nuclear weapon states and non-nuclear weapon states. The Convention is defective, as it does not contain a legal provision to make it mandatory on the nuclear weapon states to notify [about] accidents involving nuclear weapons or weapon tests. The Government of India feels that the Convention should have provided for notification of nuclear accidents in any nuclear facility, vessel, aircraft, spacecraft, etc., used for peaceful or military purposes as well as nuclear weapons.
2. The Government of India is disappointed at the outcome of the Convention because it does not cover all accidents. It should have been a comprehensive Convention covering accidents from whatever source – civil or military, including accidents emanating from nuclear weapons or nuclear weapons tests since the transboundary effects of radiological safety significance from any source whatsoever, would be equally damaging. Nevertheless, the Government of India has ratified the Convention, in view of the solemn assurance that has been given by the five nuclear weapon states to the effect that they undertake to notify [of] all accidents. This is in keeping with our policy of according to public declarations of state policy equal validity with other international commitments.

India's Reservation to the 1986 Convention on Assistance in the case of Nuclear Accident or Radiological Emergency states that:

1. The Government of India hereby declares that it does not consider itself bound by paragraphs 2 and 3 of Article 8 of the Convention.
2. The Government of India hereby declares that it does not consider itself bound by paragraph 2 of Article 10 of the Convention.

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[34] *Id.* at 191.

F. *Consultation with the Legislature*

Treaties and agreements (other than those that require implementing legislation for giving effect to obligations created thereunder) may be considered in Parliament on a motion made by the concerned minister or by a private member after signature or ratification, as the case may be. Not all such treaties and agreements may be so considered.

Some treaties and agreements dealing with matters of public importance have been laid on the table of both the houses of Parliament.[35] Thus, for instance, the Tashkent Declaration, signed by the Prime Minister of India and the President of Pakistan at Tashkent on January 10, 1966 (whereby the two countries decided to restore normal and peaceful relations between them after the 1965 armed conflict) was laid on the table of the *Lok Sabha* on February 15, 1966. On February 16, 1966, the Minister of External Affairs moved, in the *Lok Sabha*, that the Tashkent Declaration be taken into consideration.[36] The motion was discussed for three days, after which the *Lok Sabha* approved the stand of the Government of India.[37] A similar motion was moved in the *Rajya Sabha* (or Council of States, the upper chamber of the Union Parliament) on February 17, 1966, by the Minister of External Affairs.[38] It was discussed for three days, after which the *Rajya Sabha* approved the stand of the Government of India with regard to the Tashkent Declaration.[39] Notwith-standing its subsequent consideration by the houses of Parliament, the Tashkent Declaration entered into force on January 10, 1966, on the date of its signature.

The Treaty of Peace, Friendship and Cooperation between India and the USSR was signed by the foreign ministers of the two countries at New Delhi on August 9, 1971 (and was ratified by India on August 11, 1972). A copy of the treaty was laid on the table of the *Lok Sabha* and the *Rajya Sabha* on the same day. On the following day, the Minister of External Affairs moved, in the *Lok Sabha*, that the statement regarding the treaty made by him in the *Lok Sabha* on August 9, 1971, be taken into consideration.[40] In the discussion that followed, the salient features of the treaty were discussed, and it received support from the members of both the ruling party and the opposition.[41] The treaty was addressed in

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[35] *See*, "Parliament and International Treaties" (*Lok Sabha* Secretariat, New Delhi, 1976), at 10–13.
[36] *See Lok Sabha* Debates, 14th Sess., 1966, vol. L, col. 610.
[37] *Id.* at col. 1286.
[38] *See Rajya Sabha* Debates, 1966, vol. LV, col. 500.
[39] *Id.* at col. 878.
[40] *See Lok Sabha* Debates, 2d Sess., 1971, vol. VII, col. 232.
[41] *Id.* at cols. 232–344.

the *Rajya Sabha* on a motion made August 14, 1971 by the Minister of Defense,[42] calling for the consideration of the statement that had been made by the Minister of External Affairs on August 9, 1971 in the *Rajya Sabha*.[43]

The Agreement on Bilateral Relations between the Government of India and the Government of Pakistan, signed by the Prime Minister of India and the President of Pakistan at Simla on July 2, 1972, was placed on the table of the *Lok Sabha* after ratification. The agreement was ratified by India on July 28, 1972. On July 31, 1972, the Minister of External Affairs made a statement and laid a copy of the agreement on the table of the *Lok Sabha*. On the same day he moved that his statement on the agreement be taken into consideration.[44] After two days of discussion, the following motion was adopted by the House:

> The House, having considered the statement made by the Minister of External Affairs in the Lok Sabha on 31st July 1972, regarding the Agreement on Bilateral Relations between India and Pakistan signed at Simla on the 2nd July 1972, places on record its deep appreciation of the initiative which the Prime Minister and the Government of India have taken by concluding the Simla Agreement for preparing the ground for durable peace in the sub-continent.[45]

The agreement was discussed in the *Rajya Sabha* on August 2 and 3, 1972 on a motion moved by the Minister of External Affairs.[46] The motion was adopted on August 3, 1972.[47]

G. *Consultation with the Public*

According to the Indian practice, there is no imperative necessity for the government to obtain or ensure consultation with the public on treaties and other international agreements. The government may, in its discretion, explain to Parliament its position and its intentions concerning a particular treaty or agreement, and there may be a general debate in Parliament. Insofar as treaties require implementing legislation, enactment of enabling legislation by Parliament involves consultation with the elected representatives of the people through established institutional procedures.

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[42] *See Rajya Sabha* Debates, 1971, vol. LXXVII, col. 64.
[43] *Id.* at cols. 64–166.
[44] *See Lok Sabha* Debates, 5th Sess., 1972, vol. XVII, col. 248.
[45] *Id.* at col. 346.
[46] *See Rajya Sabha* Debates, 1972, vol. LXXXL, cols. 200–308 and cols. 131–287 (August 2, 1972 and August 3, 1972, respectively).
[47] *Id.* at col. 287.

H. *Publication and Transmittal Requirements*

There is no statutory requirement that all treaties or agreements be published. However, most treaties and agreements are published in official publications.

Except for less formal agreements like the exchange of notes or letters, the formal treaties and agreements are transmitted to Parliament for information and copies are kept in the Parliament Library.

Not all treaties and agreements concluded between India and the other countries are registered with the United Nations. But treaties and agreements of importance are invariably registered with the UN. Such registration is not regarded as mandatory for all treaties and agreements under Article 80 of the 1969 Vienna Convention on the Law of Treaties and Article 102 of the United Nations Charter.

There are regular publications, such as the *India: Bilateral Treaties and Agreements* Series, which periodically list and set out the status of the treaties in force. A list of treaties concluded or renewed by the Government of India during a calendar year, and which have entered into force, is also annexed to the *Annual Report* of the Ministry of External Affairs.

Texts of treaties and agreements have also been published in the following official publications:

- *Official Gazette*: As and when required under a statute, such as the agreements relating to avoidance of double taxation, maritime boundaries, etc.
- *Foreign Policy of India*: Texts of documents, 1947–1964 (Published by *Lok Sabha* Secretariat, New Delhi).
- *India: Bilateral Treaties and Agreements, vols. 1–10*: Covering the period 1947–1980 (Published by the Government of India, Ministry of External Affairs, New Delhi).
- *Foreign Affairs Record*: (Published by the Ministry of External Affairs, Government of India, New Delhi.)
- *Indian and Foreign Review*: (Published by the Ministry of Information and Broadcasting for the Ministry of External Affairs, Government of India, New Delhi.)
- *India's Trade Agreements with Other Countries*: As in force on May 1, 1976. (Published by the Ministry of Commerce, Civil Supplies and Cooperation, Government of India, New Delhi.)

In addition, the texts of treaties and agreements are also published from time to time in the following non-official publications: *Indian Journal of International Law, The Economic Times, Financial Express*, and other daily newspapers.

I. *Legally Binding Decisions of International Organizations*

Generally speaking, the decisions of international organizations are viewed as treaty commitments depending upon the nature of the decision and its subject matter, and subject to the requirements of implementing legislation, where necessary (*e.g.*, a decision requiring financial appropriations).

Decisions of international organizations are subject to the same or similar procedures by the executive and legislature as are treaty commitments. The decisions of international organizations are viewed as treaty commitments to the extent that they are relevant.

J. *Implementation of Multilateral Conventions*

The implementation of a multilateral convention is the responsibility of the ministry or the department concerned with the subject matter thereof, subject to the overall policy and treaty procedures followed by the Government of India.

K. *Treaty Termination*

The Executive alone terminates treaties and agreements, and the approval of the legislature is not required. There is no requirement for consultation with the legislature. The existence of a notice provision makes no difference in this regard.

L. *Depositary Problems*

The Government of India assumed the functions of a depositary for the first time with respect to the Agreement Establishing the Association of Iron Ore Exporting Countries, concluded at the Ministerial Meeting of Iron Ore Exporting Countries held in Geneva on April 2 and 3, 1975. Due to the withdrawal of certain members from the Association of Iron Ore Exporting Countries, the Association was wound up with effect from April 1, 1989. India further became a depositary for the Statute of the Centre for Science and Technology of the Movement of Non-Aligned Countries and Other Developing Countries, concluded at New York on February 4, 1985. In the course of this limited experience, India has not faced any problems regarding reservations, succession to treaties, or issues arising from or relating to non-recognized governments or regimes.

M. *International Agreements Concluded by Sub-National Entities*

Both in doctrine and in practice, sub-national entities in India do not possess the capacity to conclude international agreements on their own. However, agreements, if any, between sub-national entities of India with their counterparts in other countries are formalized through the appropriate ministries of the government, who exercise jurisdiction and control over such entities.

III. Basic Data and Documentation

A. *National Legislation*

Annex A: National Constitutional Provisions (Excerpts) and Excerpts from the Seventh Schedule to the Constitution

B. *Selected Examples of Treaty Documents*

Annex B: Instrument of Full Powers
Annex C: Instrument of Ratification
Annex D: Registration Certificate
Annex E: Depositary Circular Note
Annex F: Message to Legislature on Particular Treaties
Annex G: Official Proclamation of Treaties

C. *Statistical Data*

There is no central computing cell whereby the numerical figures for the agreements presently in force in India could be obtained. The information is to be derived from the various ministries and departments of the Government of India on the subjects allocated to them. As explained under Section II.C above, prior express approval of the legislature is not required before treaties or agreements come into force. Including amendments, extensions of existing agreements, etc., 150 agreements are concluded by India every year on average.

There is no condition precedent regarding express approval by the legislature before the agreements enter into force. Accordingly, each agreement enters into force on signature or ratification, in accordance with the terms of the agreement. Exchanges of letters enter into force normally with effect from the date on which the second party conveys its acceptance of the terms and conditions mutually agreed upon. Amendments and extensions agreements normally state expressly the date of their effectiveness.

ANNEX A

1. NATIONAL CONSTITUTIONAL PROVISIONS

Article 51: Promotion of international peace and security

The State shall endeavor to:

(a) promote international peace and security;
(b) maintain just and honorable relations between nations;
(c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and
(d) encourage settlement of international disputes by arbitration.

Article 53: Executive power of the Union

(1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.
(2) Without prejudice to the generality of the foregoing provision, the supreme command of the defense forces of the Union shall be vested in the President, and the exercise thereof shall be regulated by law.
(3) Nothing in this article shall –
    (a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or
    (b) prevent Parliament from conferring bylaw functions on authorities other than the President.

Article 73: Extent of executive power of the Union

(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend –
    (a) to the matters with respect to which Parliament has power to make laws; and
    (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement, provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any state to matters with respect to which the legislature of the state has also power to make laws.
(2) Until otherwise provided by Parliament, a state and any officer or authority of a state may, notwithstanding anything in this article,

continue to exercise in matters with respect to which Parliament has power to make laws for that state such executive power or functions as the state or officer or authority thereof could exercise immediately before the commencement of this Constitution.

Article 77: Conduct of business of the Government of India

(1) All executive action of the Government of India shall be expressed to be taken in the name of the President.
(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.
(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.
(4) No court or other authority shall be entitled to require the production of any rules made under clause (3) for the more convenient transaction of the business of the Government of India.

Article 245: Extent of laws made by Parliament and by the Legislatures of States

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation.

Article 246: Subject matter of laws made by Parliament and by the Legislatures of States

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with

respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

Article 248: Residuary powers of legislation

(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those lists.

Article 253: Legislation for giving effect to international agreements

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Article 254: Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Article 299: Contracts

(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

2. EXCERPTS FROM THE SEVENTH SCHEDULE TO THE CONSTITUTION

List I – Union List

Entry 10

Foreign affairs; all matters which bring the Union into relation with any foreign country.

Entry 12

United Nations Organization.

Entry 13

Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

Entry 14

Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

Entry 15

War and peace.

Entry 18

Extradition.

Entry 19

Admission into, and emigration and expulsion from, India; passports and visas.

ANNEX B

INSTRUMENT OF FULL POWERS

PRESIDENT OF INDIA

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS it is expedient to appoint a fit and proper person with Full Power and Authority to sign on behalf of the Government of the Republic of India the Agreement between the Government of the Republic of India and the Government of the _____ relating to _____

NOW THEREFORE I, _____, President of India, do herewith by these Presents name, constitute and appoint Shri _____ as the Representative of the Government of the Republic of India, having Full Power and Authority to sign the said Agreement and any other related instrument on behalf of the Government of India. Further, I do hereby certify that whatever Agreement and other related instrument shall be so signed by the said Representative, shall be agreed to, acknowledged and accepted by the Government of India in the fullest manner.

IN WITNESS WHEREOF, I have signed these Presents and caused my Seal to be affixed hereunto at New Delhi this _____ day of _____ of the Saka year one thousand nine hundred and twenty six, corresponding to the day _____ of _____ of the year two thousand and four, A.D., in the fifty-fifth year of the Republic of India.

Sd/
PRESIDENT OF INDIA

SEAL

ANNEX C

INSTRUMENT OF RATIFICATION

PRESIDENT OF INDIA

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS the Agreement between the Government of the Republic of India and the Government of the _____ was signed at _____ on the _____ day of _____ in the year _____, which Agreement is reproduced word for word in the Annexure to this document;

AND WHEREAS it is fit and expedient to confirm and ratify the aforesaid Agreement;

NOW, THEREFORE, BE IT KNOWN that the Government of the Republic of India, having seen and considered the said Agreement, does hereby confirm and ratify the same.

IN TESTIMONY WHEREOF I, _____, PRESIDENT OF INDIA, have signed these Presents and affixed hereunto my Seal at New Delhi this the _____ day of _____ of the Saka year one thousand nine hundred and twenty six, corresponding to the _____ day of _____ of the year two thousand and four, A.D, in the fifty fifth year of the Republic of India.

Sd/

PRESIDENT OF INDIA

SEAL

ANNEX D

REGISTRATION CERTIFICATE

September 15, 1975

The Permanent Representative of India to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to refer to Article 102 of the Charter of the United Nations and the related regulations approved by the General Assembly regarding the registration of treaties and related international agreements.

Pursuant to these provisions, three copies of the Treaty between India and Portugal on Recognition of India's Sovereignty over Goa, Daman, Diu, Dadra and Nagar Haveli and Related Matters, signed by Mr. Y.B. Chavan, the Minister of External Affairs, Government of India, and by Dr. Mario Soares, the Minister of Foreign Affairs, Government of Portugal, at New Delhi, on 31 December, 1974, together with the understanding with respect to Article V of the said Treaty as embodied in the letters exchanged between the two Governments on 14 March, 1975, each of these documents duly authenticated by the Secretary, Ministry of External Affairs, Government of India, are enclosed for immediate registration under Article 102 of the Charter of the United Nations.

Article VII of the Treaty provides that the "Treaty shall be subject to ratification and shall enter into force on the date of exchange of instruments of ratification which shall take place at Lisbon." India's ratification of the Treaty is "subject to the understanding with respect to Article V of the said Treaty as embodied in the letters exchanged between the two Governments," on 14 March 1975. The Instruments of Ratification were exchanged on 3 June 1975 in Lisbon and the Treaty came into force from that date. No reservations were made by either Party to the Treaty.

The Permanent Representative of India takes this opportunity to renew to the Secretary-General the assurances of his highest consideration.

SEAL

H.E. The Secretary-General,
The United Nations,
New York.

ANNEX E

DEPOSITARY CIRCULAR NOTE

No. 1979

The Ministry of External Affairs present their compliments to the Embassy of _____ and in performance of the depositary functions of the Government of India under the Agreement Establishing the Association of Iron Ore Exporting Countries concluded at the Ministerial Meeting of Iron Ore Exporting Countries held in Geneva on April 2 and 3, 1975, have the honour to inform that H.E. Mr. _____, Ambassador of and H.E. Mr. _____, Ambassador of _____, signed the said Agreement on behalf of their respective Governments in New Delhi on _____.

The Ministry would be grateful if the Embassy would forward this information to their Government.

The Ministry of External Affairs avail themselves of this opportunity to renew to the Embassy of _____ the assurances of their highest consideration.

SEAL

Embassy of _____,
New Delhi.

ANNEX F

MESSAGES TO LEGISLATURE ON PARTICULAR TREATIES

STATEMENT MADE BY THE FOREIGN MINISTER IN THE *LOK SABHA/RAJYA SABHA* ON 9 AUGUST 1971

I have the honour to lay on the Table of the House a copy of the Treaty of Peace, Friendship and Cooperation, signed today by me on behalf of the Government of India, with Mr. A.A. Gromyko, Foreign Minister of the U.S.S.R. Government, who has signed it on behalf of the Union of Soviet Socialist Republics.

[The] Government welcomes this Treaty as a further step towards strengthening friendship and cooperation between India and the Soviet Union. The Treaty will, we are convinced, provide a stabilizing factor in favor of peace, security and development not only of our two countries, but the region as a whole. It is not aimed against any third country. In fact, we hope that this Treaty will provide a pattern for similar treaties between India and other countries in this region. Such treaties between countries of this region would stabilize peace and strengthen their independence and sovereignty.

I should like to emphasize in particular that this Treaty is, in its true sense, a Treaty of Peace. It strengthens our policy of non-alignment, respect for which is expressly mentioned in the Treaty. We sincerely hope that the policy of non-alignment will be further strengthened, and will become an effective instrument for the safeguarding of our national interests as well as an important factor in the maintenance of universal peace and international security and in the lessening of tensions in the world.

It is a Treaty of Peace, Friendship and Cooperation. It is also a Treaty of Non-aggression. It further provides a credible assurance that in the event of an attack or a threat thereof, the High Contracting Parties shall immediately enter into mutual consultations in order to remove such a threat and to take appropriate effective measures to ensure peace and the security of their countries. This should act as a deterrent to any powers that may have aggressive designs on our territorial integrity and sovereignty. It is, therefore, in essence, a Treaty of Peace against War.

Sir, the world is presenting a rapidly changing and dynamic picture. There is a change in the configuration of various world forces. Our policy of non-alignment is a dynamic policy which can be adapted to these changing situations. I should like to assure Hon'ble Members that our

policy of peace stands firm as ever. We have no designs on the territory of other countries. At the same time, we shall not tolerate aggression or threat of aggression from any country. We do not want to provoke war with any country. We shall do everything in our power to defend peace and prevent war.

ANNEX G

OFFICIAL PROCLAMATION OF TREATIES

Press Release

Sierra Leone and Tunisia sign Iron Ore Agreement

New Delhi, September 16, 1975

Sierra Leone and Tunisia signed the Agreement for the Establishment of the Association of Iron Ore Exporting Countries today. H.E. Mr. Lloyd Kojo Onikeh Randall, Ambassador of Sierra Leone in Peking, and H.E. Dr. Abdul Aziz Hamzaoui, Ambassador of Tunisia in Iran, signed the Agreement on behalf of their Governments.

With these signatures, nine countries have signed the Agreement, namely, Algeria, Australia, Chile, India, Mauritania, Peru, Sierra Leone, Tunisia, and Venezuela. The Association will formally come into being with effect from 12 October 1975.

India, which along with other countries had been endeavouring for the establishment of the Association, had been assigned the role of a Depositary State for the Agreement by the sponsoring countries, who met in Geneva earlier this year in April.

The Association aims at securing orderly and healthy growth of export trade in the iron ore, securing a fair and remunerative price for ore exports, and ensuring close cooperation among the Member States in the exploitation, processing and marketing of the iron ore and general economic and social growth.

The first session of the Conference of Ministers of Iron Ore Exporting Countries will be held in London on October 23 and 24, 1975 under the Chairmanship of Professor D.P Chattopadhyaya, Union Commerce Minister.

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CHAPTER ELEVEN

NATIONAL TREATY LAW AND PRACTICE: ISRAEL

Ruth Lapidoth[1]

I. Introduction

Israel is a parliamentary democracy. The President of the State is elected by parliament (the Knesset) and has mainly ceremonial functions. Not having a written constitution, Israel's constitutional system derives from several "Basic Laws," certain ordinary laws and case law. So far the State has no special law on the conclusion of treaties.[2] Hence, the relevant rules have to be looked for in laws of a general nature, in the *Regulations on the Operation of the Government*, which are rules of procedure established by the Government for its activities, and in the *Directives of the Attorney General*. Under the Israeli system, directives of the Attorney General constitute guidance for the administration on the interpretation of the law as well as of the *Regulations on the Operation of the Government*; they are binding until overruled by a judicial decision.[3] In addition, one should mention the rules of international customary law since they are part of the Israeli legal system.[4] Israel is not a party to the 1969 Vienna Convention

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[2] The term "treaty" is used in this survey as a generic term for all international treaties, conventions, agreements, etc., whatever their designation.

[3] H.C. 73/85, *Kach Faction v. The Speaker of the Knesset*, 39(3) P.D. 141, 152.

[4] Ruth Lapidoth, "International Law," *in The Law of Israel: General Surveys* 86, 88 (Itzhak Zamir & Sylviane Colombo, eds., Jerusalem, 1995).

on the Law of Treaties,[5] but to the extent that the latter's provisions are based on customary rules, they are incorporated into Israeli law.

On February 24, 1998 the Government published a proposal for a law – *International Treaties (Approval by the Knesset) Draft Law, 5758–1998*.[6] Like all officially published proposals, this one has been approved by the ministerial committee on legislation. However, the proposed law has not been acted upon, as of this writing, and it is doubtful whether it will ever be enacted. At present (2005), two institutions are trying to draft a constitution for Israel – the Knesset Constitution and Law Committee and the Israel Institute for Democracy. Both will probably also deal with the treaty-making power.

One can summarize the present situation as follows: In principle, every international agreement must be approved by the Government according to Israeli law. The Minister of Foreign Affairs is in charge of the conclusion of treaties, by delegation from, and subject to the approval or ratification by, the Government. The Knesset has only a limited role: treaties that, under their own terms, are subject to ratification or formal approval have to be brought to the attention of parliament prior to their ratification or formal approval. In addition, according to a "constitutional usage," certain treaties of major political importance have been submitted by the Government to the Knesset for the latter's approval, either prior to their conclusion or afterwards.[7] The Supreme Court has, however, ruled that this "usage" is not binding.[8] Parliament can also exercise its general control over the actions of the Government by means of no-confidence votes.

The President of the State signs treaties that have expressly been approved by the Knesset, but his signature requires the attesting signature of the Minister of Foreign Affairs.[9] So far few treaties bear the signature of the President. The above-mentioned proposed law, described in detail below, would have considerably increased the role of parliament in the conclusion of treaties, and the number of treaties to be signed by the President.

Treaties are not automatically part of the internal law of Israel, and their incorporation is effected by an act of transformation.

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[5] *Vienna Convention on the Law of Treaties*, U.N. Doc. A/Conf. 39/27 (1969), *in* 8 ILM 679 (1969).

[6] Hatza'ot Hok, (Legislative Proposals), No. 2691, 5758 (1997/8), p. 261. An English translation is attached as Annex D. For an analytical comment and criticism of this proposal, see Rotem Gilaldi, "The Practice and Case Law of Israel in Matters Related to International Law," 32 *Isr. L. Rev.* 475–525 (1998).

[7] Shimon Shetreet, "The Role of the Knesset in Treaty Making," 36 *Hapraklitt* 349, 350–89 (1985) (in Hebrew).

[8] H.C. 5934/95, "Dov Shilansky, Deputy Knesset Speaker v. The Prime Minister et al.," 95(3) *Takdeen-Elyon* 1253, 1995, 5755/56.

[9] *Laws and Practices concerning the Conclusion of Treaties*, U.N. Legislative Series, UN Doc. ST/LEG/SER.B/3, at 70 (1953).

II. Israel: Treaty-Making Law and Practice

A. *The Law*

Before the establishment of the State of Israel, Palestine was a British Mandate. The treaty-making power was vested primarily in the British crown, by virtue of the Foreign Jurisdiction Act of 1890, and of the Terms of the British Mandate for Palestine of 1922.[10] In addition, a very limited treaty-making power was conferred on the administration of Palestine, acting upon the advice of the Mandatory Power.[11]

When the State of Israel was established in 1948, the former legal system was in principle retained. Under section 11 of the Law and Administration Ordinance of 5708–1948,

> [t]he law which existed in Palestine on the 5th day of Iyar 5708 (14 May 1948), shall remain in force, in so far as there is nothing therein repugnant to this Ordinance or to other laws which may be enacted by, or on behalf of, the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.[12]

Section 14 granted the provisional Government the powers formerly held by the British authorities. These powers were later vested in the Government of Israel by section 12 of the Transition Law of 5709–1949.[13] The treaty-making power is one of those powers.

Another relevant provision is to be found in section 32 of the Basic Law: The Government of 2001, which has repealed earlier versions of that law: "The Government is authorized to perform in the name of the State, subject to any law, any function whose performance has not been entrusted by law to another authority."[14]

By a decision taken under section 2(d) of the above mentioned Law and Administration Ordinance of 5708–1948, the Government delegated to the Minister of Foreign Affairs the power "to sign international treaties and agreements, either himself or by a person authorized by him."[15]

The Transition Law of 5709–1949, in section 6, provided that "the President of the State shall sign such conventions with foreign States as have been approved by the Knesset,"[16] and a similar provision was later

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[10] *Id.* at 68; Ruth Lapidoth, *La Conclusion des Traités Internationaux en Israël* 42–46 (Paris, 1962).

[11] *Laws and Practices concerning the Conclusion of Treaties*, *supra* note 9, at 70; Lapidoth, *supra* note 10, at 42–46.

[12] 1 *Laws of the State of Israel (L.S.I.)*, Authorized Translation (5708–1948) p. 7.

[13] 3 *L.S.I.* (5709–1949), 3.

[14] *Sefer Hachukim (Book of Laws)*, No. 1780, 5761 (2000/2001), p. 158.

[15] *Public Notices (Yalkut Hapirsumim)*, No. 162, 5711 (1950/51), p. 959.

[16] *Supra* note 13.

included in the Basic Law: The President of the State, adopted in 1964.[17] Did these provisions by implication confer any substantial role on the Knesset? Not according to the practice of the Government. The Government has interpreted this provision as meaning that only in those cases where it decides to submit a treaty to the Knesset for the latter's approval, will the treaty require the signature of the President.[18] The legality of this practice was confirmed by the Supreme Court in the case of *Kamiar v. State of Israel*.[19] In fact, only in rare cases has the Government submitted a treaty to the Knesset for its approval prior to ratification, *e.g.*, the 1979 Treaty of Peace between Egypt and Israel[20] and the 1948 Genocide Convention.[21]

Thus, in the first 36 years of Israel's existence, the treaty-making power was, for all practical purposes, entirely in the hands of the Government. Only labor conventions were regularly brought to the attention of the Knesset, due to a requirement in the Constitution of the International Labour Organization.[22] This situation provoked criticism and several private bills.[23] As a result, in 1963 and 1964 the Minister of Justice promised to table in the Knesset treaties that are under their own terms subject to ratification.[24]

In 1984 this promise was formally put into effect, by the introduction of the following amendment to the *Regulations on the Operation of the Government*:

> 6. Ratification of International Treaties.
>
> (a) If the item proposed for the agenda of the Government is the ratification of an international treaty, the subject will be included in the agenda if the Prime Minister so decides and after ten copies of the treaty have been sent by the office of the proposing Minister to the Secretariat of the Knesset for a period of two weeks for the information of the Members

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[17] 18 *L.S.I.* (5724–1963/64), 111.

[18] According to Atty-Gen. Directive No. 64002 (August 1, 1980), the President is supposed to sign the text of the instrument of ratification, as happened with the 1979 Treaty of Peace between Egypt and Israel. If the treaty is not subject to ratification, the President should sign on a separate sheet of paper, as happened in the case of the 1978 Camp David Frameworks concluded by Egypt and Israel.

[19] Cr.A. 131/67, 22(2) P.D. 85.

[20] 1138 *U.N.T.S.* 72.

[21] Convention on the Prevention and Punishment of the Crime of Genocide, 78 *U.N.T.S.* 277 (entered into force January 12, 1951).

[22] I.L.O. Const. Art. 19(5).

[23] For a recent example, *see* Private Bill D2500, submitted to the Knesset on August 2, 2000 by Members of the Knesset Langental, Guzinsky, Hirschson and Hanegbi; Private Bill P/1711, submitted to the Knesset on December 22, 2003, by Members of the Knesset Gideon Sa'ar and Eliezer Cohn.

[24] 35 *Knesset Records* (5723–1962/63) 773; 40 *Knesset Records* (5724–1963/64) 2050.

> of the Knesset, unless, in the proposing Minister's opinion and with the approval of the Ministers of Foreign Affairs and of Justice, reasons of urgency or secrecy prevent such transmission; the Government may determine that a specific treaty because of its importance, should also be submitted for approval or ratification by the Knesset.
>
> (b) When the proposal is about the ratification of an international treaty, the text of the treaty and the main points, in Hebrew translation, will be kept by the Secretariat of the Government, for consideration by the Ministers. The proposal should also specify any changes which may have to be introduced into Israeli law, and the attitudes of the Ministers of Foreign Affairs and of Justice.[25]

In the wake of this change, the Attorney General introduced corresponding changes in his *Directives* on the conclusion of international treaties.[26] Ms. Hemda Golan, former Head of the Treaty Division at the Ministry of Foreign Affairs, dealt with treaties that are subject to approval or acceptance in the same manner as treaties subject to ratification.

It has been submitted that even before the adoption of this amendment to the *Regulations on the Operation of the Government* and the *Directives of the Attorney-General*, a certain usage had developed, according to which important political treaties were debated in the Knesset *before* or *after* their conclusion.[27] This procedure was followed, for example, with regard to the 1975 Agreement between Egypt and Israel.[28] As already mentioned, the Supreme Court has decided that there was no obligation to forward such treaties to the Knesset before their conclusion.[29] However, the Attorney-General has recommended that, at least on treaties of peace[30] and treaties which involve "the transfer of territory and other heavy subjects," the Knesset should be consulted before their definite conclusion, irrespective of whether they are subject to ratification. The need for parliamentary approval for treaties that involve transfer of territory derives also from legislation under which a decision of the government on the

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[25] The text used for this translation is taken from the August 1997 version of the Regulations. It is slightly different from the 1984 version.

[26] The presently relevant Directives are: No. 64000, of August 1, 1972; No. 64002 of August 1, 1980; and No. 64000A – the addition to No. 64000 of August 1, 1984, in the wake of the change in the *Regulations on the Operation of the Government*. As this survey is being written, the administration is working on the preparation of a new updated version of the directives. One may also refer to *International Treaties – Procedure*, a text distributed on February 14, 1968 by the Director General of the Ministry of Foreign Affairs.

[27] S. Shetreet, *supra* note 7; Ammon Rubinstein & Barak Medina, *The Constitutional Law of The State of Israel* 93–96, 796 (5th ed., Tel-Aviv, 1996) (Hebrew); *see also* Atty-Gen. Legal Opinion No. 420 (October 23, 1994).

[28] UN Doc. S/11818/Add.1 (September 2, 1975).

[29] *See supra* note 8.

[30] Atty-Gen. Legal Op. No. 420, *supra* note 27.

transfer of territory requires a qualified majority in the Knesset, and perhaps also approval by referendum.[31]

A draft law on the conclusion of treaties was prepared during the nineties and published on February 24, 1998.[32] If this text had been adopted, it would have sanctioned the practice of tabling in the Knesset all treaties subject to ratification for 14 days before their ratification by the Government; in case of urgency, this period could be shortened. Certain treaties, whether subject to ratification or not, would have required the express approval by the Knesset: treaties concerning human rights; those that establish or change the boundaries of the State; treaties which, according to a resolution of the Government or of the Knesset or of any of the latter's committees, are of special political or economic interest; and treaties whose implementation requires legislation by the Knesset. In case of a classified treaty, the text would have been brought to the attention of a subcommittee of the Foreign and Defense Affairs Committee of the Knesset. This subcommittee would also have been authorized to approve classified treaties that require express parliamentary approval. The subcommittee's decision to extend or withhold its approval of a classified treaty requiring express parliamentary approval would have had the same legal effect as the entire Knesset's decision to extend or withhold its approval of a nonclassified treaty that requires express parliamentary approval.

B. *The Practice*

1. *What Is an International Agreement?*

Under the 1972 *Directives of the Attorney-General*, "International Treaty – includes every treaty or agreement between governments or between governments and international governmental or non-governmental organizations, both multilateral and bilateral."[33] Under the proposed 1998 law, a treaty is "an international agreement in written form between the State of Israel and a foreign country or an interstate organization, which is governed by international law, and regardless of its particular designation."

Agency-to-agency agreements may be concluded in implementation of

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[31] Letter No. 18648/98 (November 2, 1998); Law and Administration Ordinance (Termination of the Application of the Law, Jurisdiction and Administration) Law, 5759–1999, *Sefer Hachukum (Book of Laws)*, No. 1703, 5759 (1998/1999), p. 86; and Basic Law: Jerusalem Capital of Israel (Amendment), *ibid.*, No. 1760, 5761 (2000/2001), p. 28. *See also* Rubinstein & Medina, *supra* note 27, at 91–96.

[32] *See supra* note 6.

[33] *See supra* note 26.

existing umbrella agreements. Otherwise, an agency may conclude international agreements only if expressly authorized to do so by legislation, *e.g.*, the Office of Standards.[34]

Implementing agreements usually do not require approval by the Government, unless their implementation requires the introduction of changes into the internal law of the State, either by legislation of the Knesset or by regulations of the Government. In practice, some of the *Directives of the Attorney-General* on the conclusion of treaties are not applied to implementing agreements.

Although oral agreements can be binding under international law, they are rather rare nowadays. By their literal terms, the 1972 *Directives of the Attorney General* are not limited to agreements in written form, but the new version of the *Directives*, which is in the process of being drafted, will probably apply only to agreements in writing.

Unilateral acts are not included in the *Directives*. Such acts would be binding under the conditions established by international law for their validity. An interesting example is Israel's declaration that it would abide by the humanitarian provisions of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, irrespective of whether the Convention is legally applicable.[35]

Whether agreements on foreign aid and sales contracts are governed by international law depends on the terms of the agreement. Agreements pertaining to foreign aid or purchase of agricultural surpluses may also be of a mixed nature, including some commitments governed by international law and others of a mere commercial character and, hence, governed by the internal law of a State. There may also exist an umbrella agreement between States, followed by sales contracts of an internal nature. Similarly, in the field of technical assistance the State often concludes a framework agreement governed by international law, and the corresponding specific projects are implementing agreements that are sometimes governed by

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[34] According to Section 11A added by the Law on Standards (Amendment No. 3), of 5734–1979, the Office of Standards may, with the approval of the Minister of Industry Trade and Tourism, conclude agreements with institutions outside Israel, in order to regulate the marking by the mark of standard of goods that conform to the requirements of the standard, which are produced in that country and are imported into Israel; *Sefer Hachukim (Book of Laws)*, No. 922, 5739 (1978/79), p. 35.

[35] Haim Cohn, "Foreword," *in The Rule of Law in the Areas Administered by Israel* viii (Tel Aviv, 1981); Meir Shamgar, "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage," *in Military Government in the Territories Administered by Israel* 1967–1980, at 32, 42 & 48 (Shamgar, ed., Jerusalem, 1982). The declaration has also been dealt with in Nissim Bar-Yaacov, "The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip," 24 *Isr. L. Rev.* 485–506 (1990).

a national legal system. In principle, agreements governed by internal law are not regarded as international treaties.

It is the Legal Adviser to the Ministry of Foreign Affairs who is authorized to decide in case of doubt whether a document is or is not an international treaty.

2. *Executive Authorization and Approval Procedure*

As mentioned, the Minister of Foreign Affairs, by delegation from the Government, is the competent authority in matters of treaty making. The Treaty Division in the Office of the Legal Adviser is authorized to direct, monitor and register all treaty-making activity. The rules on supervision and coordination in matters of negotiation, conclusion, approval, and, to a certain extent, implementation of treaties have been specified in the *Directives of the Attorney General*. The *Directives* are aimed at achieving coordination between the Ministry of Foreign Affairs, the Ministry of Justice, the ministry directly interested in the respective treaty, and – if financial consequences are involved – the Ministry of Finance.

In principle, all agreements require approval or ratification by the Government. This approval is not needed for most implementing agreements. But these agreements as well should be brought to the attention of the Treaty Division in the Office of the Legal Adviser in the Ministry of Foreign Affairs.

The *Directives of the Attorney General on the Conclusion of Treaties* are not as detailed as "Circular 175" of the U.S. State Department. They deal with the following subjects: preparations for negotiations, negotiations, signing (including initialing and signing ad referendum – but in practice Israel never signs ad referendum), reservations, reporting on the conclusion of the agreement and on the steps needed for its implementation, ratification and accession, monitoring the validity of treaties and the introduction of changes, and negotiations on matters related to the implementation of the treaty in case of difficulties.

3. *Legislative Approval*

So far no law requires the express approval of the legislature prior to ratification by the Government or other form of acceptance of any treaty (except for treaties that cede territory). Two attorneys-general have, however, recommended that certain important political agreements be submitted for such parliamentary approval, as detailed above.[36] If the draft law had been adopted, certain treaties would have required prior legislative approval, as detailed above.

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[36] *See* text accompanying notes 29 and 30.

The executive organs have full discretion in deciding whether an agreement should receive the approval of the legislature prior to ratification or other form of acceptance. In the past, the Government has sought prior legislative approval for treaties of peace and a few important political agreements. Moreover, under the *Directives of the Attorney-General*, the Government should delay the ratification or other acceptance of a treaty until the Knesset has adopted the legislation needed for the implementation of the treaty under internal law.[37] Upon a request from the interested ministry, the Ministry of Justice will examine whether new legislation is needed, and it will confirm that the necessary change or amendment has been introduced.

The Knesset is not consulted on whether an agreement should be submitted for its prior approval. But since all treaties that are subject to ratification by the Government are brought to the knowledge of the Knesset prior to ratification by the Government, this would give its members the possibility to request a debate.

4. *Reservations*

Israel does not make reservations as a condition for acceptance of bilateral treaties. If there is disagreement on a bilateral text, the parties continue to negotiate until they reach agreement.

Sometimes Israel ratifies or accedes to a multilateral treaty subject to reservations. For instance, due to the jurisdiction of the tribunals of the recognized religious communities, it had to add the following reservation to its ratification of the 1966 International Covenant on Civil and Political Rights:

> With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned. To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law.[38]

5. *Consultation with the Legislature*

As mentioned, under the *Regulations on the Operation of the Government* and under the *Directives of the Attorney-General*,[39] the Government has to bring to

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[37] *Supra* note 9, at 71, 72.

[38] Text of Instrument of Ratification (dated September 4, 1991) attached as Annex F. The Family Court of Tel Aviv hinted that perhaps a reservation not compatible with the object of a treaty might be disregarded by the Court (L.S. v. L.S., of 30 January 2003, not yet published). The relevant text was the Convention on the Elimination of All Forms of Discrimination against Women, and the reservation was similar to the one added to Israel's ratification of the International Covenant on Civil and Political Rights.

[39] *Supra* notes 25 & 26.

the attention of the Knesset every treaty at least 14 days before its ratification. This procedure can be considered a mode of consultation.

Similarly, the Government has received the approval of the legislature prior to the conclusion of peace treaties[40] and of certain important political agreements, *e.g.*, the 1975 Agreement on the Further Disengagement in the Sinai.[41] Others were brought to the attention of the Knesset after their conclusion, *e.g.*, the 1949 Armistice Agreements between Israel and her neighbors.[42]

The "consultation" sometimes takes the form of a mere transmission of the text; in other cases it is an announcement by the Government to the Knesset; and in rare cases it is a request for a formal approval.[43]

6. *Consultation with the Public*

So far there never has been a referendum in Israel, either on questions related to treaties or on any other matter. However, a law on referenda may be drafted. This has become necessary since the Knesset has adopted (in January 1999) legislation according to which a Government decision on the cession of any territory subject to Israeli law and jurisdiction requires the approval of the majority of the members of the Knesset and a referendum.[44]

In some cases the representatives of the Government have consulted experts, e.g., people in academia or industry, prior to or during negotiations.

7. *Publication and Transmittal Requirements*

There is no legislative text that requires the publication of treaties as such. If a treaty is incorporated into internal law, it will be published as internal legislation, either in the book of laws, or in the collection of subsidiary legislation, or in the collection of public notices, as the case may be.

The publication and transmittal of treaties has been dealt with in the

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[40] The 1979 Treaty of Peace between Egypt and Israel was debated in the Knesset on March 20, 1979, 85 *Knesset Records* 1882–2129, and was signed on March 26. Instruments of ratification were exchanged one month later on April 25, 1979. *See* 18 *ILM* 362 (1979).

[41] The 1975 Agreement between Egypt and Israel was initialed on September 1, on September 3 it was debated in the Knesset (74 *Knesset Records*, 4079–136) and it was signed on September 4, 1975. *See* 14 *ILM* 1450 (1975).

[42] 42 *U.N.T.S.* 252–70, 288–98, 304–20, 320–40; 1 *Knesset Records* 287; 2 *Knesset Records* 1098.

[43] For examples, see Legal Opinion of the Attorney General, *supra* note 27.

[44] "Law and Administration (Repeal of Application of the Law, Jurisdiction and Administration) Law of 5759–1999," *Sefer Hachukim (Book of Laws)*, No. 1703, 5759 (1998/99), p. 86.

Directives of the Attorney-General. There are two relevant publications: a notice about the conclusion of the treaty and some information about it are supposed to be published soon after the entry into force in the *Public Notices* (*Yalkut Hapirsumim*), which are part of the *State Records* (*Reshumot*). Unfortunately, these notices have not been published for a considerable time. The *Israel Law Review* – the English-language law review of the Hebrew University in Jerusalem – used to publish periodically a list of the treaties that have come into force for Israel.

In addition, most treaties are published in the *Collection of Treaties* (*Kitvei Amana*), which is also part of the *State Records*. The Treaty Division in the Office of the Legal Adviser of the Ministry of Foreign Affairs transmits the text of the treaties to the relevant official in the Ministry of Justice for publication. According to the *Directives*, multilateral conventions as well as bilateral ones should be published. In practice, implementing agreements, which in the opinion of the Treaty Division are of no interest to the public, will not be published.

In principle, all treaties should be published in the original language(s), at least in English, French and Spanish, and in Hebrew. In bilateral agreements, Hebrew is often one of the official texts, and for multilateral ones a translation is prepared.

Unfortunately, sometimes there have been delays in the publication of treaties. The public can obtain information and a copy of treaties from the Treaty Division in the Office of the Legal Adviser to the Ministry of Foreign Affairs.

The Treaty Division notifies all the interested governmental bodies of the entry into force of any treaty signed by Israel, of any reservations to multilateral conventions, and of any denunciations, etc.

There is no provision on the transmittal of treaties to the Knesset, except for those that are subject to ratification according to their own terms. Classified treaties, even if they require ratification according to their own terms, will not be brought to the attention of the Knesset. If the new draft law had entered into force, such treaties would have been transmitted to a subcommittee of the Knesset's Foreign and Defense Affairs Committee.

The Treaty Division is in charge of the registration of treaties with the Secretariat of the United Nations, in accordance with Article 102 of the UN Charter. Israel's Mission to the United Nations transmits the Certificate of Registration to the Treaty Division, and it is kept there together with the original text of the treaty, in the country-by-country file, together with the information sheet relating to the specific treaty.

8. *Incorporation into National Law*

As in most States, in Israel international customary rules are automatically part of internal law, with no need for an act of transformation, *i.e.*, an act on the part of the Israeli legislature which would invest these rules with binding force in internal law.[45] This applies also to declaratory provisions in treaties, namely, provisions which are based on customary law and which codify it.

Moreover, the courts have adopted a presumption on the compatibility between customary international law and Israeli law, and hence will interpret the national law as far as possible so that it may conform with the international rule.[46] However, if there is a clear contradiction between the international rule and an Israeli statute which cannot be overcome by means of interpretation, the Israeli judge has to give priority to the Israeli provision.[47]

Constitutive treaty provisions, namely, those establishing new rules of international law, require a specific act of transformation, *i.e.*, incorporation, into internal law before they can be applied by the courts.[48]

There are several means by which a treaty can be incorporated into Israeli law.

8.a. *Specific Primary Legislation*: Sometimes the Knesset adopts a law which transforms the provisions of a particular treaty into internal law. Thus, for example, the Crime of Genocide (Prevention and Punishment) Law of 5710–1950 was enacted in order to introduce into the Israeli legal system the international convention on this subject concluded in 1948.[49]

8.b. *General Primary Legislation for the Transformation of Treaties to Be Concluded in a Specific Area:* In some cases, the law contains a general provision conferring in advance validity upon every international treaty that may be concluded on a certain subject. Thus, for example, the Post Office Ordinance [New Version] of 5737–1976, and its successor, the Postal Authority Law of 5746–1986, set the liability for postal items in accordance with the Universal Postal Convention as it may be in force from time to time.[50]

8.c. *Primary Legislation Whose Applicability Depends upon the Existence of a Treaty*: There is no formal transformation of treaties in the sphere of extra-

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[45] Lapidoth, *supra* note 4, at 88.
[46] *Id.* at 91–92.
[47] *Id.* at 92–93.
[48] *Id.* at 95.
[49] *Id.* at 97.
[50] Lapidoth, *supra* note 4, at 98.

dition, but their existence is a condition for the implementation of the law. Thus, section 2 of the 5714–1954 Extradition Law provides that a person may be extradited if an agreement providing for reciprocity exists. Moreover, the law also states that with respect to certain matters, the provisions of the treaty must be followed even if they differ from those included in the law.[51]

8.d. *Transformation by Subsidiary Legislation:* In many cases treaties are incorporated into Israeli law by means of regulations or orders which are published in the *Collection of Subsidiary Legislation* (*Kovets Hatakanot*) of the *State Records* (*Reshumot*). Thus, for example, the Minister of Foreign Affairs is authorized, under the Immunities and Rights (International Organizations and Special Missions) Law of 5743–1983, to grant in Israel immunities and rights that have been established by international conventions.[52] Sometimes such a ministerial act requires the approval of one or more ministers, of the Government, or of one or more committees of the Knesset.

Interestingly, in some cases the legislature not only authorizes a minister to transform international treaties but also provides that the provisions of the treaty will prevail over internal law. For instance, the Minister of Finance has been authorized to adapt Israeli legislation to agreements concerning relief from double taxation, and "any . . . such agreement shall have effect in relation to income tax notwithstanding anything in any enactment."[53]

The act of transformation determines the status and effect of the provisions of the treaty in Israeli law. The courts tend to interpret the incorporating law in conformity with the interpretation given in international law to the provisions of the treaty which is at the source of the law.[54]

Although untransformed treaties are not part of Israeli law, in a few cases the courts have nevertheless had recourse to such treaties, mainly in order to fill a lacuna[55] or for the purpose of interpretation.[56]

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[51] *Id.* at 99.

[52] 37 *L.S.I.* (5743–1982/83), 144.

[53] Income Tax Ordinance [New Version], 196, 1 *L.S.I.* [New Version] 145; *see also* "Military Justice Law of 5715–1955", §10, 9 *L.S.I.* (5715–1954/55) 184.

[54] Lapidoth, *supra* note 4, at 101–03.

[55] *Id.* at 105–06.

[56] *Id.* at 107. Israel's Supreme Court applies the humanitarian provisions included in the Fourth 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War despite the lack of a formal incorporation, on the basis of a declaration by the Government that it will conform to those rules in the West Bank and the Gaza Strip – H.C. 7015/02, and 7019/02, *Ajouri et al. v. Commander of Israeli Defense Forces in the West-Bank et al.* 56 (3) P.D. 352, at 364; H.C. 2056/04, *Council of the Village Surik and others v. Government of Israel.*

In principle, the enactment transforming a treaty into internal law should be adopted, where necessary, before the agreement is definitely concluded. However, in some cases that legislation was adopted at a later stage[57] or was not adopted at all.[58]

9. *Legally Binding Decisions of International Organizations*
These decisions are not treated like treaty commitments. The relevant ministry will have to deal with the implementation, and if a financial obligation is involved, it may need the assistance of the Ministry of Finance. Similarly, if the decision requires implementation via the internal legal system, an act of transformation may be needed. In certain circumstances, *e.g.*, some International Telecommunications Union resolutions, the approval of the Government may be needed.

10. *Implementation of Multilateral Conventions*
The implementation of multilateral conventions is within the responsibility of the relevant ministry. However, the Ministry of Foreign Affairs has the duty to monitor the process of implementation and all activities that have to be performed under the treaty.[59]

In case of difficulties in the implementation of a treaty, the relevant ministry has to notify the Ministry of Justice and the Ministry of Foreign Affairs. If consultations lead to the conclusion that negotiations are needed, they will be conducted in conformity with the *Directives of the Attorney-General* on negotiations toward the conclusion of a treaty.[60]

11. *Treaty Termination*
At least two months before the termination of a treaty, the Treaty Division in the Office of the Legal Adviser at the Ministry of Foreign Affairs has to inform the Cabinet Secretary, the relevant ministries, and the Office of the Attorney-General of the impending termination. It also has to inform them three months in advance about the dates when a revision of the treaty may be requested and other similar acts.[61]

Negotiations and other activities for the revision of a treaty are considered under the *Directives of the Attorney-General* to be similar to negoti-

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[57] Lapidoth, *supra* note 4, at 97–98.
[58] Thus, Israel ratified the 1961 Vienna Convention on Diplomatic Relations on August 11, 1990, but so far no corresponding legislation has been adopted.
[59] 1972 Atty-Gen. Directives §40.
[60] 1972 Atty-Gen. Directives §§46–49.
[61] 1972 Atty-Gen. Directives §44.

ations for the conclusion of a new treaty and are subject to the same instructions.[62]

It is not clear whether the unilateral termination of a treaty by Israel requires the approval of the Government. The approval of the legislature is not needed.

12. *Depositary Problems*

Israel has not yet served as a depositary. However, in the early years after the establishment of the State, it encountered certain problems relating to the functions of depositaries.

12.a. *Reservations*: Certain States which had not recognized Israel or even considered themselves to be in a state of war with Israel, circulated, through depositary governments, statements purporting to constitute reservations, whereby their accession to or ratification of a multilateral convention to which Israel was a party did not imply a recognition of Israel nor did it create treaty relations with Israel. Israel reacted by determining that these statements did not constitute genuine reservations but were mere political pronouncements, and that they did not affect the obligations of that state under the convention.[63]

Egypt and Jordan, in their respective peace treaties with Israel, have committed themselves to withdrawing those statements.[64]

12.b. *Succession to Treaties*: Soon after the establishment of the State of Israel, its Government declared that Israel would not be bound by treaties to which Palestine under the British Mandate had been a party.[65] It therefore adopted the practice of acceding to international treaties, even when Palestine previously had been a party.

12.c. *Nonrecognized Governments*: It happened that a depositary Government which had not recognized the State of Israel refused to accept communications from the Government of Israel pertaining to accession to the

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[62] 1972 Atty-Gen. Directives §45.

[63] Such an exchange of statements was made, for instance, by Egypt and Israel with regard to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

[64] *1979 Treaty of Peace between Egypt and Israel*, Art. VI(3) (March 26, 1979), 1138 *U.N.T.S.* 72, *in* 18 *ILM* 362, 365 (1979); *1994 Treaty of Peace between Israel and Jordan*, Art. 25(3) (October 26, 1994), *in* 34 *ILM* 43, 53 (1995).

[65] *Replies from Governments to Questionnaires of the International Law Commission*, U.N. Doc. A/CN.4/19, 2 *Y.B. Int'l L. Comm.* 206–18, 215–16 paras. 23, 26 (1950) ("Questionnaires Replies"); *Materials on Succession of States*, U.N. Legislative Series, ST/LEG/SER.B/14, at 38, 41–42 (1967).

treaty. The communications were transmitted to the depositary through the intermediary of a third Government which maintained diplomatic relations with both Israel and the depositary State. Israel protested that a depositary may not refuse to accept communications merely because they emanate from a State which it does not recognize.[66]

13. *International Agreements Concluded by Subnational Entities*

Israel is a unitary State and therefore there are no subnational entities. When Israel considers the possibility of concluding an agreement with a subnational entity of a foreign State, the Treaty Division in the Office of the Legal Adviser inquires with the relevant authorities of the foreign State whether the entity has the authority to conclude the envisaged treaty. If not, the document will bear the title "memorandum of intent" or "program" which may indicate that it is not a binding international treaty.[67]

14. *Conclusions*

The conclusion of treaties by Israel is a matter that has not yet been definitely regulated by a specific law. So far, the area is mainly within the competence of the Government, and only treaties that are subject to ratification or formal approval have to be brought to the attention of the Knesset before their ratification by the Government. In addition, in principle, the Government will not ratify or otherwise conclude a treaty whose implementation requires the introduction of changes into Israeli law unless the Knesset has adopted the necessary legislation. Similarly, the government needs the approval of a qualified majority of the Knesset and perhaps also a referendum before it can conclude an agreement that cedes territory. The President of the State should sign the instrument of ratification (or another appropriate document, if the treaty is not subject to ratification) in those cases where the text was approved by the Knesset.

While customary international law is automatically part of the Israeli legal system, constitutive treaty provisions require an act of transformation before they can be implemented by the judiciary. However, the courts are guided by the presumption that the State intends to fulfill its international obligations.

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[66] *Questionnaires Replies, supra* note 65, 2 *Y.B. Int'l L. Comm.* 217–29 (1950).

[67] According to oral information received from the former head of the Treaty Division, Ms. Hemda Golan.

III. Basic Data and Documentation

A. *National Legislation*

Annex A: The Basic Law: The President of the State, of 1964 (excerpts)
Annex B: The Basic Law: The Government, of 2001 (excerpts)
Annex C: Directive No. 64.000A of the Attorney-General of 1984 (excerpts)
Annex D: Draft Law on International Treaties (Approval by the Knesset), 5758–1998

B. *Selected Examples of Treaty Documents*

Annex E: Full Powers Document
Annex F: Instrument of Ratification
Annex G: Registration Certificate

ANNEX A

BASIC LAW: THE PRESIDENT OF THE STATE, OF 1964

Section II

(a) The President

* * *

(5) Will sign treaties with foreign States which have been approved by the Knesset . . .

ANNEX B

BASIC LAW: THE GOVERNMENT, OF 2001[68]

Section 32

The Government is authorized to perform in the name of the State, subject to any law, any function whose performance has not been entrusted by law to another authority.

[68] *Sefer Hachukim (Book of Laws)*, No. 1780, 5761 (2000/2001), p. 158.

ANNEX C

DIRECTIVES OF THE ATTORNEY-GENERAL NO. 64.000A, OF 1 AUGUST 1984: INTERNATIONAL TREATIES: PROCEDURE FOR RATIFICATION – THE KNESSET AND THE GOVERNMENT[69]

A. *Provisions in the Regulations on the Operation of the Government*

The Regulations on the Operation of the Government approved by the Government's resolution no. 534 of 21 Adar bet 5744 (25 March 1984) lay down the following provisions for the purpose of the ratification of international treaties:

* * *

4. An item on the agenda of a Government session will include:

a. The nature of the item and, should a resolution be required, the suggested text of resolution to be adopted by the Government;

b. Explanation of the background of the proposal and the need for it;

c. Should the proposal involve expenses or a financial obligation, information on the amount of expenses or financial obligation and whether they are included in the authorized budget;

d. If the proposal is for ratification of an international treaty – text of the treaty in Hebrew, to be kept at the Government secretariat for perusal by ministers, as well as the main points of the treaty, whether – and which – changes will be required in the laws of Israel, and the views of the Ministers of Foreign Affairs and Justice;

e. Reservations or remarks of the ministries concerned;

f. Signature of proposing minister.

5. * * *

e. If the item for the agenda is the ratification of an international treaty – prior to inclusion in the agenda of the Government, ten copies of the treaty will be sent by the proposing minister to the secretariat of the Knesset for the information of the Members for a period of two weeks, unless in the proposing minister's opinion, with the approval of the Ministers of Foreign Affairs and Justice, such forwarding is impossible for reasons of urgency or secrecy. The Government may decide that a specific treaty, due to its importance, shall also be submitted to the Knesset for approval or ratification.

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[69] This text is based to a certain extent on the translation published in 19 *Isr. L. Rev.* 292–94 (1984).

B. *Procedure of Ratification*

According to the Regulations on the Operation of the Government, the following is the procedure for ratification of international treaties, complementing the procedure stated in the Directives of the Attorney General No. 64.000 dated 21 Av 5732 (1 August 1972):

a. A minister desiring governmental ratification of an international treaty to which Israel is a party (hereinafter – the minister responsible), will forward ten copies of the text of the treaty in advance to the secretary of the Knesset for attention of the Members. In order to dispel any doubt, it should be noted that any international treaty which requires legislation in order to be applied in Israel, should be submitted for ratification to the Government.

b. The text to be sent to the secretary of the Knesset will be the one which the minister responsible wishes to submit for ratification as per paragraph 4(d) of Government Regulations. It will include, in addition to the Hebrew translation of the treaty, the main points of the treaty and any changes which may have to be made in Israeli law.

c. The treaty will be sent to the secretary of the Knesset with the following letter:

To: The Secretary of the Knesset
Subject: Treaty . . .

Enclosed please find ten copies of the said treaty, as well as the main points of the treaty and changes which will have to be introduced into Israeli law, prior to the submission of the treaty for ratification by the Government.

We will be grateful if you bring this treaty soon to the attention of the Knesset members.

Yours sincerely,

Copies of this letter, together with the Hebrew translation of the treaty, the main points and necessary changes in Israeli law will be sent simultaneously to the Ministers of Foreign Affairs and Justice, the Attorney General, the Cabinet Secretary and the Legal Adviser to the Ministry of Foreign Affairs.

d. A treaty will only be submitted to the Government for ratification after having been tabled at the secretariat of the Knesset for at least two weeks during the period the Knesset is in session.

e. Any action taken by the Knesset in respect of the treaty according to Knesset Regulations will be reported to the Government by the

minister responsible during the debate on the ratification of the treaty in the Government.

f. Should the minister responsible consider that the treaty should not be sent to the Knesset due to its urgency or secrecy, he will, subject to the approval of the Ministers of Foreign Affairs and of Justice, submit it for ratification by the Government without first forwarding it to the secretary of the Knesset.

g. The Government may, at its discretion, decide that a treaty of special importance will also be brought before the Knesset for approval, as was done in the case of the Camp David agreements and the Peace Treaty with Egypt.

Itzhak Zamir
Attorney General
of the State of Israel

ANNEX D

DRAFT LAW ON INTERNATIONAL TREATIES (APPROVAL BY THE KNESSET), 5758–1998[70]

Definitions

1. In this Law – "Treaty" – An international agreement concluded in written form between the State of Israel and a foreign State or an inter-State organization, governed by international law, and whatever its particular designation. "Ratification" – Including accession to a treaty.

Laying on the Table of the Knesset

2. The government shall not ratify a treaty which is subject to ratification, other than a treaty dealt with under section 4, until after it has lain on the Table of the Knesset for fourteen days during which the Knesset is in session.

Treaties Subject to Urgent Ratification

3. Notwithstanding the provisions of section 2, the Minister of Foreign Affairs having confirmed in writing, after consulting the Minister of Justice and the Minister concerned, that Section 2 cannot be complied with for special reasons of urgency, the Government will then lay the treaty on the Table of the Knesset for a shorter period to be determined by the Minister of Foreign Affairs, or after it has been ratified.

Treaties Subject to Knesset Approval

4a. The Government will not ratify a treaty requiring ratification and will not sign a treaty which does not require ratification until after the treaty has been laid on the Table of the Knesset and approved by the Knesset, if the treaty is one of the following:

1. A treaty whose subject matter is human rights;
2. A treaty which determines or changes the boundaries of the State;

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[70] *Hatza'ot Hok* – Legislative Proposals, No. 2691, 5758–1998, p. 261. In the preparation of this translation, the author to a certain extent used the translation prepared by Rotem Giladi, published in 32 *Isr. L. Rev.* 526–27 (1998).

3. A treaty which, according to a resolution of the Government, or the Knesset or any of its committees, is of a special political or economic interest;

4. A treaty whose implementation requires legislation by the Knesset.

4b. The Knesset will deliberate on a treaty referred to in sub-section (a) within thirty days of the day it has been laid on the Table of the Knesset; the time in which the Knesset is not in session will not be counted within the thirty days.

Classified Treaties

5. If the Minister of Foreign Affairs has confirmed in writing, after consulting the Minister of Defense and the Minister of Justice that, for special reasons of secrecy, a treaty cannot be laid on the Table of the Knesset or be submitted to the Knesset for approval, the Government will be entitled to ratify the treaty after it has been laid on the Table of a sub-committee of the Foreign and Defense Affairs Committee of the Knesset or after it has received the approval of that sub-committee, respectively.

Implementation

6. The Minister of Foreign Affairs is in charge of the implementation of this Law.

ANNEX E

EXAMPLE OF FULL POWERS DOCUMENT

SHIMON PERES
MINISTER OF FOREIGN AFFAIRS

TO ALL TO WHOM THESE PRESENTS SHALL COME
BE IT KNOWN

That,

Mr. E. Zeev Sufott
Ambassador Extraordinary and Plenipotentiary

is hereby appointed to sign, subject to ratification, the Agreement on Cooperation in the Fields of Health and Medicine between the Government of the State of Israel and the Government of the People's Republic of China.

IN WITNESS WHEREOF I, Shimon Peres, Minister of Foreign Affairs, have subscribed my signature and have caused the Seal of the Ministry of Foreign Affairs to be affixed hereunto, at Jerusalem, this Ninth day of Adar, Five Thousand Seven Hundred and Fifty Three, which corresponds to the Second day of March, One Thousand Nine Hundred and Ninety Three.

Inscribed in the Fifth Book of Protocol under No. 1813.

ANNEX F

EXAMPLE OF INSTRUMENT OF RATIFICATION

DAVID LEVY
DEPUTY PRIME MINISTER
and
MINISTER OF FOREIGN AFFAIRS

TO ALL TO WHOM THESE PRESENTS SHALL COME
BE IT KNOWN

WHEREAS an International Covenant on Economic, Social and Cultural Rights was adopted by the General Assembly of the United Nations on 16 December 1966;

AND WHEREAS the said International Covenant was signed by Israel on 19 December 1966;

AND WHEREAS the Government of the State of Israel, in accordance with the powers vested in it by Law decided on 18 August 1991 to ratify the said International Covenant;

NOW THEREFORE, by these presents it is declared that the Government of the State of Israel ratifies the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16 December 1966;

IN WITNESS WHEREOF I, David Levy, Deputy Prime Minister and Minister of Foreign Affairs, have subscribed my signature and have caused the Seal of the Ministry of Foreign Affairs to be affixed hereunto, at Jerusalem, this Twenty Fifth day of Elul, Five Thousand Seven Hundred and Fifty One, which corresponds to the Fourth day of September, One Thousand Nine Hundred and Ninety One.

Inscribed in the Fifth Book of Protocol under No. 1749.

ANNEX G

EXAMPLE OF REGISTRATION CERTIFICATE

UNITED NATIONS – ORGANISATION DES NATIONS UNIES

No. 36221

CERTIFICATE of REGISTRATION	CERTIFICAT d' ENREGISTREMENT
The SECRETARY-GENERAL of the UNITED NATIONS	Le SECRETAIRE GENERAL de L'ORGANISATION des NATIONS UNIES
hereby certifies that the following international agreement has been registered with the Secretariat, in accordance with Article 102 of the Charter of the United Nations:	certifie par la présente que l'accord international indiqué ci-aprês a été enregistré au Secretariat, conformément à l'Article 102 de la Chartre des Nations Unies:
No. 27316. ISRAEL AND PANAMA:	No. 27316. ISRAEL ET PANAMA:
Agreement on tourism co-operation. Signed at Jerusalem on 20 May 1987.	Accord de coopération touristique. Signé a Jérusalem le 20 mai 1987.
Registered by Israel on 12 June 1990.	Enregistré par Israel le 12 juin 1990.
Done at New York on 19 December 1991 For the SECRETARY-GENERAL	Fait à New York le 19 décembre 1991 Pour le SECRETAIRE GENERAL

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H.H.	*Hatza'ot Hok* (Legislative Proposals)
Isr. L. Rev.	Israel Law Review
Isr. Y.B. on Hum. Rts.	Israel Yearbook on Human Rights
ILM	International Legal Materials
I.L.O.	International Labour Organization
I.T.U.	International Telecommunications Union
L.S.I.	Laws of the State of Israel (authorized translation)
P.D.	*Piskei Din* (Judgments of the Supreme Court)
U.N. Doc.	United Nations Document
U.N.T.S.	United Nations Treaty Series
Y.B. Int'l L. Comm.	The Yearbook of the International Law Commission

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CHAPTER TWELVE

NATIONAL TREATY LAW AND PRACTICE: JAPAN

Takao Kawakami[1]

I. Introduction

Article 73(3) of the Constitution of Japan provides that the power "to conclude treaties" resides in the Cabinet. This article further provides that the Cabinet shall "obtain prior or, depending on circumstances, subsequent approval of the Diet" for the conclusion of treaties. As a constitutional practice, the approval of the Diet is required only for the conclusion of treaties falling under certain categories. The conclusion of international agreements that do not fall under these categories, so-called executive agreements, is interpreted to be a part of the function of the Cabinet to "manage foreign affairs" specified in Article 73(2) of the Constitution and is not considered the conclusion of "treaties." With respect to the exercise of these powers of the Cabinet, namely the power to conclude treaties under Article 73(3) of the Constitution and the power to conclude executive agreements under Article 73(2) of the Constitution, the Ministry of Foreign Affairs is authorized, *inter alia*, to conclude, interpret and implement treaties and other international agreements under Article 4 of the Law for the Establishment of the Ministry of Foreign Affairs.

The Ministry of Foreign Affairs conducts negotiations in cooperation with other ministries concerned in every field of State activity. These negotiations often lead to the conclusion of international agreements. Once the negotiations of international agreements come to a successful conclusion, the text of the agreement is submitted to the Cabinet in the name of the Minister for Foreign Affairs in order to seek a Cabinet decision for signature. For executive agreements that do not require Diet approval, a Cabinet decision is the only procedure necessary for signature of the agreement, although the Cabinet Legislation Bureau checks beforehand whether the international agreement in question really falls under the

[1] Tomoaki Ishigaki, Deputy Director of the International Legal Affairs Division of Japan's Ministry of Foreign Affairs, assisted in updating the materials in this essay for publication.

category of executive agreements or not. With regard to "treaties" that require the Diet's approval, legal and editorial scrutiny of the treaty on the part of the Cabinet Legislation Bureau is required for, and prior to, a Cabinet decision in addition to the normal procedures.

The treaties that are submitted to the Diet are, in normal cases, first deliberated upon by the Committee on Foreign Affairs in the House of Representatives and by the Committee on Foreign Affairs and Defences in the House of Councillors, and next by the Plenary Meeting in each of the two Houses of the Diet. The subject of approval of the Diet is not the treaty itself but the action of the Cabinet in concluding the treaty in question. In this connection, the Diet does not have the power to amend the provisions of the treaty that is submitted to it for approval. If the Diet gives its approval on the condition that certain provisions are to be amended, such action on the part of the Diet is considered, in effect, disapproval of the conclusion of the treaty itself.

It is a constitutional practice for all treaties that require the Diet's approval to be promulgated. The promulgation of treaties is an act performed by the Emperor with the advice and approval of the Cabinet as stipulated in Article 7 of the Constitution.

II. Japanese Treaty-Making Law and Practice

A. *What Is an International Agreement?*

1. *Criteria Applied Generally*

The generally applied criteria as to what constitutes an international agreement are few in number; treaties and international agreements, in the sense of the above-mentioned Article 4 of the Law for the Establishment of the Ministry of Foreign Affairs, are generally understood to mean international agreements concluded between States and governed by international law, regardless of their titles.[2] Furthermore, treaties and international agreements are understood to include those to which international organizations are parties. If any ambiguity arises as to whether documents or instruments to be made in the course of diplomatic negotiations should be classified as international agreements or not, it is the International Legal Affairs Bureau of the Ministry of Foreign Affairs that usually has the final word.

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[2] Paragraph 1(a), Article 2 of The Vienna Convention on the Law of Treaties, to which Japan became a party in 1981, provides "'treaty' means an international agreement concluded between States in written form and governed by international law . . ."

2. *Agency-to-Agency and Implementing Arrangements*
Ministries other than the Ministry of Foreign Affairs are not authorized to conclude international agreements on behalf of the Government of Japan. In some exceptional cases, however, it is not entirely precluded that they may conclude agency-to-agency or implementing arrangements concerning those matters that fall exclusively within their jurisdiction, if such arrangements are duly authorized under existing treaties or domestic laws.

3. *Oral Agreements*
Theoretically, it is possible for the representative of a State or Government to make an oral statement regarded as constituting an international agreement. The conclusion of oral agreements is not, however, normal practice as far as Japan is concerned.

4. *Unilateral Acts*
It often happens that such documents or instruments as *notes verbales*, records of discussions, etc. are made in the course of diplomatic negotiations for the purpose of recording statements made by one or more Parties to the other Party or Parties concerning the former's policies, intentions, judgments or decisions, etc. Even if they contain some kind of undertaking on the part of the Party or Parties having made such statements, they should be distinguished from international agreements in the sense that they are not legally binding.

B. *Executive Branch Authorization and Approval Procedures*

1. *Role of the Ministry of Foreign Affairs*
In Japan, as Article 73(3) of the Constitution of Japan provides, the power to "conclude treaties" resides in the Cabinet. For the exercise of this power, the Ministry of Foreign Affairs is authorized, *inter alia*, to conclude, interpret and implement treaties and other international agreements pursuant to Article 4 of the Law for the Establishment of the Ministry of Foreign Affairs.

The Ministry of Foreign Affairs, therefore, conducts negotiations in every field of State activities, in cooperation with other Ministries concerned, that may lead to the conclusion of international agreements. The Ministry's participation, leadership or coordinating role in the negotiation and conclusion of international agreements is quite scrupulously observed in Japan, with the primary concern naturally being for consistency in diplomacy. Even at the strictly preparatory or experts' stage of negotiations, the participation of the Ministry of Foreign Affairs has to be ensured.

Since the Ministry's involvement in negotiations is thus continuous, overall coordination is smoothly done by it from the outset, in its capacity as the central coordinator or possessor, in fact, of the powers for negotiation and conclusion of international agreements.

In the Ministry of Foreign Affairs, according to Article 12 of the Cabinet order for the Organization of the Ministry of Foreign Affairs, the International Legal Affairs Bureau shall take charge of, among other things, (1) matters relating to the conclusion of treaties and other international agreements, and (2) matters of international law and legal matters concerning foreign relations.

Thus, it is a well-established practice that the International Legal Affairs Bureau is very closely consulted, and in many cases its actual participation ensured, from the outset and during the course of the negotiation and conclusion of international agreements. To put it more concretely, regional and/or functional bureaus of the Ministry, together with other ministries concerned, usually conduct negotiations of international agreements with the participation of, or in close consultation with, the International Legal Affairs Bureau, which performs the task of a legal adviser. In addition, the power and responsibility of the International Legal Affairs Bureau is not limited solely to this legal adviser status; officers of the International Legal Affairs Bureau sometimes become the main negotiators for knotty legal issues. Furthermore, the International Legal Affairs Bureau is always directly involved in negotiations at the drafting stage. This practice is related to the fact that the International Legal Affairs Bureau has primary responsibility for all domestic procedures for the conclusion of international agreements, ranging from clearance within the Ministry of Foreign Affairs, which is authorized to conclude treaties and other international agreements, through the final legal and editorial scrutiny of the Cabinet Legislation Bureau, to seeking the Cabinet decision. It is also responsible, together with the relevant regional and/or functional bureaus of the Ministry, for obtaining the approval of the National Diet in case of international agreements that require such ratification or acceptance and also for publication or promulgation of the texts of agreements.

2. *Procedures for the Cabinet Decision*

A request for authorization to negotiate for the purpose of concluding an international agreement, as well as instructions on how to conduct negotiations, should normally be cleared with the Ministry of Foreign Affairs through the relevant functional and/or regional bureaus of the Ministry and through the International Legal Affairs Bureau.

Once the negotiations of bilateral agreements come to a successful

conclusion, a Cabinet decision, which is indispensable for the signature of the text of an international agreement, should be sought. The text prepared by the International Legal Affairs Bureau of the Ministry of Foreign Affairs, together with a brief explanatory note, is submitted in the name of the Minister for Foreign Affairs for decision by the Cabinet.

As for executive agreements that do not require the Diet's approval for their conclusion, the necessary procedure is limited to the Cabinet's decision for signature, although theoretically (in some cases actually) the Cabinet Legislation Bureau checks whether the international agreement in question actually falls within the category of executive agreements. The Cabinet decision is customarily sought just in time for, but in any case prior to, the signature. Executive agreements enter into force upon signature, unless the other Party (or Parties) requires some internal procedure after signature.

With regard to treaties that require Diet approval for their conclusion, the procedures for the Cabinet decision may take a certain period of time, because the Japanese text or Japanese translation of the treaties has to be prepared by the relevant regional and/or functional bureaus of the Ministry in cooperation with the International Legal Affairs Bureau and should be scrutinized both legally and editorially by the Cabinet Legislation Bureau. This scrutiny on the part of this Bureau is in addition to the above-mentioned normal procedures for the Cabinet's decision to sign an international agreement.

C. *Legislative Approval*

1. *Three Categories of Agreements that Require the Formal Approval of the Legislature*

Article 73(3) of the Constitution of Japan authorizes the Cabinet, as one of its functions, "[to] conclude treaties. However, it [the Cabinet] shall obtain prior or, depending on circumstances, subsequent approval of the Diet."

As a constitutional practice of Japan, the approval of the Diet is required for the conclusion of treaties falling within the scope of one or more of the following three categories:

- international agreements that include undertakings related to the legislative power of the Diet,[3] i.e., international agreements requiring new legislation or continuation of existing domestic laws;

[3] Article 41 of the Constitution of Japan provides, "The Diet shall be the highest organ of State power, and shall be the sole law-making organ of the State."

- international agreements that involve expenditure, except as previously authorized by the Diet in the form of budget or laws.[4] International agreements that can be implemented within the annual budget authorized by the Diet[5] could be concluded as executive agreements; and
- international agreements that are politically important in that they provide the basic framework for the relations between Japan and a foreign country or countries and, therefore, have a ratification clause.

This constitutional practice regarding the classification of "treaties" and "executive agreements" was officially confirmed by the statement pronounced by then-Foreign Minister Ohira at the committee on Foreign Affairs of the House of Representatives on February 20, 1974.

2. *Some Examples*

International agreements falling within the scope of any of the categories mentioned under Section II.C.1 above, require the approval of the Diet, regardless of their titles. Among such international agreements are treaties of peace, treaties of security, treaties of commerce and navigation, and tax conventions. Agreements on fisheries, agreements on atomic energy, cultural agreements, agreements for economic and technical cooperation, consular conventions as well as multilateral conventions can also be cases in point depending on their content.

Some cultural agreements and some economic cooperation agreements have been the subject of controversy in the Diet as to whether or not parliamentary approval is required for these agreements. In the case of cultural agreements, approval of the Diet is sought by the Government in light of the political importance and ratification clause of such agreements. In the case of international agreements to extend economic cooperation to developing countries within the scope of a budget already authorized by the Diet, the conclusion of such agreements could be interpreted as part of the function of the Government, namely the power to "manage foreign affairs" described in Article 73(2) of the Constitution, once the budget for such cooperation is secured by the authorization of the Diet.

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[4] Article 85 of the Constitution of Japan provides, "No money shall be expended, nor shall the State obligate itself, except as authorized by the Diet."

[5] Article 86 of the Constitution of Japan provides, "The Cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year."

3. *Amendment and Termination*

Amendment of a treaty is subject to approval of the Diet unless the Government is so authorized within the treaty to make such amendment.

Some multilateral treaties provide that an amendment becomes effective with respect to all Contracting Parties, including Japan, even though it has not accepted such amendment, if a certain number of Contracting Parties accept such amendment (e.g., the U.N. Charter). In this case, the Government would seek to obtain approval of the Diet if the Government wishes to positively accept such amendment.

Extension of the duration of a treaty can be brought into force by the Government without the approval of the Diet if there is an extension clause authorizing the Government to do so. If there is no such extension clause, approval of the Diet is required.

Termination of, or withdrawal from, a treaty having a termination or withdrawal clause can be effected by the Government alone, as such act is not interpreted as the conclusion of a treaty as described in Article 73(3) of the Constitution. There is no established practice yet concerning the case where a treaty does not have a termination clause.

4. *Decision on Whether Legislative Approval Is Necessary*

As a constitutional practice, the approval of the Diet is required for the conclusion of treaties falling under certain categories, regardless of their designation. In cases where there are doubts, the Ministry of Foreign Affairs is authorized, subject to consultations with the Cabinet Legislation Bureau, to decide whether an international agreement requires approval of the Diet. The Diet is not consulted in such cases.

D. *Reservations Questions*

1. *Bilateral Treaties*

Reservations are generally considered to be a practice devised to enable as many States as possible to accede to multilateral treaties. In normal cases, reservations in that sense do not exist with respect to bilateral treaties. If a Party makes reservations to certain provisions of a bilateral treaty that has already been signed, such reservations are interpreted to mean that these provisions are not yet agreed upon by the two Parties to that treaty. The reservations, if accepted by the other Party, are considered in effect, and treated in practice, as a separate agreement modifying or amending the treaty in question.

2. *Multilateral Treaties*

The practice is that the Japanese Government makes reservations only where there are truly compelling reasons; the treaties that Japan has concluded in post-war years with reservations are limited in number. The most recent example is the WIPO Performances and Phonograms Treaty.

As a matter of constitutional practice, the domestic procedures for making reservations *vis-á-vis* the Diet differ somewhat depending upon whether or not a treaty contains provisions specifically permitting entry of reservations. Making a reservation with respect to a treaty that contains provisions permitting entry of reservations is not subject to the Diet's approval, whereas the Diet's approval is sought for making a reservation with respect to a treaty that contains no such provision. Even in cases where the Diet's approval is sought, the contents as well as the wording of the reservation in question would not be subject to modification in the Diet.

Withdrawal of a reservation that was made with respect to a treaty containing provisions specifically permitting entry of reservations is to be done by the Government on its own authority and competence. However, regarding withdrawal of a reservation that was made subject to the Diet's approval, Japan has never experienced such a situation under the present Constitution.

E. *Consultation with the Legislature*

There is no institution under which the Government conducts official consultations with the Diet, either prior to or during the course of treaty negotiations, apart from the fact that Ministers in charge of negotiations may be questioned by the Diet, or the Government may wish to make a progress report on the negotiations to the Diet.

As to communication in general between the Diet and the Government concerning matters related to the conclusion of a treaty, an executive agreement that has been concluded in order to implement a treaty brought into force after the approval of the Diet may be reported on an ad hoc basis to the Committee on Foreign Affairs in the House of Representatives and the Committee on Foreign Affairs and Defences in the House of Councillors, if the knowledge of such agreement and of the actual implementation of the treaty is deemed to be important and necessary. Furthermore, in case the Government decides to undertake provisional application of a treaty, it will be reported to a meeting of Directors (i.e., members of the Committee who are designated as members of the steering panel of the Committee and decide on procedural

matters) of the Committee on Foreign Affairs in the House of Representatives and the Committee on Foreign Affairs and Defences in the House of Councillors.

F. *Consultation with the Public*

There is no established practice of consulting with the public in a general sense. The Ministry that has domestic jurisdiction over such matters as may be covered by a proposed agreement, however, usually consults with any interested group or groups at an appropriate time. The holding of consultations of this kind is left, unless otherwise provided for in some laws or regulations, to the discretion of the Ministry in question, and they may be held either before or during the course of negotiations of an agreement.

Apart from this practice of particular consultations, it goes without saying that the Ministry of Foreign Affairs, together with other Ministries concerned, may be questioned, as indicated above (*see* Section II.E, *supra*), at the Diet's sessions during the negotiations on the desirability, progress, or even actual points of controversy of important treaty negotiations.

G. *Legal Bases for Agreements Not Formally Approved by the Legislature*

1. *Governmental Function Authorized by the Constitution*

The conclusion of executive agreements, that is, international agreements that do not fall within the aforementioned three categories (*see supra* Section II.C.1), is interpreted as part of the function of the Government to "manage foreign affairs" as described in Article 73(2) of the Constitution. The Government is authorized, in other words, to conclude executive agreements pursuant to this particular governmental function provided for in the Constitution.

2. *Authorization Clause in a Treaty*

As to the problem of whether clauses in a treaty can be a source of authorization for an executive agreement, it has never been questioned that the Government may conclude executive agreements if there is some kind of authorization clause in the treaty in question. Such is the case, for example, of amendments to schedules attached to air-transport agreements where there is a clause to the effect that, in case of agreement between the aeronautical authorities of the two Contracting Parties, their recommendations relating to modifications to the Schedule will come into effect after they have been confirmed by an exchange of diplomatic notes.

As a rule, when the "authorization clause" in a treaty gives rise to some problem of interpretation, a careful case-by-case judgment is made as to whether a particular agreement requires the Diet's approval or not.

H. *Publication and Transmittal Requirements*

1. *Publication and Promulgation*

It is a constitutional practice of Japan that all treaties, i.e., international agreements requiring the Diet's approval, are promulgated and published in the official Gazette, and that most executive agreements are also published in the official Gazette.

The promulgation of treaties is in Japan an act performed by the Emperor with the advice and approval of the Cabinet (Article 7 of the Constitution), while the publication in the official Gazette is made by the Minister for Foreign Affairs. Treaties are not considered internally valid unless they have been promulgated.

2. *Transmittal to the Diet*

Some executive agreements may be transmitted to the Diet for its information. There are no established criteria for such transmittal, the selection being in the discretion of the Government, but an important executive agreement for the implementation of a treaty brought into force after the Diet's approval, for example, may be reported as such a one as mentioned above (*see supra* Section II.E). Various instruments made at the same time with a main treaty, such as an exchange of notes, agreed minutes, etc., which are to be classified as executive agreements, are transmitted for the information of the Diet at the time of its deliberations on the main treaty, where necessary and appropriate.

3. *Registration in the United Nations*

Bilateral treaties that require the Diet's approval for their conclusion are transmitted, after their entry into force, to the Secretariat of the United Nations for registration. Related instruments made simultaneously with the main treaty, such as an exchange of notes, agreed minutes, etc. are also transmitted at the time of transmission of the main treaty.

I. *Incorporation into National Law*

It is a constitutional practice to promulgate all treaties that require the Diet's approval for their conclusion. A treaty is not considered internally valid unless promulgated. Upon its promulgation, a treaty is given effect as domestic law.

In some cases, separate domestic legislation is required in order to ensure the implementation of a treaty. It is the Government's basic policy to obtain the approval of the Diet on such domestic legislation during the course of the session of the Diet to which the treaty in question is submitted. Although domestic legislation is not required from a theoretical point of view for so-called self-executing treaties, new legislation, or the amendment of existing domestic laws, may be enacted with respect to such treaties if this is deemed appropriate and desirable from the standpoint of harmonizing such treaties with existing domestic legislation.

J. *Legally Binding Decisions of International Organizations*

What sort of legal force a decision of an international organization is to be given and how such a decision becomes effective for a Contracting Party are to be provided in the constitutional convention of the organization itself.

If a relevant treaty provides that its organization may adopt legally binding decisions and that such decisions, upon adoption, shall become binding upon all Contracting Parties, such decisions are viewed, in this country as in other countries, as enforcement of treaty commitments; Japan is bound by such decisions as part of its obligations under the treaty.

If a relevant treaty provides that its organization may adopt a legally binding decision and that such a decision shall become binding upon only those Contracting Parties that have accepted it, the fact that the organization has adopted such a decision does not in itself mean that a Contracting Party is bound *ipso jure* by it. In this case, Japan accepts a decision after appropriate domestic procedures.

K. *Implementation of Multilateral Conventions*

1. *Role of the Ministry of Foreign Affairs*

The responsibilities of the Ministry of Foreign Affairs include those to conclude, interpret and execute treaties and other international agreements.[6] However, domestic measures, including the making of new laws necessary for ensuring internal application of an international agreement, would be prepared by the ministry or agency having domestic jurisdiction over the subject matter of the conventions concerned.

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[6] Article 4 of the Law for the Establishment of the Ministry of Foreign Affairs.

2. *Procedures for Ensuring Implementation*

The question of whether there is a need to make new laws or regulations for internal application of conventions is carefully studied on a case-by-case basis. If it is concluded that new legislation is required, such legislation will be prepared by the ministry concerned and will be enacted by the Diet through normal constitutional procedures.

Conventions and relevant bills will be submitted for consideration to the same session of the Diet but will be referred to different Committees, i.e., conventions are always referred to the Committee on Foreign Affairs and domestic legislation to the committee that has jurisdiction over the subject matter.

If the Diet's decision on a necessary domestic bill is delayed while a treaty is already approved, the Government will refrain from concluding such a treaty (until the domestic bill is enacted).

Domestic legislation is not enacted for so-called self-executing treaties, i.e., treaties that have provisions which are of such nature as to permit direct domestic application. Various agreements on privileges and immunities and specific provisions of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Treaty and the Montreal Convention) have been considered as belonging to this category. If, however, domestic legislation is deemed appropriate and desirable in light of harmonization with existing domestic laws, new legislation or amendments to existing domestic laws are enacted.

L. *Treaty Termination*

With respect to treaties that require the Diet's approval for their conclusion, termination or withdrawal can be effected by the Government alone if the treaty in question has a termination or withdrawal clause, since such act is based on the termination or withdrawal clause. There is no established practice yet with respect to cases where a treaty does not have a termination clause. With respect to executive agreements, termination or withdrawal can be effected by the Government alone in any case.

III. Basic Data and Documentation

A. *National Legislation*

Annex A: Extracts from the Japanese Constitution
Annex B: Statutory Provisions

B. *Selected Examples of Treaty Documents*

Annex C: Full Powers Document
Annex D: Instrument of Ratification
Annex E: Promulgation of Treaties

C. *Statistical Data*

Annex F: The Number of Treaties and Executive Agreements in force on September 1, 1995
Annex G: Treaties, Related Instruments, and Executive Agreements Concluded 1948–2003

ANNEX A

EXTRACTS FROM THE JAPANESE CONSTITUTION

Promulgated November 3, 1946

[Translation from 2 Peaslee, Constitutions of Nations (2d Edition 1956)]

Article 7

The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people:

Promulgation of amendments of the constitution, laws, cabinet orders and treaties.

* * *

Article 41

The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

Article 60

The budget must first be submitted to the House of Representatives.

Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet.

Article 61

The second paragraph of the preceding article applies also to the Diet approval required for the conclusion of treaties.

Article 65

Executive power shall be vested in the Cabinet.

Article 66

The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided for by law.

The Prime Minister and other Ministers of State must be civilians.

The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.

Article 73

The Cabinet, in addition to other general administrative functions, shall perform the following functions:

[1] Administer the law faithfully; conduct affairs of state.
[2] Manage foreign affairs.
[3] Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet.

* * *

Article 85

No money shall be expended, nor shall the State obligate itself, except as authorized by the Diet.

Article 86

The Cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year.

Article 98

This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

The treaties concluded by Japan and established laws of nations shall be faithfully observed.

ANNEX B

STATUTORY PROVISIONS

[Author's Translation]

LAW FOR THE ESTABLISHMENT OF THE MINISTRY OF FOREIGN AFFAIRS

Article 4

Responsibilities of the Ministry of Foreign Affairs:

* * *

4. To conclude treaties and other international agreements.
5. To interpret and implement treaties, other international agreements and customary international law.

ANNEX C

FULL POWERS DOCUMENT

Emperor of Japan

To all to whom these Presents shall come, Greeting!

The Japanese Government has appointed _____ as Plenipotentiaries of Japan to _____, which convenes at _____ on the _____ of _____, 20 ____, investing them with full power, severally or jointly, to participate in the deliberations with the Plenipotentiaries of the other Powers participating in the Congress, and to sign and seal any and all international instruments to be made at the Congress.

Whereto, in accordance with the provisions of the Constitution of Japan, We do hereby attest; and in witness whereof We have caused the Seal of the Emperor to be affixed to these Presents, which We have signed with Our own hand.

Given at _____, this _____ day of the _____ month in the _____ year of Heisei (_____, 20 _____).

Sign-manual:

Seal of the Emperor

Signed:

Seal, Prime Minister

Signed:

Seal, Minister for Foreign Affairs

ANNEX D

INSTRUMENT OF RATIFICATION

Emperor of Japan

To all to whom these Presents shall come, Greeting!

Having seen and considered _____ the Government of Japan does ratify the said Convention.

Whereto, in accordance with the provisions of the Constitution of Japan, We do hereby attest; and in witness whereof We have caused the Seal of the Emperor to be affixed to these Presents, which We have signed with Our own hand.

Given at Our Palace in Tokyo, this _____ day of _____ the _____ month in the _____ year of Heisei (_____, 20 ____).

Sign-manual:

Seal of the Emperor

Signed:

Seal, Prime Minister

Signed:

Seal, Minister for Foreign Affairs

ANNEX E

PROMULGATION OF TREATIES IN THE GAZETTE

I hereby promulgate (the name of a treaty).

Signed (the name of the Emperor), Seal of the Emperor

This _____ day of the _____ month of the _____ year of Heisei (Month, Date, 20 ____)

Prime Minister

(Prime Minister's name)

Treaty No. _____

ANNEX F

THE NUMBER OF THE TREATIES AND EXECUTIVE AGREEMENTS IN FORCE ON SEPTEMBER 1, 1995

BILATERAL	
Treaties	287
Executive Agreements	10,086
MULTILATERAL	
Treaties	242
Executive Agreements	127

(These numbers do not include related instruments made with the treaties.)

ANNEX G

TREATIES, RELATED INSTRUMENTS, AND EXECUTIVE AGREEMENTS CONCLUDED 1948–2003

	Treaties			Related Instruments made with the Treaties			Executive Agreements		
	Bilateral	Multilateral	Total	Bilateral	Multilateral	Total	Bilateral	Multilateral	Total
1948	0	2	2	0	0	0	0	0	0
1949	0	1	1	0	0	0	1	0	1
1950	0	5	5	0	0	0	0	0	0
1951	0	7	7	0	0	0	3	0	3
1952	7	11	18	3	0	3	40	2	42
1953	14	18	32	5	0	5	46	0	46
1954	12	9	21	6	0	6	26	0	26
1955	12	7	19	4	0	4	40	0	40
1956	16	11	27	9	0	9	37	1	38
1957	12	8	20	3	0	3	33	1	34
1958	11	4	15	11	0	11	37	1	38
1959	9	10	19	2	0	2	30	2	32
1960	8	2	10	21	0	21	41	4	45
1961	10	8	18	7	0	7	35	3	38
1962	9	5	14	7	0	7	39	5	44
1963	21	13	34	24	0	24	35	8	43
1964	10	12	22	7	0	7	31	9	40
1965	13	6	19	13	0	13	38	4	42

(*cont.*)

	Treaties			Related Instruments made with the Treaties			Executive Agreements		
	Bilateral	Multilateral	Total	Bilateral	Multilateral	Total	Bilateral	Multilateral	Total
1966	1	15	16	2	0	2	37	5	42
1967	10	10	20	11	0	11	35	12	47
1968	10	11	21	15	0	15	42	8	50
1969	6	4	10	4	0	4	60	6	66
1970	12	9	21	17	0	17	80	6	86
1971	5	16	21	5	0	5	75	9	84
1972	6	5	11	10	0	10	91	3	94
1973	3	8	11	3	0	3	86	2	88
1974	8	7	15	11	0	11	86	4	90
1975	3	14	17	3	0	3	93	3	96
1976	4	18	22	4	0	4	78	7	85
1977	10	9	19	8	0	8	156	6	162
1978	14	9	23	11	0	11	186	7	193
1979	5	7	12	3	0	3	231	4	235
1980	17	18	35	13	0	13	255	9	264
1981	11	17	28	5	0	5	324	10	334
1982	12	11	23	8	0	8	339	5	344
1983	5	12	17	2	0	2	380	3	383
1984	6	5	11	3	0	3	389	5	394
1985	2	7	9	0	0	0	483	5	488
1986	2	12	14	2	0	2	471	6	477
1987	4	12	16	2	0	2	481	3	484
1988	4	9	13	3	0	3	691	2	693

(*cont.*)

	Treaties			Related Instruments made with the Treaties			Executive Agreements		
	Bilateral	Multilateral	Total	Bilateral	Multilateral	Total	Bilateral	Multilateral	Total
1989	4	4	8	3	0	3	734	2	736
1990	3	5	8	2	0	2	652	4	656
1991	5	8	13	4	0	4	714	5	719
1992	3	7	10	4	0	4	760	8	768
1993	2	7	9	2	0	2	789	8	797
1994	7	8	15	6	0	6	741	6	747
1995	4	10	14	4	0	4	620	3	623
1996	5	19	24	4	0	4	756	2	758
1997	5	9	14	3	0	3	773	4	777
1998	4	13	17	10	0	10	796	1	797
1999	9	8	17	9	0	9	758	0	758
2000	5	5	10	6	0	6	668	2	670
2001	2	14	16	1	0	1	731	2	733
2002	6	11	17	4	0	4	743	1	744
2003	1	6	7	1	0	1	695	1	696
TOTAL	390	518	908	332	0	332	16,723	213	16,936

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[7] Written in English; all the others references are in Japanese.

CHAPTER THIRTEEN

NATIONAL TREATY LAW AND PRACTICE: MEXICO

Dr. Luis Miguel Díaz[1]

I. Introduction

In 1986, Mexican foreign policy reached a crossroads. Since becoming an independent State in 1821, Mexico's international presence had always been directed toward two complementary goals: the assurance of its sovereignty, and the proclamation of universal values. The assumption was that based upon the firm foundation of the latter, the former could be guaranteed. Mexico's foreign policy embodied a positional attitude of norms and values. Then, in 1986, with its entry into the General Agreement On Tariffs And Trade (GATT), the country embarked on a new direction in foreign policy with a corresponding new outlook on international law.[2] The new goal became the implementation of a foreign policy and a corresponding framework for international law that would seek concrete advantages for the economic prosperity of the country.[3]

In 1991, a few years after the opening of Mexican markets to world competition, and in light of the then-imminent beginning of the NAFTA negotiations, the government saw the need for measures that would prepare the country for the new international legal commitments just over

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[1] My recognition and gratitude to Molly Molloy for her persistence, energy and time to improve this work.

[2] See the book prepared by the International Trade Cabinet in 1986: *El Proceso de Adhesion de México al Acuerdo General sobre Aranceles Aduaneros y Comercio Exterior (GATT)*. Jorge V. Witker, *Los Códigos de Conduct al Internacional del GATT Suscritos por México. Comentados y Relacionados con la Legislación Mexicana* (Mexico: UNAM, 1988).

[3] *See* L.M. Díaz, *México: De la Diplomacia de Máximas a la de Resultados*, *in Revista Occidental Estudios Latinoamericanos*, *Instituto de Investigaciones Culturales Latinoamericanas*, 8 Año No. 1, at 1B26 (1991); Mario Ojeda, *México: el Surgimiento de Una Política Exterior Activa* (México: SEP, 1986); Josefina Zoraida Vázquez, *Los Primeros Tropiezos*, *in Historia General de México* (El Colegio de México, 1976); Olga Pellicer, *Cambios Recientes en la Política Exterior Mexicana: Realidad y Perspectivas* (El Colegio de México, 1972); Aarón Sáenz, *La Política Internacional de la Revolución* (México: FCE, 1961); Isidro Fabela, *Historia Diplomática de la Revolución Mexicana* (México: FCE, 1958); Antonio De la Peña y Reyes, *La Diplomacia Mexicana, Archivo Histórico Diplomático Mexicano* (México: SRE, 1923); Isidro Fabela, *Historia Diplomática de la Revolución Mexicana* (México: FCE, 1958); Genaro Fernández MacGregor, *Las Relaciones Exteriores de México y el Derecho Internacional* (México: SEP, 1946).

the horizon. There were two specific challenges. One was to assure other governments that commercial and investment disputes of foreigners in Mexico or with Mexicans could be settled before international tribunals. The second was that the accomplishment of the first would not signify a betrayal of the tradition of non-intervention, now more than a century old, as embodied particularly in the Calvo Doctrine.[4]

The 1991 Law Regarding the Making of Treaties (Treaty Law)[5] was the legal response to the stated challenges.

A. *Overview of the Mexican Constitution*

The legal framework of the current Mexican political system is based upon the Federal Constitution of the United Mexican States (the Constitution), which was proclaimed on February 5, 1917.

This Constitution was drafted as a result of the Mexican Revolution during 1910–1917. Among other things, the content of the Constitution was shaped by principles sustained by the different constituencies during the revolutionary years. In addition, it acquired the more legalistic and political features that are endemic to a written constitution.

Several provisions of the 1917 Constitution declared that better conditions for working and peasant classes were fundamental; others aimed to convert the old system of vast landholdings and servitude into a productive structure based on social justice; some urged greater political participation in government. The underlying political motto was: "Effective suffrage, no reelection."

The Constitution is composed of 136 articles. Since the present work is intended as an introduction to non-Mexicans of the treaty-making pro-

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[4] Two key concepts of the Calvo Doctrine are: States are sovereign within their territories and all other States shall refrain from any intervention in such areas; and foreigners must obey the laws of the countries where they invest. Carlos Calvo, *Le Droit International Théorique et Pratique, Precede d'un Exposé Historiqué des Progrés de la Science du Droit des Genes* 185B205 (4th ed., 6 Tomes, Paris-Berlin, 1887); César Sepúlveda, *La Responsabilidad Internacional del Estado y la Validez de la Cláusula Calvo* 41B46 (México, 1944); Fernando González Roa, *Las Cuestiones Fundamentales de Actualidad de México* (México: SRE, 1927); William D. Rogers, *Of Missionaries, Fanatics, and Lawyers: Some Thoughts On Investment Disputes in the Americas,* 72(1) *Am. J. Int'l L.* 1, 2–16 (1978); Antonio Gómez Robledo, *Los Convenios de Bucareli ante el Derecho Internacional* (México: Polis ed., 1938); L.M. Díaz, *México y las Comisiones Internacionales de Reclamaciones* (México: UNAM, 1983); Loretta Ortiz, *Alguma Reflexiones sobre la Cláusula Calvo, in El Foro* 105–17 (México, 1999).

[5] *See* Annex A (Law Regarding The Making Of Treaties (Dec. 21, 1991) (effective, January 3, 1992), *reprinted in* 31 *ILM* 390 (1992)). The text in Annex A is reproduced from the unofficial translation provided by Antonio Garza, Office of the Legal Advisor, Department of Foreign Affairs, Mexico. The official text of the Law appears in CDLX *Diario Oficial de la Federación* 2 (Jan. 2, 1992). The Introductory Note was prepared for *International Legal Materials* by Mr. Garza.

cess in Mexico, included here in Annex B is a transcription of the text of Article 27 of the Constitution. The purpose is to demonstrate for the reader the great detail with which the Constitution treats many subject matters. Sometimes it is better to show things than to try to explain them.

Article 27 provides an example of a multifaceted style or technique that certainly served many purposes at the time it was first drafted. From one perspective, Article 27 may appear too legalistic, too detailed, and too contingent on immediate political and/or economic circumstances. Looked at another way, the text can be viewed as a list of historic events, political goals, moral principles, legal rules, or economic programs. By presenting the entire text of Article 27 in Annex B, our intention is to anchor the reader to the actual technique employed in writing the Mexican Constitution.

From its very inception, the Constitution's drafters never assumed the possibility that the subjects it covered could be considered within the jurisdiction of international law. One effect of the absence of this assumption is that the constitutional text makes the entire treaty-making process very cumbersome.

Paragraph 1 of Article 27 contains the so-called Calvo Clause that concerns a myriad of economic rights and duties for Mexicans, non-Mexicans and governments. Other articles of the Constitution indicate that Mexico is a representative, democratic and federal republic (Const. Art. 40). National sovereignty, which essentially and originally resides in the people (Const. Article 39), is exercised by the executive, legislative and judicial branches (Const. Article 49). The Republic is constituted by free and sovereign states regarding their internal regulation, but united into a federal republic, comprising 31 states and the federal district (Const. Article 41). The Constitution also establishes a presidential type of government (Const. Article 80). The President is elected to a single six-year term (Const. Article 83).

The Constitution has been reformed more than 100 times since its adoption in 1917 in order to connect the legal system with the ever-changing national social realities and international circumstances. The most recent amendments to the Constitution reflect the determination of the Mexican people to improve the system of democratic participation through more efficient electoral mechanisms.[6]

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[6] To illustrate the willingness to amend the Constitution, it will suffice to list amendments since 1996. The date is of the *Federal Official Gazette* (*Diario Oficial de la Federación*). Article 4, (IV–2000); Article 115 (XII–1999); Article 102 (IX–1999); Articles 73, 74, 78 and 79 (VII–1999); Articles 4, 25 and 73 (VI–1999); Articles 94, 97, 100 and 107 (III–1999); Articles 16, 19, 22 and 123 (III–1999); Articles 30, 32 and 37 (II–1999).

B. *Conceptual View of the Treaty Law*[7]

The purpose of the Treaty Law adopted in December 1991 was to reassure the world community of Mexico's commitment to international law.

The preliminary text of the draft of the Treaty Law was prepared by the Department of Foreign Relations, the Secretaría de Relaciones Exteriores (SRE). After a preliminary law draft was negotiated with all other departments within the executive branch, it was submitted by the President of the Republic for the approval of the General Congress. The Senate (Cámara de Senadores), after reviewing, debating and making some modifications to the initiative, approved it unanimously. Following similar review and debate in the Chamber of Deputies (Cámara de Diputados), it was approved in a landslide majority vote. Both chambers' reports include important interpretations of its provisions.[8]

Despite its singular title, the content of the Treaty Law establishes sets of rules pertaining to three distinct areas: (1) the decision-making process for treaties; (2) inter-institutional agreements; and (3) international mechanisms for the settlement of legal disputes.

Concerning rules for treaties, the Treaty Law defines the term "treaty" in a manner compatible with the 1969 Vienna Convention on the Law of Treaties.[9] Recognizing that Mexico was a party to the Vienna Convention and as such that the Convention was part of the Mexican law, the Treaty Law only indicates a few rules that are distinctive within the national legal system. The law establishes that treaties can only be entered into by the federal government of the United Mexican States; that they require approval by the Senate; that, when consistent with the Constitution, they become the supreme law of the union; and, that treaties are binding in the national territory only after they have been published in the *Federal Official Gazette*.

The Treaty Law promotes order and coherence in actions with respect to entering into treaties by reiterating the authority of the SRE to coor-

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[7] In this section, the author relies heavily on and is indebted to the Introductory Note of the Treaty Law prepared by Antonio Garza for *International Legal Materials*. *See supra* note 5.

[8] *See Ley de Tratados* (Mexico: SRE, 1992). This book includes the Mexican President's Presentation of the Draft Treaty Law before the Congress, the discussion and Opinions on the Draft Law by both the Senate (Cámara de Senadores) and the Chamber of Deputies (Cámara de Diputados), and the Treaty Law as adopted. An analysis of the Treaty Law is in L.M. Díaz, *Ley Sobre La Celebración de Tratados, in La Modernización del Derecho Mexicano* 770B79 (Mexico: *Porrúa*, ed. 1994).

[9] Vienna Convention *On The Law Of Treaties*, UN A/Conf. 39/27 (May 23, 1969) (English text), *reprinted in* 8 *ILM* 679 (1969 Vienna Convention). For the text in Spanish, see the *Diario Oficial de la Federación*, Feb. 14, 1975.

dinate all such actions. The SRE must prepare an opinion about the propriety of entering into any treaty. The Chamber of Deputies views this opinion to be binding upon any agency of the Federal Public Administration involved in making the Treaty, without prejudice to the ultimate decision of the President of the Republic.[10]

In relation to the second set of rules, the Treaty Law breaks new ground by authorizing centralized or decentralized agencies of the Federal, State or Municipal Public Administrations to enter into international agreements that according to the Constitution are not treaties. The Treaty Law circumscribes the capacity of these agencies to enter into only these international agreements within their legal spheres of authority. As a result, inter-institutional agreements are binding only upon those agencies that have concluded them, not upon the federation. These agreements, thus, do not have to receive Senate approval. They correspond to what some international lawyers refer to as "international executive agreements," that is, agreements that are negotiated based on the sole powers of the executive. This new right for state agencies provides a legal foundation for an existing practice.

Any agency that plans to enter into an inter-institutional agreement must keep the SRE informed of any action undertaken towards that end. The SRE must also issue reports on the propriety of proposed inter-institutional agreements. In doing so, it assures that these agreements do not exceed the legal spheres of authority assigned to the agencies which enter into them, interfere with the authority of the federal Government, or contravene Mexico's foreign policy. The Chamber of Deputies considers such SRE reports as authorization to enter into the inter-institutional agreements.[11]

The third set of rules incorporated in the Treaty Law provides a legal basis for international mechanisms for the settlement of legal disputes. The Calvo Clause was reinterpreted in order to allow negotiation of international legal dispute settlement mechanisms in both treaties and inter-institutional agreements. The federation, legal entities, and individuals can all be parties in such disputes. The Chamber of Deputies addressed this issue directly, stating that submission to an international mechanism for the settlement of disputes is not, in any manner, an invocation of diplomatic protection by a foreign government that the Calvo Clause forbids in the Constitution (Article 27).[12]

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[10] Garza, *supra* note 5, at 391.
[11] *Id.*
[12] *Id.*

These international dispute settlement mechanisms must adhere to a few fundamental principles: they must render equal treatment to Mexicans and foreigners; they must assure the parties the right to be heard and due presentation of their defense; and they must guarantee that the composition of the decision-making bodies assures their impartiality. These provisions were intended to serve as the legal basis for the dispute resolution systems that are inherent in international treaties related to investment.[13]

The Treaty Law also contains a national security clause under which the Government of Mexico will not recognize any judgment by the international decision-making bodies of these mechanisms when national security, public policy or essential interests of the nation are involved. This provision is consistent with international law and has frequently been inserted into those treaties to which Mexico is a party.[14]

Finally, the law contains provisions regarding the appointment of arbitrators, commissioners, or experts in disputes where the Federation is a party and the recognition and enforcement of rulings, arbitral decisions, and other judicial decisions arising from the application of international legal dispute settlement mechanisms.

II. Mexican Treaty-Making Law and Practice

A. *What Is a Treaty?*

The term treaty is defined by Article 2 of the Treaty Law as:

> [A]n agreement governed by public international law, entered into in writing between the Government of the United Mexican States and one or various subjects of public international law, pursuant to which the United Mexican States undertakes obligations, and without regard to whether its application requires the making of agreements in specific matters, and without regard to its name.

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[13] Since the adoption of the Treaty Law, Mexico has signed bilateral investment treaties with Spain (1995), Switzerland (1995), Argentina (1996), Austria (1998), The Netherlands (1998), Germany (1998), Belgium-Luxemburg (1998), France (1998), Finland (1999), Uruguay (1999), Portugal (1999), Italy (1999), Denmark (1999). Chapter XI of NAFTA is also a sort of investment treaty.

[14] For example, in Mexico's declaration of acceptance of the Jurisdiction of the International Court of Justice, Mexico conditions the jurisdiction of the Court on the statement by Mexico that a specific dispute is not within its internal jurisdiction. A text of the Declaration is found in *México: Relación de Tratados en Vigor* (México: SRE, 1998); *See also Reservas Formuladas por México a Instrumentos Internacionales sobre Derechos Humanos* (México: *Comision Nacional de Derechos Humanos*, 1996).

> In compliance with Article 76, paragraph I of the Political Constitution of the United Mexican States, treaties must be approved by the Senate and pursuant to Article 133 of the Constitution will, when consistent with the Constitution, be the Supreme Law of all the Union.

This definition is compatible with the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[15]

B. *Who Negotiates and Signs Treaties?*

Within the framework of the Constitution, the President is the sole authority for negotiating and signing treaties according to paragraph X of Article 89, which indicates the rights and duties of the President. It reads:

> The powers and obligations of the President are the following:
>
> X. Direct foreign policy and conclude international treaties, and submit them to the approval of the Senate: In the conduct of this policy, the head of the Executive Power will observe the following standard principles: self-determination of peoples, non-intervention, peaceful resolution of disputes, juridical equality of states, international cooperation for development, and the struggle for international peace and security.

Based on Article 90 of the Constitution, the Federal Public Administration law, the *Ley Orgánica de la Administración Pública Federal* (LOAPF), distributes the exercise of the President's powers among the various departments (Secretarías). As instructed by Article 28 of the LOAPF, the everyday practice of treaty making is basically a responsibility of the SRE. Other agencies and entities of the federal Government shall undertake the negotiation of all treaties, agreements and conventions in conjunction with the SRE. Article 6 of the Treaty Law develops the LOAPF. It proclaims:

> The Department of Foreign Affairs, without affecting the exercise of the attributions of the agencies and entities of the Federal Public Administration, will coordinate the actions necessary for the making of any treaty and prepare an opinion about the propriety of executing it, and after execution, will inscribe it in the appropriate Registry.

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[15] *See* 1969 Vienna Convention, *supra* note 9; Vienna Convention on The Law of Treaties Between States and International Organizations or between International Organizations, UN A/CONF.129/15 (Mar. 20, 1986), *reprinted in* 25 *ILM* 543 (1986), *ratified by* Mexico (Oct. 8, 1988).

According to Article 9 of the *Reglamento Interior de la SRE* (Internal Rules of the SRE), matters related to treaties and inter-institutional agreements are concentrated in the Legal Adviser's office.[16]

The legal office and other administrative units of the SRE promote, by their own initiative or by that of some other agencies or entities of the Federal Public Administration, Mexico's participation in conferences that take place in international fora in order to conclude multilateral treaties. Concerning bilateral treaties, the SRE proposes or analyzes initiatives and coordinates government actions that may lead to their formalization.

During the negotiations, the SRE carries out a process of consultation through the Treaty Section of the Legal Adviser's office. The Treaty Section compiles the opinions of other offices of the SRE and of the agencies and entities of the federal Government, whether centralized or decentralized, that would be responsible for implementing the treaty being negotiated.

The substantive negotiation of treaties on very specific subjects, which are clearly within the authority of an entity of the federal Government, may be carried out by such entity. Throughout this process there is continuous communication and coordination with the SRE.

When treaties of great relevance for their social, economical or political implications for the nation are being negotiated, representatives of different agencies of the executive involved in such negotiation must appear before Congress to explain the rationale and basis behind the negotiation. This has been encouraged when there is a need to inform public opinion, as in the cases of the negotiations to enter into the GATT and the North American Free Trade Agreement (NAFTA).

At the conclusion of negotiations, the SRE, as established in Article 6 of the Treaty Law, issues a report with respect to the proposed treaty. The Legal Adviser's office prepares the report, as established in Article 9 of the Internal Rules of the SRE.[17] This report addresses any legal issues raised by such treaty and includes an assessment of whether the formalities required by international law and practice for the conclusion

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[16] *See Guía Para La Conclusión de Tratados y Acuerdos Interinstitucionales en el Ámbito Internacional Según La Ley Sobre La Celebración de Tratados* (México: SRE, 1998); Jorge Palacios Treviño, *Tratados: Legislación y Practica en México* (México: SRE, 1982).

[17] Practically all countries have a similar office in the ministries of foreign affairs. *See* Hans Corell, "Legal Advisers Meet at 'UN Headquarters in New York,'" *85 Am. J. Int'l L.* 371, 372–73 (1991); Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association, "The Role of the Legal Adviser of the Departments of State," 85 *Am. J. Int'l L.* 357, 358–71 (1991).

of such proposed treaty have been observed. The report also includes an assessment on its congruence with domestic law and policy.

If the report proves to be favorable, the formalization of the document containing the treaty will be undertaken. If it is not favorable, the entities of the federal Government involved in the negotiation of the treaty will have to provide new elements so that the SRE may reconsider the report on the proposed treaty.

Upon the favorable completion of the review by the SRE, the signing of the treaty may take place. The Mexican representative who signs the treaty must first receive full powers from the President of the Republic, through an executive decree, which is endorsed by the Secretary of SRE.

By virtue of Article 7 of the 1969 Vienna Convention on the Law of Treaties, the President of the Republic and the Secretary of Foreign Affairs do not need full powers to execute any act related to the conclusion of treaties. Mexican heads of diplomatic missions also do not require full powers to adopt the text of a treaty between Mexico and the State before which such person is accredited. Finally, representatives accredited by Mexico in an international conference, or an international organization or one of its agencies also do not require such powers for the adoption of the text of a treaty in such conference, organization or agency, but it is customary to give them this authority.

C. *Actors and Actions in the Approval, Ratification, Accession, Registration, Publication and Denunciation of Treaties*

1. *Approval of Treaties by the Legislative Branch of Government*

Article 89, paragraph X of the Constitution provides that the President of the Republic must submit to the Senate for its approval all treaties that he has concluded and that he intends to ratify. In accordance with Article 133 of the Constitution, only those treaties approved by the Senate that do not conflict with the Constitution become part of the "Supreme Law of all the Union."

The legislative power of Government rests on the General Congress, which is divided into two chambers: the Chamber of Deputies composed of 500 representatives of the people (Const. Article 50), and the Chamber of Senators composed of 128 senators representing the 31 states of the federation and the federal district (Const. Article 56).

The chambers have shared authority in some matters, and exclusive authority in others. Article 76, paragraph I, indicates the rights of the Senate in the treaty-making process. It reads:

> These are powers exclusive to the Senate:
>
> I. Analyze the world political situation and developments provided by the Federal Executive as a basis for the annual reports that the President of the Republic and the appropriate Secretary of Dispatch give to the Congress, and approve international treaties and diplomatic conventions that the Executive of the Union concludes.

Therefore, this provision establishes the exclusive authority of the Chamber of Senators to "approve international treaties and diplomatic conventions that the Executive of the Union concludes."

This constitutional provision operates as follows. After the treaty is signed, the SRE, through the Secretaría de Gobernación (SG), submits to the Senate those treaties for which the President of the Republic seeks final approval. The SG is the entity that manages and maintains the balance in the relationship among the executive, legislative and judicial powers of the federal Government.

The Senate has different standing commissions that study matters on specific subjects. Once a treaty reaches the Senate, it is referred to the Commission of Foreign Relations for its analysis and discussion. Depending on the subject matter of the treaty under consideration, other commissions will also participate in this process. Each commission issues a report that is submitted to the floor of the Chamber of Senators. The Chamber undertakes a first reading of the report and subsequently schedules a second reading. During these readings, an overall and article-by-article analysis is done. At the conclusion of this phase of the approval process, the Chamber of Senators issues the minutes of the readings and in case there is a motion of approval, the minutes will include a draft of the approval decree. In cases when the Government intends to make a reservation or interpretative declaration, the Chamber of Senators also has to approve it.

All resolutions by Congress are issued through a law or decree (Const. Article 70). In the case of the approval of a treaty, the resolution of the Senate is a decree signed by the President of the Chamber of Senators.

The Senate's decree is sent to the SG, and to the President of the Republic, who in accordance with Article 89, paragraph I of the Constitution will issue a decree ordering the publication of the Senate decree approving the treaty. The SG then publishes the President's decree in the *Diario Oficial de la Federación* (*Federal Official Gazette*).[18]

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[18] To the knowledge of the author there has not been a case in which the Senate did not approve a treaty.

2. *Ratification of Treaties*

Upon the completion of the approval procedure described above, the international ratification of the treaty may be undertaken. The President of the Republic has exclusive authority for the ratification process as provided by Article 89, paragraph X of the Constitution.

In the case of multilateral treaties, the SRE will deposit the instrument of ratification as established in the treaty. In the case of bilateral treaties, instruments of ratification may be exchanged or in treaties that do not require such exchange, the SRE will carry out an exchange of formal notes through which the parties inform each other that the approval procedure has been completed.

3. *Promulgation and Entry into Force of Treaties*

Immediately after ratification, the SRE prepares for the President a decree by which the treaty is promulgated, so it may enter into force. The Secretary of the SRE must endorse the decree. This decree, which includes the complete text of the treaty, is published in the *Federal Official Gazette*, in accordance with Article 4 of the Treaty Law, which establishes that "treaties will be binding in the national territory only after they have been published in the Federal Official Gazette."

4. *Accession to a Treaty*

In the event that Mexico desires to accede to a treaty already in force, the SRE will hold consultations among the different agencies interested in such treaty. After consultations, the text is submitted to the Senate for its consideration and approval, and continues the same process as for treaties signed *ad referendum*.[19]

5. *Treaty Registry*

Article 7 of the Treaty Law orders the SRE to inscribe all those treaties of which Mexico is a party in a registry. The Legal Adviser's office is in charge of the registry and the registry is open to the public.[20]

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[19] This was the process followed for the accession to the GATT in 1986.

[20] For a treaty collection *see Tratados Celebrados por México*, an ongoing collection of all Mexican treaties, prepared by the Legal Adviser's office in the SRE. So far 70 volumes have been published. *See also México: Relación de Tratados en Vigor* (México: SRE, 1998) (an index of treaties in force to which Mexico is a party). Both are available to the public, in books and in compact disc and, in the near future, via the Internet. For a collection containing a selection of Mexican legal documents and commentaries in English *see* Jorge A. Vargas, *Mexican Law: A Treatise for Legal Practitioners and International Investors* (West Group: St. Paul, MN, 1998). Since 1823 Mexico has signed more than 2,492 treaties.

6. *Registration in the United Nations*
In accordance with Article 102 of the United Nations Charter, the Government of Mexico, through the SRE, registers before the United Nations all treaties ratified by Mexico.

7. *Denunciation of or Withdrawal from Treaties*
The SRE, after holding consultations with those interested agencies of the Federal Government, will carry out the formalities necessary to denounce or withdraw from a treaty, as the provisions of the treaty in question may establish. Historically, the Senate has not had any role in the process of withdrawal from treaties.

D. *Inter-Institutional Agreements*

The Treaty Law breaks new ground by authorizing centralized or decentralized agencies of the Federal, State or Municipal Public Administrations to enter into international inter-institutional agreements.

1. *Definition of Inter-Institutional Agreements*
Article 2, paragraph II of the Treaty Law defines an inter-institutional agreement as:

> [A]n agreement governed by public international law, entered into in writing between any centralized or decentralized agency of the Federal, State or Municipal Public Administration and one or more foreign government agencies or international organizations, whatever its denomination, and without regard to whether or not it arises out of a previously approved treaty.
>
> Inter-institutional agreements must be strictly circumscribed by the scope of authority of the above-mentioned agencies that may execute them on respective levels of government.

2. *Legal Nature of Inter-Institutional Agreements*
Inter-institutional agreements are not treaties. Article 117, paragraph I of the Constitution prohibits states of the federation from entering into any alliance, treaty or coalition with any other state or country. The capacity of centralized or decentralized agencies of the Federal, State or Municipal Public Administration to enter into these agreements is clearly circumscribed by their legal sphere of authority. Therefore, they are only binding upon those agencies, which have entered into them, and not upon the federation, as are treaties. Consequently, these agreements do not have to be approved by the Senate.

3. *Negotiation, Signing and Registration of Inter-Institutional Agreements*
Article 7 of the Treaty Law fosters order and coherence in all actions undertaken to enter into inter-institutional agreements, by ordering:

> The centralized and decentralized agencies of the Federal, State or Municipal Public Administration shall keep the Department of Foreign Affairs informed about any inter-institutional agreement that they plan to enter into with other foreign governmental agencies or international organizations. The Department shall prepare a report about the propriety of entering into it, and when appropriate, will inscribe it in the corresponding Registry.

Inter-institutional agreements may be negotiated directly by the agencies interested or with the support of the SRE. The Legal Adviser's office of the SRE analyzes the draft of the inter-institutional agreements, considering the information offered by the agencies regarding the motivation to enter into the agreements and the applicable Mexican law. The Legal Adviser's office may confer with other offices of the SRE, and the SRE may confer with other agencies of Government, which might be interested in the subject of the agreements.

Having done the analysis and the necessary consultations regarding the agreements, the SRE issues a report. The report on the propriety of inter-institutional agreements assures that they do not exceed the legal sphere of authority of the agencies that enter into them, or interfere with the attributions of the federal Government or contravene Mexican foreign policy. This report is regarded as an authorization to enter into the inter-institutional agreement. If the report is unfavorable, the agencies interested may submit to the SRE new information that may be useful to reassess the report.

Once signed, all inter-institutional agreements must be sent to the SRE to be registered. The registry is the same as that for treaties approved in the most formal way – it is public and can be consulted at the SRE.

E. *Implementation of Treaties*

1. *Treaties and Domestic Law*
The issue of whether treaties are self-executing in the sense that term is used in U.S. practice has not been raised under Mexican constitutional and domestic law, because Article 133 of the Constitution has been interpreted in the sense that, if a treaty is approved by the Senate, such treaty becomes law of the union irrespective of its content.

The issue of the supremacy of the Constitution over treaties and

federal laws has long been a favorite subject of Mexican jurists interested in international law.[21]

Article 133 of the Constitution establishes:

> This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or the laws of the States.

Notwithstanding that treaties are supreme law of all the union, the Constitution shall prevail over treaties because for a treaty to be supreme law of the land it should be in accordance with the Constitution.[22]

In 1947, the Supreme Court of Justice established that any treaty that has been signed by the President and approved by the Senate, but that is contrary to the provisions of the Constitution, should not be enforceable.[23]

In 1992, the same court adopted the view that federal laws and treaties have the same rank.[24] In 1995, the court declared that it did not have jurisdiction to decide a contradiction between federal law and the Paris Convention on Patent Law.[25] In 1999, in a case of a contradiction between a treaty and a federal law, the court adopted a new interpreta-

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[21] *Universidad Iberoamericana* 33 (1980); *see also* Laura Trigueros, *La Constitucionalidad de los Tratados Un Problema Actual, in Un Homenaje a Don César Sepúlveda Escritos Jurídicos. Instituto de Investigaciones Jurídicas* 467–86 (México: UNAM, 1995); Leonel Pereznieto Castro, *El artículo 133: Una Relectura* (*Revista Jurídica, Universidad Iberoamericana*, 1995); Leonel Pereznieto Castro, *Los Tratados Internacionales en el Sistema Constitucional Mexicano, in Temas Selectos del Nuevo Derecho Internacional, Facultad de Ciencias políticas y Sociales* 55–74 (México: UNAM, 1994); Loretta Ortiz Ahlf, *Derecho Internacional Público* 8 (México: Harla, ed. 1993); Fernando Vázquez Pando, *Algunos Aspectos Constitucionales del TLC, Panorama Jurídico del Tratado de Libre Comercio II*, at 23B28 (*Universidad Iberoamericana*, 1993); Felipe Tena Ramírez, *Derecho Constitucional Mexicano* 41 (México: Porrúa, ed., 1990); L.M. Díaz, *Tratados Internacionales y la Constitución*, in X *Anuario Jurídico* 533–75 (México: UNAM, 1983); Jorge Carpizo, *La Interpretación del Artículo 33 Constitucional, Estudios Constitucionales* (México: UNAM, 1980).

[22] This is indicated by the actual text of the Constitution. The initial text in 1917 granted the same hierarchy to the Constitution and international law. However, Article 133 was amended on January 18, 1934. This was due, among other things, to the International Arbitral Award which declared that the Isla de la Pasión (Clipperton Island) belonged to France and not to Mexico. Antonio Gómez Robledo, *México y el Arbitraje Internacional* (México: Porrúa, ed., 1981).

[23] *Amparo en Revisión* 7798/47 T. XCVI, 1639.

[24] *Tesis Aislada-Amparo en Revisión* 2069/91. Manuel García Marínez. *30 de junio de 1992. Mayoría de quince votos.* Ponente Victoria Adato Green. *Gaceta del Semanario Judicial de la Federación, Octava Epoca, Tomo* 60, December 27, 1992.

[25] *Jurisprudencia, Apéndice de 1995, Séptima Época, Tomo I Parte Suprema Corte de Justicia de la Nación, Tesis* 327, 302.

tion of Article 133 of the Constitution. It concluded that international treaties are placed hierarchically above federal laws, second in rank to the Constitution.[26]

Thus, treaties and federal law shall be in accordance with the Constitution but are different kinds of legal instruments. A treaty cannot abrogate a federal law, and federal laws cannot override treaties. If a treaty and a federal law regulate the same subject, the treaty will be

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[26] "Hierarchically speaking, international treaties are above federal laws and are in second place with respect to the Federal Constitution. The question has been raised continuously regarding this hierarchy in our laws. A consensus exists to the extent that the Federal Constitution is the fundamental norm. And although in principle the expression ". . . they will be the Supreme Laws of the entire Union . . ." appears to indicate that not only is the Magna Carta the Supreme Law, such objection is overcome by the fact that the laws should emanate from the Constitution and should be approved by a constituted body, as is the case with the Congress of the Union. In addition, treaties should be in accordance with the Fundamental Law, that which the Constitution clearly defines as the Supreme Law. The problem concerning the hierarchy of the other norms has found different solutions in jurisprudence and in doctrine. Among them are the following: the supremacy of federal law over local law, and the same hierarchy, plain and simple in its variations, and with the existence of "constitutional laws," and the idea that the supreme law be qualified as constitutional. Nonetheless, this Supreme Court of Justice considers that international treaties are in the second place immediately beneath the Fundamental Law and above federal and local law. This interpretation of Article 133 of the Constitution has the result that these international agreements entered into by the Mexican State as a body are binding on all of its authorities before the international community. For this reason it is explained that the constituents have enabled the President of the Republic to sign international treaties in his capacity as the head of State, and in the same manner, the Senate intervenes as a representative of the will of the federal entities, and, by means of ratification, obligates its authorities. Another important aspect to consider in regard to the hierarchy of treaties is that in this area there exists no limit of jurisdiction between the Federation and the federal entities, this is to say that questions concerning federal as opposed to local jurisdiction are not taken into account in a treaty. Rather, what is expressly mandated by Article 133 is that the President of the Republic and the Senate may obligate the Mexican state in any matter, independently of whether on other grounds this may be within the competence of the federal entities. As a consequence of the above, the interpretation of Article 133 results in considering it in a third place to federal law and local law, in the same hierarchy, by virtue of the provision in Article 124 of the Fundamental Law, which provides that "The powers that are not expressly given to the federal bodies, are understood to be reserved to the States." It cannot go unnoticed that in the above conclusion, this Highest Tribunal adopted a position in contrast to the thesis P.C./92, published in the Weekly Gazette of the Federal Judiciary, Number 60, in December of 1992, page 27, heading, "FEDERAL LAWS AND INTERNATIONAL TREATIES SHARE THE SAME NORMATIVE HIERARCHY." Nevertheless, this full Tribunal considers it opportune to abandon such reasoning and to rather adopt one that considers the hierarchy of treaties superior including that in relation to federal law. *Thesis Aisalada*, Ninth Session, Federal Judicial Seminar and its Gazette, Volume X, November, 1999, Thesis p. LXXVIII 99, 46" (unofficial English translation by Ruth Teitelbaum). For an excellent analysis of this view in a legal and historical perspective see Loretta Ortiz Ahlf, *Jerarquía entre Leyes y Tratados, published in Reforma de Estado, Barra Mexicana de Abogados* (México, 2000).

applied because the principle of specificity applies. In other words, the treaty applies because it regulates specific cases that are generally covered by the federal law. In contrast, the federal law continues to be applicable to all those cases outside the scope of the treaty.

F. *Treaty Enforcement by the Judiciary*

Article 104, paragraph 1 of the Constitution grants federal courts jurisdiction over "[a]ll questions of civil or criminal order that arise about the observation and application of federal laws or international treaties concluded by the Mexican State . . ."

The article is understood to separate the jurisdiction of federal courts from that of local courts. However, it cannot be understood as a prohibition for granting jurisdiction to international tribunals.

Article 8 of the Treaty Law assumes this viewpoint when it enumerates the characteristics that international decision-making bodies should possess:

> Any treaty or inter-institutional agreement, which contains international mechanisms for the settlement of legal disputes in which the parties are, on the one hand, the Federation or Mexican individuals or legal entities, and on the other, foreign governments, individuals or legal entities, or international organizations, shall:
>
> I. Render equal treatment to Mexicans and foreigners who are parties to the dispute, pursuant to the principle of international reciprocity;
> II. Assure the parties the right to be heard and the due presentation of their defense; and
> III. Guarantee that the composition of the decision-making bodies insures their impartiality.

This provision was the legal response to those who argued that the Calvo Clause prevented Mexico from negotiating treaties that could establish international tribunals to decide controversies between foreigners and Mexicans in relation to investments in Mexico.

On the other hand, Article 11 of the Treaty Law reformulates the international legal obligation of Mexico to recognize, enforce and, if applicable, use as evidence, the rulings, arbitral decisions and other judicial decisions arising from the application of the international mechanisms for the settlement of legal disputes, in accordance with the Federal Code of Civil Procedure and applicable treaties.[27]

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[27] For example, Mexico is party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (22/1/71), the 1975 Inter-American Convention on International Commercial Arbitration (27/4/78), the 1979 Inter-

G. *International Disputes*

Institutional frameworks for the settlement of international disputes based on the Treaty Law, such as NAFTA, have been utilized. As of December 1999, 186 meetings had been held between diverse organizations that have been created as a result of the treaty itself. The many commissions and working groups have analyzed a variety of issues and controversies to be resolved according to NAFTA provisions.

As of January 1999, 55 NAFTA-based trade disputes had been presented on anti-dumping and countervailing duties, and three on provisions contained in the agreement. These have been the focus of the dispute resolution mechanisms established in Chapters 19 and 20 of NAFTA. In addition, 11 cases regarding investments have been presented for resolution according to Chapter 11 of the Agreement; four of these cases involve Mexico. Although some of the findings issued by the panels have been the object of debate and criticism, these negotiated mechanisms have proven to be useful in allowing Mexico to better defend its interests.[28]

H. *Conclusion*

The Treaty Law may be seen from two distinct perspectives. In practical terms, the law provides a proper national legal framework that can

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American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards (30/11/1987). José Luis Siqueiros, *Mexican Arbitration: The New Statute*, 30 *Tex. Int'l L.J.* 227–59 & n.2 (1995). For a compilation of Mexican laws and treaties to which Mexico is a Party that regulate or include arbitration clauses, see L.M. Díaz, *Arbitraje: Privatización de la Justicia*, (Mexico: Themis, ed., 2d ed., 1998). Comments by American, Canadian and Mexican jurists in *Commercial Mediation and Arbitration in the NAFTA Countries* (L.M. Díaz & Nancy A. Oretskin, eds., JurisNet, N.Y. 1999).

[28] Literature about conflict resolution under NAFTA by Mexican jurists include L.M. Díaz, L. Ortiz Ahlf & F.A. Vazquez Pando, *Aspectos Jurídicos del Tratado de Libre Comercio de América del Norte y Sus Acuerdos Paralelos* (Mexico: Themis, ed. 1998); López Ayllón, J.C. Sergio y Thomas, *El Capítulo XIX del Tratado de Libre Comercio de América del Norte: desafíos en la interpretación de los tratados internacionales y en la reconciliación del civil law y del common law en la zona de libre comercio*, 7 *Revista de Derecho Privado* No. 20, at 37–72 (México, 1996); Guillermo Aguilar, *Marco Jurídico del Tratado de Libre Comercio de América del Norte*, *in La Modernización del Derecho Mexicano* 601B31 (México: Porrúa, ed. 1994); L.M. Díaz & Antonio Garza, *Los Mecanismos Para La Solución de Controversias del Tratado de Libre Comercio de América del Norte*, *in Revista de Investigaciones Jurídicas* No. 17 (1993); Beatriz Leycegui, *Reflexiones en torno al régimen general de prevención, administración y solución de controversia previsto en los capítulos 19 y 20 del Tratado de Libre Comercio* (Mexico: *Escuela Libre de Derecho*, 1993); Leonel Pereznieto Castro, *Algunos Aspectos del Sistema de Solución de Controversias en el Tratado Norteamericano de Libre Comercio*, *in Jurídica Anuario del Departamento de Derecho de la Universidad Iberoamericana* No. 23, at 355–80; José Luis Siqueiros, "NAFTA Institutional Arrangements and Dispute Settlement Procedures," 23 *Cal. W. Int'l L.J.* 383–94 (Spring 1993); Julio C. Treviño Azcue, *Prácticas Desleales*, *in Panorama Jurídico del Tratado de Libre Comercio* II, at 53–66 (*Universidad Iberoamericana* 1993).

facilitate Mexico's entry into international agreements at a time when Mexico's international relations are more intense than ever before. In addition, Mexican Federal, State and Municipal Public Administration agencies and entities are able to establish formal legal relationships with the ever-changing different subjects of international law.

From a theoretical legal perspective, the Treaty Law has been controversial. It has been alleged that the law contains legal rules related to treaty making which were already part of the Mexican legal system, that the new arbitration tribunals to decide disputes between Mexicans and foreigners might be contrary to the Constitution, and that inter-institutional agreements are unconstitutional because they do not require approval by the Senate.[29]

The ongoing dialectic between these two perspectives reflects and informs domestic and international political discourse as it relates to Mexico's integration into the global economy.

On September 2, 2004, the Federal Official Gazette published the Law for Approval of International Treaties on Economic Matters. The philosophy behind this new law is the promotion of the principle of transparency in governmental affairs and the participation of diverse sectors of the society in the approval of treaties. The Law develops the Law of International Trade (published in 1993 as amended in 2003) and the Law Regarding the Making of Treaties (1991). It concerns treaties related to trade, investment, services, technology transfer, copyright, double taxation and economic cooperation. The Law contains 14 articles which refer to the purpose of the said treaties, the channels of communication between the Senate and the Executive for the approval of treaties, and the participation of State governments, management associations, citizens and labor unions before the Senate. On the settlement of disputes, the Law restates (Article 4(1)) the three guiding principles established in Article 8 of the 1991 Law of Treaties: Any treaty or inter-institutional agreement that contains international mechanisms for the settlement of legal disputes in which the parties are, on one hand, the Federation or Mexican individuals or legal entities, and on the other, foreign governments, individuals or legal entities, or international organizations, shall: (i) render equal treatment to Mexicans and foreigners who are parties to the dispute, pursuant to the principle of international reciprocity; (ii) assure the parties the right to be heard and due presentation of their defense; and (iii) guarantee that the composition of the decision-making bodies insures their impartiality.

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[29] *See* Trigueros, *supra* note 21, at 481.

III. Basic Data and Documentation

A. *National Legislation*

Annex A: Law Regarding the Making of Treaties
Annex B: Selected Constitutional Provisions
Annex C: Law on the Approval of International Economic Treaties (September 2004)

B. *Selected Examples of Treaty Documents*

Annex D: Official Proclamation of a Treaty
Annex E: Official Proclamation of a Treaty with a Reservation
Annex F: Message to the Executive from the Senate
Annex G: Full Powers

ANNEX A

LAW REGARDING THE MAKING OF TREATIES[30]

Article 1

The purpose of this law is to regulate the making of international treaties and international inter-institutional agreements. Treaties may only be made and entered into between the Government of the United Mexican States and one or various subjects of international law. Inter-institutional agreements may only be made and entered into between a centralized or decentralized agency of the Federal, State or Municipal Public Administration and one or more foreign governmental agencies or international organizations.

Article 2

For the purposes of this law, the following definitions will apply:

I. "Treaty": an agreement governed by public international law, entered into in writing between the Government of the United Mexican States and one or various subjects of public international law, pursuant to which the United Mexican States undertakes obligations, and without regard to whether its application requires the making of agreements in specific matters, and without regard to its name.

   In compliance with Article 76, paragraph I of the Political Constitution of the United Mexican States, treaties must be approved by the Senate and pursuant to Article 133 of the Constitution will, when consistent with the Constitution, be the Supreme Law of the Union.

II. "Inter-institutional agreement": an agreement governed by public international law, entered into in writing between any centralized or decentralized agency of the Federal, State or Municipal Public Administration and one or more foreign governmental agencies or international organizations, whatever its denomination, and without regard to whether or not it arises out of a previously approved treaty.

   Inter-institutional agreements must be strictly circumscribed by the scope of authority of the above-mentioned agencies that may execute them on respective levels of government.

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[30] Reprinted in 31 *ILM* 390 (1992).

III. "Signature ad referendum": an act whereby the United Mexican States manifests that its consent to be bound by a treaty can be considered as definitive only after ratification.
IV. "Approval": an act whereby the Senate approves the treaties entered into by the President of the Republic.
V. "Ratification," "adhesion" or "acceptance": an act whereby the United Mexican States establishes at the international level its consent to be bound by a treaty.
VI. "Full Powers": a document which designates one or more individuals [who] are designated to represent the United Mexican States in any act relative to the making of treaties.
VII. "Reservation": a declaration made when signing, ratifying, accepting or adhering to a treaty, for the purpose of excluding or modifying the legal effects of certain dispositions of the treaty as applicable to the United Mexican States.
VIII. "International Organization": a legal person created in accordance with public international law.

Article 3
Full Powers are granted by the President of the Republic.

Article 4
Treaties submitted to the Senate pursuant to Article 76, paragraph I of the Constitution, will be referred to Committee in accordance with the Organic Law of the General Congress of the United Mexican States, for the preparation of the appropriate report. In due course, the decision of the Senate will be communicated to the President of the Republic.

Treaties will be binding in the national territory only after they have been published in the Federal Official Gazette.

Article 5
The intention of the United Mexican States to be bound by a treaty will be expressed through an exchange of notes, an exchange or deposit of the instrument of ratification, adhesion or acceptance, by means of which the approval of the treaty by the Senate is notified.

Article 6
The Department of Foreign Affairs, without affecting the exercise of the attributions of the agencies and entities of the Federal Public Administration, will coordinate the actions necessary for the making of any treaty and prepare an opinion about the propriety of executing it, and after execution, will inscribe it in the appropriate Registry.

Article 7
The centralized and decentralized agencies of the Federal, State or Municipal Public Administration shall keep the Department of Foreign Affairs informed about any inter-institutional agreement that they plan to enter into with other foreign governmental agencies or international organizations. The Department shall prepare a report about the propriety of entering into it, and when appropriate, will inscribe it in the corresponding Registry.

Article 8
Any treaty or inter-institutional agreement which contains international mechanisms for the settlement of legal disputes in which the parties are, on the one hand, the Federation or Mexican individuals or legal entities, and on the other, foreign governments, individuals or legal entities, or international organizations, shall:

I. Render equal treatment to Mexicans and foreigners who are parties to the dispute, pursuant to the principle of international reciprocity;
II. Assure the parties the right to be heard and the due presentation of their defense; and
III. Guarantee that the composition of the decision-making bodies insures their impartiality.

Article 9
The Government of the United Mexican States will not recognize any judgment of the international decision-making bodies for the settlement of legal disputes mentioned in Article 8 when national security, public policy or any other essential interest of the Nation is involved.

Article 10
In compliance with the applicable treaties, the President of the Republic will appoint, in cases in which the Federation is a party in the international mechanisms for the settlement of legal disputes mentioned in Article 8, those who will participate as arbitrators, commissioners or experts in the decision-making bodies of said mechanisms.

Article 11
The rulings, arbitral decisions and other juridical decisions arising from the application of the mechanisms for the settlement of legal disputes mentioned in Article 8 will be recognized and enforced in the Republic, and may be used as evidence by Mexican nationals in the same legal situation, in accordance with the Federal Code of Civil Procedure and the applicable treaties.

ANNEX B

SELECTED CONSTITUTIONAL PROVISIONS

Article 27

Lands and waters understood to be within the limits of the national territory belong originally to the Nation, which has had and has the right of transmitting their ownership to particular persons, thus constituting them as private property.

Expropriations may only be for cause of public utility, and by means of indemnization.

The Nation will at all times have the right to impose on private property the ways of use that the public interest dictates. Its use will be regular, to social benefit, and for the appropriation of its natural elements, with the object of making an equitable distribution of public wealth, taking care to conserve these elements, and to achieve balanced development of the country and improvement of life for the rural and urban population. As a consequence, the nation will dictate the means necessary to keep human settlements functioning, and establish adequate provisions, uses, reserves, and end uses of lands, waters, and forests to the effect of building public works and planning and regulating their construction, conservation, improvement, and growth of centers of population, to preserve or restore ecological balance, to divide large estates; to manage, in the terms of regulating law, the organization and collective functioning of communes and communities, for the development of rural property; for the promotion of agriculture, ranching, use of forest products, and of the various economic activities in the rural setting, and to avoid the destruction of natural elements, and the damages that property may suffer to the detriment of society.

The Nation has direct ownership of all natural resources of the continental shelf and underwater zones around islands, of minerals or substances that are in veins, layers, or masses; of beds of ore that constitute deposits naturally distinct from the components of the earth, such as minerals from which metals and alloys used in industry are derived; of beds of precious stones; of rock salt, and the salts formed directly in sea waters; the products derived from the decomposition of rocks when their exploitation requires underground work; of mineral beds, or beds of organic materials that are used as fertilizers; solid combustible materials; of petroleum and all solid, liquid or gaseous hydrocarbons, and of the space situated over the national territory, to the extent and terms fixed by international law. The waters of the territories are the property of the Nation, to the extent and terms fixed by international law: interior

navigational waters, lagoons and inlets that are permanently or intermittently linked with the sea, naturally formed interior lakes that have water in them constantly, rivers and their direct or indirect tributaries from the point where their first permanent intermittent or torrential water starts until their flow into the sea; lakes, lagoons, or inlets that are national property, constant or intermittently running creeks and washes and their direct or indirect tributaries when, in all or part of their length, they serve as a boundary of national territory, or between two federated entities, or when they pass from one federated entity to another, or cross the boundary line of the Republic; lakes, lagoons, and inlets which cross boundary lines of two or more entities or between the Republic and a neighboring country, or when the limit of the banks serves as a boundary between two federated entities, or between the Republic and a neighboring country; waters that have their origins in beaches, maritime zones, river beds, or banks of lakes, lagoons, or inlets that are national property, and those that are extracted from mines, and river beds or beds of interior lakes to the extent that the law sets. Ground water may be freely appropriated by means of artificial works and used by the owner of the land, but when the public interest requires it or it affects other users, the Federal Executive has the power to regulate its extraction and utilization, and also to establish zones where ground water use is prohibited, equal to those waters which are national property. Whatever waters were not included in the preceding, are considered the property of the lands under which they run or where their deposits are found, but if they are located under two or more properties, the use of these waters is considered of public utility, and will remain subject to the dispositions that the States dictate.

In cases referred to in the two paragraphs above, the ownership of the Nation is inalienable and essential, and the exploitation, use, or enjoyment of these resources by individuals or by associations governed by Mexican law cannot take place except by means of concessions granted by the Federal Executive according to the rules and conditions which the laws establish. Normal laws relating to works or labors of exploitation of minerals and substances referred to in the fourth paragraph of this article will regulate the execution and verification by which the exploitation is conducted, or the operations by which it should be effected, independent of the date of granting of the concession. Non-observance will result in the cancellation of the concession. The federal government has the right to establish national reserves, and to relinquish them. The corresponding declarations will be made by the Executive in the cases and conditions that the laws specify. No concessions or contracts will be granted for the extraction of petroleum or solid, liquid, or gaseous hydro-

carbons, or for radioactive minerals. The Nation will carry out the exploitation of these products in the terms that the respective regulating law specifies.

The Nation has the exclusive right to generate, conduct, transform, distribute, and supply electrical energy for use in public service. In this matter, concessions will not be granted to individuals, and the Nation will make use of the goods and national resources required to achieve these ends. The Nation also enjoys the right to use nuclear combustibles for the generation of nuclear energy, and to regulate its application in other uses. The use of nuclear energy is permitted only for peaceful ends. The Nation will exercise control over an area situated outside the territorial seas and adjacent to them, under the rights of sovereignty and the jurisdiction that the laws of the Congress determine. The exclusive economic zone will extend to 200 nautical miles from where the territorial seas start. In those cases in which this extension produces conflict with the exclusive economic zones of other countries, the boundaries of these zones will be determined by means of agreements with those countries.

The ability to acquire the domain of the lands and waters of the Nation will be regulated by the following prescriptions:

I. Only Mexicans by birth or naturalization and Mexican associations have the right to obtain ownership of lands, waters, and their accessories, or to obtain mining or ground water concessions. The State has the power to concede the same right to foreigners, as long as after verifying with the Secretariat of Relations that they will respect the lands and waters as nationals would, and will not invoke the protection of their governments. The penalty in case of violation of the contract is loss to the Nation of the benefits that were acquired from the concessions. In a zone of 100 kilometers distance from the borders, and 50 from the coast, no foreigners shall be permitted to acquire direct ownership of land or water for any reason.

   The State, in agreement with internal public interest and the principles of reciprocity, may allow foreign states to acquire real private property necessary for the direct service of their embassies or legations in the permanent place of residence of the Federal Powers.

II. Religious associations, as defined in the terms of Article 130 and its regulating law, will have the capacity to acquire, possess, or administer exclusively the property that is essential for their object, with the requisites and limitations that the regulating law establishes.

III. Public or private institutions of benefit that have for their object aid to the needy, scientific research, the spread of education, the mutual aid of their members, or any other legal object may not acquire

more real property than is necessary for the object immediately or directly destined to them, subject to what the regulating law establishes.

IV. Mercantile societies by means of stock may become owners of rural lands, but only in the extension that is necessary to complete their object. In no case may societies of this type acquire lands dedicated to agriculture, ranching, or forestry activities in greater extension than the amount equivalent to 25 times the limits given in section XV of this article. The regulating law will regulate the capital structure and minimum number of members of these societies, to the effect that the lands owned by the society do not exceed what each member would own as small property. In this case, all property of individual investors corresponding to rural lands will be counted for the effects of computation. At the same time, the law will give the conditions for foreign participation in these societies. The appropriate law will establish the means of registration and control necessary to implement this section.

V. Commercial banks that are authorized and that conform to the laws of credit institutions may hold capital obligations for rural and urban property in accordance with the prescriptions of the same laws, but they may not hold or administer more resources than those entirely necessary for their direct objects.

VI. The States and the Federal District, as well as the municipalities of all the Republic, will have the full capacity to acquire and possess all the real property necessary for public services.

The laws of the Federation and the States, in their respective jurisdictions, will determine the cases in which public utility requires the occupation of private property. The procedures used by the administrative authority to acquire this property will be according to these laws. The price fixed for indemnification of the expropriated property will be based on its fiscal value as figured at the appraiser's or assessor's office. When its worth has been demonstrated by the owner, payment has been accepted by him or her tacitly. Any increase in value that the particular property has for improvements during or after the date of appraisal will be subject to expert judgment or judicial resolution only.

The exercise of actions that belong to the Nation by virtue of the dispositions in the present article will have effect by judicial procedure, but within this procedure and by order of the corresponding tribunals that will dictate the maximum term of one month, the administrative authorities will proceed without delay with the occupation,

administration, auction, or sale of the lands or waters taken and all their accessories, except that in no case may the same be revoked by the same authorities without a written order of execution.

VII. The judicial personality of concentrations of population in communes and communities is recognized, and their property on the land is protected as well as their human character and productive activities. The law will protect the integrity of the lands of indigenous groups. The law, considering the respect and strengthening of the community life of communes and communities, will protect the land for human communities and regulate the use of common lands, forests, and waters, and the taking of actions of promotion necessary to elevate the level of life of their inhabitants. The law, with respect for the will of commune and community residents to adopt the conditions most agreeable to them for the use of their productive resources, will regulate the exercise of the rights of community residents over the land, and of each commune resident over his or her own parcel of land. At the same time, it will establish the procedures by which commune and community residents have the power to associate with each other, with the State, or with third parties, and grant the use of their lands; and in conjunction with commune members, it will transmit their parcel rights among the individual members of the concentration of population, equally fixing the requisites and procedures by which the communes in assembly may grant individuals ownership of their parcels. In the case of transfer of parcels, in accordance with the right of preference that the law contains, within a given concentration of population, no commune member may become the owner of more than five percent of commune lands. In all cases the ownership of lands by one commune member must conform to the limits specified in section XV. The general assembly is the supreme organ of a communal or community concentration of population with the organization and functions that the law specifies in section XV. The commune or community property commissioner, elected democratically in terms of the law, is the representative of the concentration of population, is the person responsible for the actions of the concentration, and is responsible for putting into effect the resolutions of the assembly. The distribution of lands, forests, and waters to concentrations of population will take place in terms of the regulating law.

VIII. The following are declared null and void:

(a) All transfers of lands, waters, and mountainous lands belonging to towns, settlements, congregations, or communities, made by the political heads, governors of the States, or by any other state or local authority in contravention to the disposal specified in the law of June 25, 1856, and other relevant laws and dispositions.

(b) All concessions, settlements, or sales of lands, waters, and mountainous lands made by the Secretariats of Promotion, Finance, or any other federal authority, from the first of December of 1876 to this date, when these lands and waters were invaded and illegally occupied, or of any other class of lands or waters pertaining to towns, settlements, congregations, or communities, and concentrations of population.

(c) All acts of surveying or marking boundaries, transactions, transfers, or resolutions that took place during the time referred to in the previous subsection by companies, judges, or other authorities of the States or of the Federation, when these resulted in the illegal invasion or occupation of lands, waters, and mountainous lands of communes, commonly shared lands, or of any other cases belonging to concentrations of population.

Exceptions to the above will include only those lands transferred with regards to the law of June 25, 1856 and possessed with proper title of more than ten years, when their area does not exceed fifty hectares.

IX. The division or distribution that took place among neighbors of a concentration of population with an appearance of legitimacy, and in which there was an error or bad intent shall be nullified when three-fourths of the persons are in possession of one-fourth of the lands in question, or one-fourth of the same persons are in possession of three-fourths of the lands.

X–XIV (Repealed)

XV. Large estates remain prohibited in the United Mexican States. Small agricultural property will be considered anything which does not exceed 100 hectares of irrigated or non-irrigated prime land, or its equivalent in other classes of land.

For the purposes of equivalence, one hectare of irrigated land will be computed to be as two of secondary land, as four of grazing land of good quality, and as eight of woods, mountainous land, or grazing land in arid areas.

As small property, the land that an individual may have may not exceed 150 hectares when the lands are used to raise cotton,

if they receive irrigation; and of 300 if they are used for the cultivation of bananas, sugar cane, coffee, henequen, rubber, palm oil, wine grapes, olives, quinine, vanilla, cacao, or fruit trees.

Small ranching property will be considered anything which does not exceed the area necessary to maintain up to 500 head of large livestock or its equivalent in small livestock, in the terms that the law fixes, in accord with the grazing capacities of the lands. When, through works of irrigation, drainage, or any other works done by the owners or possessors of a small property, the quality of the land has been improved, the land will continue to be considered small property, even when, by virtue of the improvement obtained, it passes the maximum amounts specified by this section, as long as it remains as one piece of property according to the requisites that the law sets.

When, within one small ranching property, there are improvements in lands and these are dedicated to agricultural uses, the area utilized for these cannot exceed in any case the limits from the second and third paragraphs of this section that correspond to the quality that these lands had before the improvement.

XVI. (Repealed);

XVII. The Congress of the Union and the legislatures of the States in their respective jurisdictions will pass laws that establish the procedures for the dividing and transfer of property that exceeds the limits specified in sections IV and XV of this article. The excess must be divided and transferred by the owner within the term of a year from the receipt of notification. If the excess has not been transferred by the time the term has elapsed, the sale must be by means of a public auction. When possible, the right of preference will be respected by the regulating law. State and local laws will determine what the worth of the family is, and determine the goods that belong to it on the basis that it will be inalienable and will not be subject to being frozen or encumbered with liens.

XVIII. All the contracts and concessions made by the previous government since 1876, that have had as a consequence the collection of lands, waters, and natural resources of the Nation for a single person or association, are declared subject to review, and the Executive of the Union will be enable to declare those that involve serious damage to the public interest null and void.

XIX. On the basis of this Constitution, the State will have at its disposal the means for the expedient and honest distribution of

agrarian justice, with the object of guaranteeing legal recognition of the tenancy of collective and communal lands, and of small property, and it will support the legal rights of farmers. All questions on the boundaries of communal and community lands, that have their origin in these, are under federal jurisdiction, pending or ongoing questions among two or more concentrations of population, as well as questions on the possession of the land of communes and communities. For these effects, and in general, for the administration of agrarian justice, the law will institute tribunals given autonomy and full justice with magistrates proposed by the Federal Executive and confirmed by the Chamber of Senators, or, if the Senate is in recess, by the Permanent Commission. The law will establish an organ for pursuit of agrarian justice.

XX. The State will promote conditions for integral rural development, with the object of generating employment and guaranteeing the farming populations well-being and its participation and incorporation in national development, and will promote agriculture and forest activity for the optimum use of land, with works of infrastructure, financial grants, credits, storage services, and technical assistance. At the same time, it will make regulating legislation to plan and organize agricultural production and its industrialization and commercialization, considering the public interest.

* * *

Article 76

These are powers exclusive to the Senate:

I. Analyze the world political situation and developments provided by the Federal Executive as a basis for the annual reports that the President of the Republic and the appropriate Secretary of Dispatch give to the Congress, and approve international treaties and diplomatic conventions that the Executive of the Union concludes;

II. Ratify the nominations that the same Secretary makes of ministers, diplomatic agents, consuls general, supervisory employees of finance, colonels and other superior officers of the national Army, Navy, and Air Force, in the terms that the law gives;

III. Authorize national troops to leave the limits of the country, the passing of foreign troops through national territory, and the stationing of task forces of other powers (for more than a month) in Mexican waters;

IV. Give its consent for the President of the Republic to use the National Guard outside of its respective states, setting the force necessary;

V. Declare, when all the constitutional powers of a State have disappeared, that it is necessary to name a provisional governor, who will call elections according to the constitutional laws of that State. The nomination of the governor will be made by the Senate from a list made by the President of the Republic with the approval of two-thirds of the members present, and in its recesses, by the Permanent Commission, according to the same rules. The official named may not be elected constitutional governor in the elections that he or she conducts. This disposition will always be in effect if the constitutions of the States do not give it. The law will regulate the exercise of this power, and the one of the section before;

VI. Resolve the political questions that arise among the powers of a State, when one of these has been brought before the Senate with the object of resolving it, or when, because of these questions, constitutional order has been interrupted by a conflict of arms. In this case, the Senate will give its resolution subject to the General Constitution of the Republic and that of the State;

VII. Sit as a panel of judgment to learn about the mistakes or omissions that public servants commit, and if they have taken advantages for themselves to the detriment of the fundamental public interest and to their good functioning in office, in the terms of Article 110 of this Constitution;

VIII. Designate the ministers of the Supreme Court of Justice of the Nation, from the short list that the President of the Republic submits to it for its consideration, as well as grant or deny its approval to requests for their leave or resignation that the same official submits to it;

IX. Name and remove the head of the Federal District in terms given by this Constitution;

X. Others that this Constitution attributes to it.

* * *

Article 89

The powers and obligations of the President are the following:

I. Enforce and expedite the laws that the Congress of the Union passes, providing for their exact observation in the administrative sphere;

II. Name and remove freely the Secretaries of Dispatch, remove the diplomatic agents, and supervisory employees of Finance, and name and remove freely the other employees of the Union, whose naming or dismissal is not determined in another way in the Constitution, or in the laws;

III. Name the ministers, diplomatic agents, and consuls general with approval of the Senate;
IV. Name, with approval of the Senate, colonels and other superior officers of the national Army, Navy and the Air Force, and the supervisory employees of Finance;
V. Name other officers of the Army, Navy, and Air Force, in agreement with the laws;
VI. Use all the permanent Armed Forces, the Army on land, the Navy, and the Air Force, for the internal security and external defense of the Federation;
VII. Use the National Guard for the same objects in the terms that section IV of Article 76 gives;
VIII. Declare war in the name of the United Mexican States, given the law of the Congress of the Union;
IX. Designate, with the ratification of the Senate, the Attorney General of the Republic;
X. Direct foreign policy and conclude international treaties, and submit them to the approval of the Senate: In the conduct of this policy, the head of the Executive Power will observe the following standard principles: self-determination of peoples, non-intervention, peaceful resolution of disputes, juridical equality of states, international cooperation for development, and the struggle for international peace and security;
XI. Call the Congress to extraordinary sessions when the Permanent Commission agrees;
XII. Give the Judicial Power the help that it needs for the prompt exercise of its functions;
XIII. Authorize all classes of ports, establish coast and border customs stations, and set their location;
XIV. Give, conforming to the laws, pardons to persons sentenced for crimes under the jurisdiction of the Federal courts, and for persons sentenced for crimes against the common order in the Federal District;
XV. Give exclusive privileges for a limited time, with agreement of the respective law, to discoverers, inventors, or perfecters of processes of industry;
XVI. When the Chamber of Senators is not in session, the President of the Republic may make the nominations that sections III and IV discuss, with the approval of the Permanent Commission;
XVII. (Repealed);
XVIII. Present, to the consideration of the Senate, a short list for designation of ministers of the Supreme Court of Justice and submit

their requests for leave and resignation to the approval of the Senate;

XIX. (Repealed);

XX. Others that this Constitution expressly confers on him or her.

* * *

Article 133

This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or the laws of the States.

ANNEX C

LAW ON THE APPROVAL OF INTERNATIONAL ECONOMIC TREATIES

CHAPTER I
GENERAL PROVISIONS

Article 1
This law is of public interest, its aim being to establish the regulation pursuant to Article 93 of the General Constitution of the Republic regarding the Senate constitutional powers to require information to the Secretaries of State, chiefs of administrative departments, and directors of the competent decentralized agencies, in relation to the negotiation, celebration and approval of treaties related to commerce and exchange of goods, services, investments, technology transfers, intellectual property, double taxation, economic cooperation and with other similar concepts as stated herein.

Article 2
For the purposes of this law, the meaning of *treaties* is that as established by the Law Regarding the Making of Treaties.

The treaties shall be made in accordance with the General Constitution of the Republic, respecting:

I. The individual guarantees, and
II. The division of Government branches, the distribution of powers and the legal authority of the State organs representing the people.

CHAPTER II
OBJECTIVES OF THE CELEBRATION OF TREATIES

SECTION I
GENERAL OBJECTIVES

Article 3
In order to approve a treaty, the following general objectives shall be observed:

I. Contributing to improving the quality of life and the well-being of the Mexican population;

II. Promoting the management of the country's productive resources;
III. Promoting the access of Mexican products to international markets;
IV. Contributing to the diversification of markets;
V. Fostering the integration of the Mexican economy with the international economy, contributing to raising the competitiveness of the country; and
VI. Promoting transparency in international commercial relations, as well as full respect to the principles of foreign policy as stated in section X, Article 89, of the Political Constitution of the United Mexican States.

SECTION II
SPECIFIC OBJECTIVES

Article 4

Where appropriate, and in order to approve a treaty, it shall be made in accordance with the following particular objectives:

I. Regarding the solution of controversies:
   a) Granting of the same treatment to Mexicans and foreign nationals party in a controversy, according to the principle of international reciprocity;
   b) Assurances to the parties in a controversy of their right to have a hearing and the exercise of the right to have a defense; and
   c) Assurances that the composition of decision-making organs guarantees their impartiality;
II. Regarding unlawful practices of international commerce:
   a) Promotion of free competition, fostering fair practices in international commerce, and
   b) Establishment and promotion of adequate mechanisms to remedy the effects of unlawful commercial practices with countries' parties to a treaty;
III. Promotion of respect for intellectual property rights;
IV. Encouragement of promotion and reciprocal protection of investments, technology transfers, as well as the generation, diffusion and application of technological and scientific knowledge required for national development;
V. Elimination or reduction of unnecessary obstacles, incompatible with commerce, consistent with obligations under [national] law and international commitments;
VI. Prevention of asymmetries, differences and imbalances in the drafting of the treaties, as well as the corresponding measures to correct them; and
VII. Any other objectives consistent with the nature of the treaty.

CHAPTER III
INFORMATION PROCEDURE REGARDING THE MAKING OF TREATIES

Article 5

At the beginning of each ordinary session's period, the Senate, through the competent commissions, shall require, from the Secretaries of State and any federal government entity representing Mexico, a report regarding the beginning of formal negotiations of a treaty.

This report will include:

I. The reasons for the negotiation beginning, as well as the possible consequences for not doing so.
II. The benefits and advantages expected from the negotiation, as well as the expectation of compliance with the objectives of this law, corresponding to the treaty to be negotiated.
III. A program containing the scheduled process of negotiation.

The Senate commissions receiving the reports may create, for each particular treaty, a politically plural sub-committee in order to analyse and propose appropriate legislative measures, as well as to obtain information on the progress of the negotiations. The sub-committee may also interview civil servants, representatives of a particular group, experts or any person able to contribute to the process of negotiation through experience or knowledge.

Article 6

Upon receiving the information on the progress of the negotiations, the aforementioned commissions or sub-committees, shall require a final report from the Secretaries of State and any Federal government agency representing Mexico in the negotiations. The final report shall include the outcome of the negotiations, as well as the manner in which the objectives and requirements of this law were fulfilled. The final report shall be delivered with reasonable anticipation before the programmed signing date.

This final report shall also include a comprehensive and detailed study of:

I. The benefits obtained during the negotiation;
II. The extent of the negotiation;
III. The commitments made during negotiation; and
IV. The administrative and legal regulations to be modified as a result of the treaty.

Article 7
The Senate of the Republic may, if appropriate and based upon the aforesaid information, pass a resolution regarding the report, as stated in Articles 58 and 59 of the Internal Rules of the General Congress of the United Mexican States.

Article 8
During the period established by Articles 5 and 6 of this law, the Secretaries of State and any Federal government agency representing Mexico in a process of negotiation shall present periodic reports based on the scheduled program as stated in section III of Article 5. These reports shall be presented to the Legislative commissions or sub-committee.

The commissions or sub-committees may require the aforesaid information. They may also consult studies made by their assistants or by the competent agencies and secretaries of the Federal government.

In this regard, commissions or sub-committees may summon the above mentioned civil servants to appear before them.

Article 9
For the approval by the Senate of a treaty already signed, the following documents shall be submitted:

I. A document containing all administrative actions to be undertaken in order to achieve the objectives of the treaty;
II. An explanation of the effects of the treaty on the laws and regulations of Mexico;
III. The concessions made by Mexico during the negotiation;
IV. The manner proposed to comply with the objectives of the signed treaty;
V. The manner in which the treaty complies with the interests of Mexico; and
VI. The reservations made by the countries that signed the treaty and the reasons therefore.

Article 10
For the approval of a treaty by the Senate, as mentioned in the precedent Article, the Senate of the Republic or the Permanent Commission of Congress shall send the treaty to the competent commissions in the session held after the date in which the Federal Executive have submitted the treaty to the Senate.

CHAPTER IV
PARTICIPATION OF STATE AUTHORITIES, LABOR UNIONS, BUSINESS AND PRIVATE ORGANIZATIONS

Article 11
Without any distinction, the citizens and business and private organizations, as well as labor unions, shall be able to express their opinion before the Senate of the Republic.

The expression of opinion from citizens and organizations to the related commissions may be in a hearing or in writing. The hearings and documents shall be public, except if the States' law establishes otherwise.

Article 12
The Senate of the Republic, through their commissions, shall receive and take into account the proposals made by State governments or legislatures.

CHAPTER V
GENERAL PROVISIONS

Article 13
For the application of time limits and terms established in this Law, *work days* shall mean every day, except Saturdays and Sundays and the days established in Article 74 of the Federal Labour Law.

Article 14
All matters not regulated expressly by this Law, shall be governed by the Law of International Commerce, the Law Regarding the Making of Treaties and other legal applicable dispositions.

TRANSITORY ARTICLES

First: This Law shall enter into force the day after its publication in the Official Bulletin of the Federation.

Second: If the Federal Executive has already initiated negotiations of treaties, it shall provide the information required in Article 5, as well as the status of the negotiation process, as stated in Article 6 of this Law.

Done in Mexico, D.F., 29th April, 2004.

Published in the Official Bulletin of the Federation on September 2, 2004.

ANNEX D

OFFICIAL PROCLAMATION OF A TREATY

SEAL OF THE PRESIDENCY OF THE REPUBLIC

PRESIDENT OF THE UNITED MEXICAN STATES,

FOR ALL WHO SEE THIS, MUST LEARN,

ON THE DATE . . . . WAS SIGNED IN . . . . THE CONVENTION. . .

THE CONVENTION WAS APPROVED BY THE CHAMBER OF SENATORS OF THE HONORABLE CONGRESS ON . . . . ACCORDING TO THE DECREE . . . . PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE DATED ON. . . .

BY VIRTUE OF, I. . . ., PRESIDENT OF THE UNITED MEXICAN STATES, IN USE OF THE POWER CONFERRED TO ME BY THE TENTH PARAGRAPH OF THE EIGHTY NINTH ARTICLE OF THE MEXICAN POLITICAL CONSTITUTION, RATIFY AND CONFIRM, THE CONVENTION . . . . AND I PROMISE, ON BEHALF OF THE MEXICAN NATION, TO FULFILL AND OBSERVE THE CONVENTION.

IN FAITH OF THE ABOVE, I ISSUE THIS DOCUMENT, SIGNED BY MY HAND AND AUTHORIZED BY THE GREAT SEAL OF THE NATION, AND COUNTERSIGNED BY THE SECRETARY OF FOREIGN AFFAIRS ON DATE . . . .

PRESIDENT

SECRETARY OF FOREIGN AFFAIRS

ANNEX E

OFFICIAL PROCLAMATION OF A TREATY WITH A RESERVATION

SEAL OF THE PRESIDENCY OF THE REPUBLIC

PRESIDENT OF THE UNITED MEXICAN STATES,

FOR ALL WHO SEE THIS, MUST LEARN,

ON THE DATE . . . . THE PLENIPOTENTIARY OF THE UNITED MEXICAN STATES, DULY AUTHORIZED FOR THAT EFFECT, SIGNED, AD REFERENDUM, THE CONVENTION . . . . OPEN FOR SIGNATURE IN THE CITY . . . . ON THE SAME DATE.

THE QUOTED CONVENTION WAS APPROVED BY THE CHAMBER OF SENATORS OF THE HONORABLE CONGRESS DATED ON . . . . ACCORDING TO THE DECREE PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE DATED ON . . . . WITH THE FOLLOWING RESERVATION:

> "THE GOVERNMENT OF MEXICO MAKES AN EXPLICIT RESERVATION TO ARTICLE X BECAUSE IT IS CONTRARY TO ALL . . . RIGHTS THAT INHABITANTS IN MEXICO POSSESS IN ACCORDANCE WITH THE POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES."

BY VIRTUE OF, I . . . . THE PRESIDENT OF THE UNITED MEXICAN STATES, IN USE OF THE POWER CONFERRED ON ME BY THE TENTH PARAGRAPH OF THE EIGHTY NINTH ARTICLE OF THE MEXICAN POLITICAL CONSTITUTION, RATIFY AND CONFIRM, THE QUOTED CONVENTION . . . . AND I PROMISE, ON BEHALF OF THE MEXICAN NATION, TO FULFILL AND OBSERVE THE CONVENTION.

IN FAITH OF THE ABOVE, I ISSUE THIS DOCUMENT, SIGNED BY MY HAND AND AUTHORIZED BY THE GREAT SEAL OF THE NATION, AND COUNTERSIGNED BY THE SECRETARY OF FOREIGN AFFAIRS ON DATE. . . .

PRESIDENT

SECRETARY OF FOREIGN AFFAIRS

ANNEX F

MESSAGE TO THE EXECUTIVE FROM THE SENATE

GOVERNMENT DIRECTION, SECRETARY OF GOVERNMENT,

FOR THE RELEVANT CONSTITUTIONAL EFFECTS, WE ALLOW OURSELVES TO FORWARD YOU THE DECREE THAT WAS ISSUED TODAY, IN PRIVATE SESSION, BY THIS CHAMBER OF SENATORS, IN WHICH WAS APPROVED THE CONVENTION . . . . MADE IN . . . . DATED ON . . . .

THIS LETTER AND ITS ANNEXES ARE RELATED TO YOUR LETTER NUMBER . . . . DATED ON . . . . FROM THE GOVERNMENT DIRECTION.

SENATOR SENATOR

ANNEX G

FULL POWERS

SEAL OF THE PRESIDENCY OF THE REPUBLIC

PRESIDENT OF THE UNITED MEXICAN STATES

FOR ALL WHO SEE THIS, MUST LEARN,

I HEREBY GRANT TO . . . . THE NECESSARY FULL POWERS TO SIGN AD REFERENDUM THE CONVENTION BETWEEN THE UNITED MEXICAN STATES AND . . . .

IN FAITH OF THE ABOVE AND AUTHORIZED WITH THE GREAT SEAL OF THE NATION, AND COUNTERSIGNED BY . . . . SECRETARY OF FOREIGN AFFAIRS, I ISSUE THIS DOCUMENT, IN THE RESIDENCE OF THE FEDERAL EXECUTIVE POWER, IN MEXICO CITY, ON DATE . . . .

PRESIDENT

SECRETARY OF FOREIGN AFFAIRS

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Abbreviations

Federal Official Gazette	Diario Oficial de la Federación
GATT	General Agreement on Tariffs and Trade
ILM	International Legal Materials
LOAPF	Ley Orgánica de la Administración Pública Federal
NAFTA	North American Free Trade Agreement
SG	Secretaría de Gobernación
SRE	Secretaría de Relaciones Exteriores
Treaty Law	Law Regarding the Making of Treaties

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CHAPTER FOURTEEN

NATIONAL TREATY LAW AND PRACTICE: THE NETHERLANDS

J.G. Brouwer

I. Introduction

In 1813, when the Netherlands regained its independence after almost 20 years of French rule, little was left of the former confederational structure. There was a strong wish not to restore this weak form of government, in which the States-General, composed of the representatives of the provinces, were responsible for foreign affairs. In 1814, the Dutch Constitution concentrated the treaty-making power in the hands of the Sovereign. It was the first time in history that the States-General were not a party to the treaty-making procedure. The one and only obligation of the King was to notify the States-General of treaties that had been concluded.

However, an expanding range of treaties was concluded. While in the eighteenth century, treaties generally had related to peace, political alliances, tariffs, commerce and navigation, in the mid-nineteenth century, they started to deal with more varied aspects of State activity. As a result, an accompanying tendency toward more democratic procedures in the treaty-making process developed.

In 1840, a decision of the Supreme Court, holding that the Treaty concerning Rhine navigation had to be considered as a formal source of law in the Netherlands, sounded the overture to redistributing the treaty-making power between the executive and the legislative branches. When the Constitution was revised in 1848, the States-General succeeded in including a provision guaranteeing them the right of prior approval of treaties involving "statutory rights."

It appeared, however, that the States-General, at that time already considered to be a parliament in the modern sense of the word, wanted to control the conclusion not only of law-making treaties, but also of political treaties in order to be involved in foreign policy decisions. The culmination of this strong desire was the requirement in the Constitution of 1953 of prior parliamentary approval for all treaties.

Since the 1953 revision, there were no substantial changes with respect to the treaty-making power until the Kingdom Act[1] of 1994 on the Approval and Publication of Treaties ("Kingdom Act"), when the States-General once more strengthened their position in the treaty-making process.[2] This Act was passed in response to a desire to remove, among other things, the provisions on approval of treaties from the Constitution.

II. Treaty-Making Law and Practice

A. *The Treaty-Making Power*

Today, the treaty-making power in the Kingdom of the Netherlands is a shared one: the Government, consisting of the King or Queen (the head of the state) and cabinet ministers, may bind the Kingdom of the Netherlands by a treaty, provided that Parliament has approved this action.

On the international plane it is the head of the state who, by virtue of the office, has the power to bind the Kingdom.[3] By and large, however, the international representation of the state through the Crown is a fiction. Ever since the mid-nineteenth century, the King has acted only upon the instruction of the Minister for Foreign Affairs, who, in turn, is held politically responsible for these acts. The making of foreign policy and the execution thereof are the business of this cabinet minister, in cooperation with Parliament. Every action by the Crown in this field requires this minister's countersignature.[4]

A royal decree of March 6, 1950 permanently authorizes the Minister for Foreign Affairs to conclude treaties that do not require ratification by the King. This document also authorizes the Minister for Foreign

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[1] Whether a Kingdom Act or a common Act of Parliament is required depends on whether its subject is a Kingdom matter or not. The conclusion of treaties is considered to be a Kingdom matter. The parliamentary bodies of the Netherlands Antilles and Aruba inform the Netherlands Parliament with respect to their opinion as regards bills on Kingdom matters.

[2] *Rijkswet goedkeuring en bekendmaking van verdragen en bekendmaking van besluiten van volkenrechtelijke organisaties* (Kingdom Act on the Approval and Publication of Treaties), *Annexes to the Proceedings of the States-General*, 1988–1989, 21214 (R 1375) [hereinafter: *Kamerstukken II*].

[3] The present Constitution no longer explicitly stipulates this; on the occasion of the revision of the Constitution in 1983 a provision stating this was deleted. In some cases, moreover, the Kingdom of the Netherlands no longer possesses the international capacity to conclude treaties. *See* H.G. Schermers, *The Internal Effect of Community Treaty-Making*, in *Essays in European Law and Integration*, 167–173 (1982).

[4] *See* Annex A (Neth. Const. Art. 42).

Affairs to appoint a proxy – a Kingdom's ambassador or a Kingdom's delegate – to conclude treaties on his behalf. In the case of treaties that require ratification, the authorization is issued by the King on the recommendation of the Minister for Foreign Affairs. (*See* Annex F.1).

Although, in recent years, the prime minister's political influence has been broadened – in particular, by his participation in the meetings of the Heads of Governments in the European Union[5] – under Dutch constitutional law he still needs authorization to sign a treaty. In contrast, under international law the head of a government is *competent ex officio* to conclude treaties.[6]

Under internal law, the treaty-making process at the executive level is considered to be primarily a collective responsibility of the government. Article 45 of the Constitution states that the Council of Ministers, generally known as the Cabinet, shall consider and decide upon overall policy and shall promote the coherence thereof. According to the Standing Order for the Council of Ministers, the making of treaties is considered to be an element of general government policy, with a few minor exceptions.[7]

If the Cabinet decides that the Netherlands should become a party to a treaty, the treaty must be submitted to the States-General, since Article 91 of the Constitution provides that the Kingdom shall not be bound without prior approval of the States-General, although this approval may be tacit. The same Article contemplates that Parliament may specify by statute those cases in which approval is not required. (*See* Annex A).[8]

B. *The Treaty Concept*

Under Dutch constitutional law, the precise meaning of the word "treaty" is crucial, since an agreement that can in fact be qualified as a "treaty" must be submitted for parliamentary approval. In the current text of the

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[5] *See* L.F.M. Besselink, *De Minister-President en de Minister van Buitenlandse Zaken* (The Prime Minister and the Minister for Foreign Affairs), TBP 801 (1992).

[6] *See* Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27, Art. 7(2)(a), *reprinted in* 8 *I.L.M.* 678 [hereinafter Vienna Convention]. The Netherlands became a party to the Vienna Convention on April 9, 1985.

[7] Treaties which do not require parliamentary approval and do not relate to important matters of foreign policy, for example a treaty with an international organization concerning a symposium hosted by the Dutch Government, may be concluded without being considered and decided upon by the Cabinet.

[8] The total number of treaties concluded is approximately 8,000. This figure, however, is an estimate and cannot be accurately checked, since the data are not computerized. For the same reason, it is difficult to say how many of these agreements are still in force, and how many are inoperative. At present about 100 treaties a year are entered into.

Constitution of 1983, the term "treaties" (*verdragen*) replaces the term "international agreements," used in the Constitution since 1953. The change in terminology was not intended to have any material effect. According to the official definition in the Explanatory Memorandum on the Constitution of 1983, a treaty is still considered to be any agreement, irrespective of its name or form, that binds the Kingdom of the Netherlands under public international law.[9]

The present constitutional term "treaties" is, in some respects, wider than the term "treaty" in Article 2 of the Vienna Convention on the Law of the Treaties ("Vienna Convention"),[10] to which the Netherlands became a party on April 9, 1985. Dutch constitutional law proceeds on the assumption that both states and international organizations have the capacity to conclude treaties. In theory the concept also comprises oral agreements. In Dutch treaty-practice, however, the conclusion of treaties in oral form is extremely rare. On the occasion of the revision of the Constitution in 1983 the government declared that it was against verbal agreements in order to obviate problems in establishing their existence and content.

On the other hand, the constitutional approach to the term "treaties" is narrower in other respects. Whereas the Vienna Convention speaks of "governed by international law," the constitutional concept requires a *consensus ad idem* to create or change obligations "binding under public international law." Consequently, according to international law non-binding agreements, like gentlemen's agreements and agreements on policy, fall outside the constitutional scope. This may also be the case with the so-called "administrative agreements." The position of administrative agreements is, however, less evident and far more complicated.

The situation is clear with respect to those administrative agreements that necessarily represent the outcome and implementation of approved treaties between the Kingdom of the Netherlands and other states, for example, numerous administrative agreements in the field of social security and Dutch aid to developing countries. These agreements, concluded pursuant to Article 7(b) of the Act on Approval and Publication of Treaties (*see* Annex C) by authorities that have express power to do so, undeniably constitute treaties and are binding under international law.

It is not clear that administrative agreements that are autonomously concluded by authorities not vested with express powers to do so (for example ministers, departments, government agencies and other public bodies) are binding under international law. They appear in different

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[9] *Kamerstukken II*, 1979–1980, 15049 (R 1100), No. 3, at 6.
[10] Vienna Convention, *supra* note 6, Art. 2(a).

forms and qualities and generally stem from the desire to lay down international rules while avoiding the time-consuming process of treaty making. Their contents vary widely.[11] They may contain rules governing the exercise of discretionary powers of administrative bodies in different countries for the purpose of coordinating internal policies, but they can also affect rules concerning joint action with regard to the execution of treaty provisions.

According to Sondaal,[12] the common feature of these agreements is that the authorities concerned do not intend to create binding obligations for the Kingdom under public international law and that, consequently, these are no "treaties" in the formal sense.[13] The reach of these agreements must therefore be very limited: they cannot create legal obligations.

Vierdag advocates a more differentiated approach. In each case, it must be decided whether a particular administrative agreement forms a treaty. In his opinion, some of these autonomously concluded administrative agreements do bind the Kingdom of the Netherlands positively under public international law.[14] The fact is, however, that administrative agreements are never submitted to Parliament for approval.

Private law contracts are distinctly outside the constitutional scope. Such contracts are for the greater part identifiable in that they specify the applicable municipal law. The same holds for purely unilateral acts. However, whether an act can be qualified as such depends on the legal consequences that it carries. Of course, a unilateral act is treated as if it were a treaty in cases where it establishes bilateral engagements.

The constitutional requirement of parliamentary approval does not apply to decisions of international organizations, or its agencies, which result from exercising their power to legislate, conferred on them by a treaty, in accordance with Article 92 of the Constitution. These decisions become binding on the Kingdom of the Netherlands automatically, that is without any further legal action of the Netherlands, provided that the international institution does not exceed its authorization. On the other hand, prior parliamentary approval is required for decisions of international organizations that amend treaties concluded under their auspices, if no such legislative power was conferred in the original treaty on this international institution.

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[11] *See* M. Bothe, "Legal and Non-Legal Norms: A Meaningful Distinction in International Relations," 1980 *Neth. Y.B. Int'l. L. 70–75.*

[12] H.H.M. Sondaal, "Dutch Treaty Practice," 1988 *Neth. Y.B. Int'l L.* 179, 184.

[13] *See* Vienna Convention, *supra* note 6, Art. 7(1).

[14] E.W. Vierdag, *Spanningen tussen recht en praktijk in het verdragenrecht*, (Tension between Law and Practice in the Law of Treaties) *Mededelingen NVIR, Preadvies* (Report submitted to the International Society of International Law), 1989 *NVIR* 36–73.

C. *The Municipal Procedure*

1. *Executive Authorization*

The power to negotiate an international agreement is an executive prerogative. This must be so since the external representation of the state on the international plane is entrusted to the executive. Discussions in 1993 about the Bill on Approval and Publication of Treaties, however, clearly showed that Parliament wanted a voice at an early point in time of the treaty-making process. For that reason, the Kingdom Act confers on the Minister for Foreign Affairs the obligation to submit to Parliament a list of draft treaties on which negotiations are proceeding, in order to enable the States-General to discuss the contents of treaties at a stage in which the text has not yet been established as definitive.[15] The initiation and conduct of negotiations with a view to concluding a treaty, however, is traditionally a matter for the Government.[16]

There is, in fact, at the executive level, a large measure of latitude to initiate negotiations on a treaty. In order to strike a balance between the political responsibility of the Minister for Foreign Affairs for the conclusion of an agreement and the political responsibility that other Ministers may have for the subject matter of an agreement, the coordinating body for treaties – the Treaties Department of the Ministry for Foreign Affairs – has to be informed of any intention of the executive to conclude a treaty.

No detailed regulations and procedures exist in respect of the negotiations of treaties. Only now and then are written instructions on negotiations deemed necessary. In those cases, instructions are drawn up in consultations among the ministries concerned. Instructions on negotiations of any particular significance are submitted to the Council of Ministers for approval.

Once the text of an agreement has been finalized, it is submitted to the Council of Ministers for approval.[17] After the cabinet has approved it, the treaty will be signed, either with or without reservation as to ratification, acceptance or approval, depending on whether or not parliamentary approval is required.

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[15] *See* Annex C (Kingdom Act on Approval and Publication of Treaties (1994) (Neth.), Art. 1) [hereinafter "Kingdom Act"]; *compare* United States Department of State Circular No. 175, Purpose 1.2 (Dec. 13, 1955).

[16] Twice a year, the Minister for Foreign Affairs submits a list of draft treaties on which negotiations are proceeding on behalf of the Kingdom. On this list the minister indicates draft treaties of significant political weight. *See* Annex C (Kingdom Act, Art. 1).

[17] In rare cases, treaties are signed without the prior approval of the Council of Ministers. *See supra* note 7.

2. *The Council of State*

According to Article 73 of the Constitution, the Council of State – the Government's legislative advisor – shall be consulted on proposals for the approval of treaties by parliament. The Council's recommendations influence the decision whether to enter reservations or make declarations (as well as the content and formulation thereof) on becoming a party to the treaty, the type of parliamentary approval (tacit or explicit), and the need for implementing legislation, as well as its form and content.

3. *Parliamentary Approval*[18]

Article 91 of the Constitution provides that treaties without the prior approval of the States-General shall not bind the Kingdom, whether they are formal treaties subject to ratification or agreements entering into force upon signature.[19] To prevent this requirement hindering rapid and efficient action by the Government in the international plane, the same provision stipulates that an Act of Parliament may exempt treaties from this rule. The Kingdom Act on Approval and Publication of Treaties indicates exemptions from the requirement of approval, as well as exceptions in the meaning of approval, once consent to bind the Kingdom has been expressed. The differences in the Kingdom Act are not always obvious. In these cases prior approval is not required, unless a treaty contains provisions which conflict with the Constitution or result in such a conflict.[20]

3.a. Exemptions

The six cases wherein parliamentary approval is not required at all are summed up in Article 7 of the Kingdom Act. (*See* Annex C.) The oldest exemption, introduced into the Constitution of 1887, is the category of treaties the conclusion of which is authorized by an Act of Parliament (Art. 7(a)). Only a very small percentage of treaties are concluded on this basis. In general parliament's opinion is that it should not grant this authorization too lightly.

The second case in which parliamentary approval is not required (Art. 7 (b)), which occurs more frequently (about 20 percent of the time), pertains to treaties solely concerned with the implementation of an approved treaty, unless the States-General express within 30 days of

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[18] Under Dutch Constitutional law, there is no possibility of submitting treaties to a referendum vote.

[19] Article 91 also applies to decisions of international organizations which require further legal action to become binding.

[20] *See* Annex C (Kingdom Act, arts 10(1), and 15(1)).

notification, a wish that the implementing treaty be submitted for approval.[21] Two criteria are applied to determine whether a treaty fits this category. The first is whether the basic treaty entails a legal obligation to conclude an implementing treaty. The second is whether the basic treaty indicates clearly which matters require further regulation. Parliament, when approving the basic treaty, must be able to determine with precision what may be agreed to in the future under the heading of implementation.[22]

The third exemption (Art. 7 (c)) concerns the treaties that involve no substantial financial obligations for the Kingdom and have been concluded for a period not exceeding one year.

Article 7(d) enumerates the exemption for secret or confidential treaties. This exemption, like the three aforementioned ones, was already in existence, but is now explicitly set forth in the Kingdom Act. Strictly speaking, Article 7(d) is not an exemption, because Article 11 of the Kingdom Act states that such a treaty shall be submitted to parliament for approval *post factum* as soon as it no longer needs to remain secret or confidential. However, such a situation has never occurred.

The exemption mentioned under Article 7(e) represents an innovation. It exempts from parliamentary assent treaties extending treaties that are about to expire. In 1953 the Government suggested this type of exemption, but the States-General rejected it, fearing the possibility of prolonging an earlier treaty without parliamentary approval. The reason put forward by Parliament then was that circumstances might change fundamentally compared to those existing at the time of the initial conclusion of the treaty. To surmount this disadvantage, the States-General are now, pursuant to Article 9(2) of the 1994 Kingdom Act, authorized to request that the prolongation treaty be submitted for approval within 30 days of the notification.

The last exemption, found in Article 7(f) is also a novelty: it exempts treaties the purpose of which are to amend an annex that is an integral part of an existing treaty and the contents of which aim to implement the provision of the approved treaty of which it is an annex. This provision was the product of recent criticism emanating from the Council of State directed at the Government's practice of regarding annexes to

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[21] *See id.*, Art. 8.

[22] The decisions within the North Atlantic Treaty Organization about the modernization of tactical nuclear weapons – in particular the deployment of cruise missiles armed with nuclear warheads on Dutch territory – could have been formally looked upon as mere implementation of the Mutual Defense Assistance Agreement of 1951, concluded with the United States. Because of considerable opposition in the Lower House, however, the exchange of letters concerning this decision was submitted for express approval. (*Kamerstukken II*, 1977–1978, 15049 (R 1100), No. 9, at 5.)

a treaty as implementing the treaty. As a result, amendments to existing annexes or subsequent new annexes came under the heading of implementing treaties and consequently were not subject to parliamentary assent, even though the annexes form an integral part of the treaty and even though the basic treaty fails to specify clearly what any subsequent annexes or amendments to previous annexes will entail.

3.b. Approval

Post Factum: A second category in the Kingdom Act on Treaties comprises treaties that are submitted to Parliament for approval once consent to be bound has been expressed. Article 10 regulates the "provisional entry into force" of treaties and provides that the Kingdom may be bound immediately if, in exceptional cases of a compelling nature, it would be definitely prejudicial to the interests of the Kingdom if the treaty were not to enter into force before approval. In such cases, the treaty shall subsequently be submitted to the States-General for approval as soon as possible. Such a treaty shall be entered into with the reservation that it will be terminated should approval be withheld.[23]

In Article 15 of the Kingdom Act the "provisional application" of treaties has been given an explicit legal basis. The conditions for the provisional entry into force are notably more stringent than those for the "provisional application" of treaties: "in case the interests of the Kingdom so require, a treaty may be applied provisionally pending its entry in force." At the same time, the provisional application is restricted to treaties that do not conflict with an Act of Parliament or result in such conflict, unless these treaties are in the category that does not require the approval of the States-General.[24]

4. *Notification of Treaties*

The decision of whether or not a treaty requires prior parliamentary approval is taken at the executive level. Parliament is not consulted on this matter.[25] In order to assess whether a treaty has correctly not been submitted to the States-General, Parliament must be acquainted with these treaties. Accordingly, Article 13 of the Kingdom Act on Treaties dictates that the States-General shall be notified as soon as possible of treaties by which the Kingdom is bound and which, pursuant to the provisions of Article 7, require no approval or, pursuant to Article 10,

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[23] Article 12 of the Kingdom Act states that if approval is withheld, the treaty shall be terminated as soon as this is legally possible. *See* Annex C.

[24] *See* Annex C (Kingdom Act, Art. 15(2)).

[25] The opinion of the Treaties Department in this regard is predominant.

require no prior approval. Notification of treaties of a secret or confidential nature shall take place subject to conditions unless the interests of the Kingdom dictate that the notification shall not take place. In the event a treaty is to be provisionally applied, the States-General shall be notified of this without delay.[26]

In the event that the States-General differ with the Government's view and consider that a notified treaty does need prior parliamentary approval, it may make use of a common political instrument: the right to interpellate pursuant to Article 68 of the Constitution. (*See* Annex A).[27]

In addition to the requirement of notification *post factum*, discussed above, the 1994 Kingdom Act on the Approval of Treaties obliges the Government to notify Parliament of two categories of treaties before expressing its consent to be bound. This obligation of prior notification applies (a) where the Government intends to conclude a treaty that solely concerns the implementation of an approved treaty, and (b) where the Government intends to extend a treaty which is about to expire.[28]

A novelty is found in Article 13(4). It provides that the Government must inform the States-General immediately when a treaty is approved by the parliament, but the Government decides against the Kingdom being bound by that treaty. This provision again demonstrates the tendency in the 1994 Kingdom Act towards an upgrading of parliament's position in the process of treaty making.[29]

5. *The Parliamentary Approval Procedures*

During the revision of the Constitution in 1983 the provisions on how approval of treaties should be granted were deleted. To enhance flexibility and to enable changes to be made in the approval procedure, if so desired, Article 91(2) of the Constitution delegates this subject to the regular Legislature.

In the 1980s, when the contents of the Bill on the Approval of Treaties were discussed preliminarily in literature, some treaty-lawyers advocated abandoning the use of an Act of Parliament to express explicit approval of a treaty.[30] Strictly speaking, this use of an Act of Parliament is improper. Legislation is the result of a joint act of Government and Parliament, whereas approving a treaty is, above all, the outcome of a unilateral

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[26] *See* Annex C (Kingdom Act, Art. 15(4)).
[27] *Kamerstukken II*, 1979–1980, 15049 (R 1100), No. 10, at 6.
[28] *See* Annex C (Kingdom Act, arts. 8(1) and 9(1)).
[29] *See id.*, Art. 13(4); *see also id.*, Art. 9(3).
[30] J.J.E. Schutte, *Goedkeuring en uitvoering van verdragen*, (Approval and Implementation of Treaties), *in Kracht Van Wet*, (W.J. van Eijkernbundel), 246 (Deventer, 1984).

statement of Parliament. Implicitly – it is not declared in so many words – an Act concerning approval of a treaty authorizes (possibly subject to conditions)[31] the Government to express its consent to be bound by a treaty.[32]

In the 1994 Kingdom Act the prevailing practice regarding the approval of treaties, which had grown over the years, has been perpetuated. Article 3 sets forth that approval may be tacit or express.[33] An Act of Parliament shall grant express approval and tacit approval is considered to have been given if, within 30 days of the submission of the treaty to both Houses of the States-General for approval, Parliament has not expressed its wish that the treaty will be subject to express approval.[34] If such a will is expressed, the Government introduces a Bill for approval as soon as possible.[35]

Express and tacit approval are of absolute equal standing in the sense that the manner of approval does not create any difference in the legal effect of treaties. Taking into account that the purpose was to simplify the procedure, tacit approval is requested if there is no need to discuss the treaty with the Government, nor a necessity for implementing Acts. Otherwise, it is more efficient to deal with the Act concerning approval together with the Act concerning implementation.

Under Article 6 of the Kingdom Act, a treaty that contains provisions that conflict with the Constitution or could result in such conflict must be submitted for express approval. Such a Bill shall state that approval is granted having regard to Article 91 paragraph 3, which decrees that in the event a treaty contains any provisions that conflict with the Constitution, these provisions may be approved by the Chambers of the States-General only if at least two-thirds of the votes cast are in favor of approval.

Article 91 paragraph 3 contains no substantive criterion by which to decide whether a treaty-provision or its implementation is in conflict with the Constitution. The prevailing opinion is that there is a conflict with

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[31] The States-General must, of course, also accept reservations to a treaty that requires parliamentary approval.

[32] An act concerning approval of a treaty does not oblige the Government to become a party to a treaty once approved. The decision to bind the Kingdom by a treaty is a governmental power, over which the Parliament can exercise its customary supervision. However, if the Government decides not to become party to an approved treaty, it must, pursuant to Article 13(4) of the 1994 Kingdom Act inform Parliament of its decision immediately.

[33] Approximately two-thirds of the treaties are submitted for tacit approval.

[34] Article 5 of the Kingdom Act prescribes that the wish must be expressed by or on behalf of one of the Houses or at least a fifth of the number of members. *See* Annex C.

[35] *See* Annex C (Kingdom Act, Art. 5(3)).

the Constitution when a treaty or the implementation thereof is incompatible with specific constitutional provisions. It is first and foremost the Government that decides whether a treaty-provision is incompatible with the Constitution, but, of course, Parliament may differ from the Government's view.[36]

6. *Denunciation of Treaties*

According to Article 91 of the Constitution, parliamentary approval is required not only when the Government considers it desirable for the Kingdom to become party to a certain treaty, but also when the Government wishes to denounce a treaty. Again, the Constitution leaves it to the Legislator to regulate which treaties are exempted from the requirement of prior approval. According to Article 14 of the 1994 Kingdom Act, the provisions concerning approval and publication apply *mutatis mutandis* to plans to denounce treaties. Thus, for example, in the circumstances referred to in Article 7(a) and 7(b), the denunciation of treaties is exempted from the requirement of parliamentary approval. On a similar basis, the Government is authorized to denounce a treaty without prior approval in exceptional circumstances of a compelling nature, within the meaning of Article 10.[37]

D. *Expressing Consent to Be Bound*

Article 11 of the Vienna Convention, to which the Netherlands is party, recognizes a multiplicity of methods for expressing a State's consent to be bound by a treaty. Signature or exchange of instruments, however, cannot as a rule bind the Kingdom under Dutch law. The States-General must approve treaties, with a few very specific exceptions. Expressing willingness to be bound by a treaty is permitted, once the Netherlands has notified the other contracting party that the constitutional procedures have been completed.[38]

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[36] Profound differences of opinion have existed about the constitutionality of the Treaty concerning the Deployment of Cruise Missiles, *Kamerstukken II*, 1985–1986, 19290, No. 1 and the Treaty Concerning the European Union (Maastricht-Treaty) of 1992. *See* N.H.M. Roos, *Grondwet En Kruisvluchtwapens* (Constitution and Cruise Missiles) (1986); A.W. Heringa, *De verdragen van Maastricht in strijd met de Grondwet* (Maastricht-Treaties in Conflict with the Constitution), 1992 *NJB* 749–52; M.C. Burkens et al., *Reactie*, (Reaction) 1992 *NJB* 861–66; J.G. Brouwer, *Wijkt het Unie-Verdrag van Maastricht af van de Grondwet of het Statuut* (A Conflict between the Maastricht Treaties, the Constitution and/or the Charter of the Kingdom?)," 1992 *NJB* 1045–1049.

[37] *See* Annex C (Kingdom Act, Arts. 10, 14(2)).

[38] Before treaties are entered into, the question of whether or not existing legislation needs to be modified and whether enabling legislation is required is thoroughly examined by the departments concerned, often at the instigation of the Treaties Department.

When expressing its consent to be bound by a treaty the Kingdom makes any declarations, interpretative or otherwise, and enters any reservations considered necessary and permissible in light of Article 19 of the Vienna Convention.[39] Reservations are included in the instrument of ratification, acceptance, approval or accession, because they specify to which part of the treaty the Kingdom shall not bind itself. Declarations, on the other hand, are made in writing but separate from the instrument itself.[40]

As soon as a bilateral treaty has entered into force,[41] the other party is asked whether it has the intention of registering the treaty with the United Nations in accordance with Article 102 of the United Nations Charter and, if not, whether the contracting party would have any objection to the Netherlands doing so. If no objection is raised, the Treaties Department asks the United Nations to register the treaty.

Obviously, this obligation in the United Nations Charter poses a problem with respect to secret and confidential treaties. They cannot, by their nature, be required to be registered. In reply to questions of the States-General (Lower House), the Government merely stated that Article 102 of the United Nations Charter does not cast doubts on the validity of unregistered treaties, but only provides that a party to any such treaty may not invoke an unregistered treaty before an organ of the United Nations. Considering the aim of Article 102 – to prevent States entering into secret treaties without the knowledge of their nationals, and without the knowledge of other States, whose interests might be affected by such a treaty – this answer is rather unsatisfactory.[42]

E. *The Position of the Netherlands Antilles and Aruba*

The treaty-making power is exercised on behalf of the Kingdom of the Netherlands. The Kingdom has the exclusive authority to act under international law. The constituent parts of the Kingdom of the Netherlands – the Netherlands (at times referred to as the "Kingdom of the Netherlands in Europe"), the Netherlands Antilles, and Aruba – do not

[39] It is standing practice to enter reservations only in the case of multilateral treaties.
[40] Sondaal, *supra* note 12, at 186.
[41] The registration of multilateral treaties is not usually dealt with in the treaty itself.
[42] J.G. Brouwer, *Het parlementaire lek in de goedkeuringsregeling verdragen* (The Democratic Leak in the Kindom Act on the Approval and Publication of Treaties), in: "*Parlement En Buitenlands Beleid* (Parliament and Foreign Policy)," *Preadvies* (Report submitted to the Society of Constitutional Law) 33 (1993).

possess the power to conclude treaties.[43] The countries individually have no such power.[44]

The quasi-federal structure of the Kingdom, in which each of the three entities has its own Constitution, is set out in the Charter for the Kingdom of the Netherlands of 1954 (*See* Annex B). The Netherlands Constitution is subordinate to this Charter. By virtue of the Charter, however, the provisions of the Netherlands Constitution often apply to matters that are of concern to the entire Kingdom. Kingdom matters are to be dealt with by special organs, as a rule the Netherlands organs, together with representatives from the overseas countries.[45] These Kingdom matters include foreign relations, of which the conclusion of treaties is a major part.[46]

Pursuant to Article 27 of the Charter, the overseas countries must be involved in the negotiation and implementation of any agreement that are deemed to affect them. The Governments of the overseas countries are informed of any intention to negotiate and conclude a treaty so as to avoid any dispute as to whether a treaty will affect the Netherlands Antilles and Aruba.

The three countries of the Kingdom decide individually on the desirability of a treaty. In case the overseas countries want to enter exclusively into a treaty, they need the co-operation of the Kingdom Government, since they do not have the international legal capacity to conclude treaties. With regard to economic or financial treaties, the Government of the Kingdom, must pursuant to Article 26 of the Charter, cooperate in concluding such a treaty. According to Sondaal there is considerable latitude in the application of this provision. Cooperation is given with respect to every kind of treaty the overseas countries wish to conclude.[47] If they wish, the Netherlands Antilles or Aruba can become a member of international organizations on the basis of treaties entered into by the Kingdom.[48]

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[43] Aruba is one of the six Caribbean islands originally constituting the Netherlands Antilles, but in 1986 it "seceded" from the other islands.

[44] *See* H.F. van Panhuys, "The International Aspects of the Reconstruction of the Kingdom of the Netherlands," 11 5 *NTIR* 1–31 (1958).

[45] The Kingdom's Government consists of the Netherlands Government enlarged with the Ministers Plenipotentiary of the Netherlands Antilles and Aruba. The latter are entitled to participate in meetings of the Netherlands cabinet and the Houses of Parliament in the event these organs are dealing with Kingdom affairs.

[46] *See* Annex B (Charter for the Kingdom of the Netherlands of 1954, Arts. 24–27 [hereinafter "Charter"]).

[47] Sondaal, *supra* note 12, at 229.

[48] *See* Annex B (Charter, Art. 28).

In principle, the influence of the overseas countries in the decision-making process is very limited. The Council of Ministers may decide to enter into negotiations for a treaty against the wishes of the overseas countries and may apply this treaty in these countries as well as in the Netherlands. There is, however, one type of international treaties to which the Netherlands Antilles and Aruba cannot be bound without their consent, and which cannot be denounced without their consent when in force. In the matter of economic and financial treaties affecting them, an absolute veto has been granted to the overseas countries.[49]

The Charter imposes special procedures with regard to the notification and approval of treaties that affect the overseas countries. When a treaty is submitted to the Netherlands Parliament, it is simultaneously sent to the parliamentary bodies of the Netherlands Antilles and Aruba. In the case of a treaty submitted for tacit approval, the Ministers Plenipotentiary of the Netherlands Antilles and Aruba have the right to request that the treaty be subject to express approval.[50] These provisions apply *mutadis mutandis* in the case of denunciation.[51]

In the case of a treaty submitted for express approval, the parliamentary bodies of the Netherlands Antilles and Aruba have the right to submit a report on the treaty after deliberation. During the debate on this treaty in the Netherlands Parliament, the Ministers Plenipotentiary of the overseas countries are entitled to attend and to furnish any information they consider desirable. In addition, these parliamentary bodies may designate one or more special delegates to participate in the debate.

If a treaty is intended to bind not only the Netherlands, but also the Netherlands Antilles and/or Aruba, then express approval must be effected by an Act of the Kingdom. When the treaty is not intended to bind one of the overseas countries, a common Act (*i.e.*, an act of the regular Dutch legislature) will suffice.[52]

F. *Treaty Law and Municipal Law*

1. *Preliminary Remarks*

The relationship between municipal law and treaty law is a very complex one, with which many generations of lawyers have wrestled. Historically, there have been various ways of approaching this fundamental problem.

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[49] *See id.*, Art. 25.

[50] *See id.*, Art. 24(2); Annex C (Kingdom Act, Art. 5(2)).

[51] *See* Annex B (Charter, Art. 24(3)).

[52] J.G. Lammers, "Municipal Aspects of Treaty-Making by the Kingdom of the Netherlands," *in* 1 *International Law in the Netherlands* 368 (1978).

A very common method in the Dutch legal literature is to analyze this relationship from the angle of the courts. However, this must lead to an unacceptable narrowing of the complexity of the question at issue. The courts are not the only authorities involved in applying treaty law: administrative and legislative organs must also respect the international undertakings.

In order to obtain a reliable analysis of the interrelation between treaty law and municipal law, it makes sense to identify five different aspects: (a) the hierarchical position of treaty law; (b) the legal duty of States to ensure that municipal law conforms to accepted international obligations; (c) the implementation system; (d) the internal position of treaty law in the municipal system of laws; and (e) the power of the judiciary to review laws incompatible with treaty provisions.

2. *The Hierarchical Position of Treaty Law*

Over the past two centuries the priority of treaty law over municipal law has never been seriously contested in the Dutch legal literature. Unmistakably, a partial explanation for this may be found in the fact that the Kingdom of the Netherlands owes its formal existence to a treaty: the Vienna Convention of 1815. It was not accidental that at the turn of the last century, when a theory of sovereignty emanating from Germany threatened to destroy international law altogether, the international lawyer, Hamaker, advocated that the municipal legal order should derive its legal force from the community of States. In his vision of the laws of mankind, all law constitutes a hierarchical system in which municipal law is by definition subordinated to international law.[53]

Van Vollenhove also rejected the old dogmas about sovereignty and the inherent rights of states, but he founded the priority of treaty law upon a voluntary basis. It is true, he argued, that each state is in principle equal and sovereign, but the word "sovereignty" does not signify an independent, unlimited and supreme power. A state is independent in the sense that it cannot be forced by another state to do something against its will. However, once it has agreed voluntarily to bind itself, then it is compelled to comply with the ensuing obligations. Entry into official relations with other countries presupposes that a State must accept the principles and rules of international law that together form the basis of relations between States.[54]

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[53] H.J. Hamaker, *De jongste geschiedenis van het internationale privaatrecht* (Recent History of International Private Law), 1903 *WPNR* 1723.

[54] C. van Vollenhove, *Omtrek en Inhoud Van Het Internationale Recht* (Scope and Content of International Law) 71–72 (1898).

Jitta presented a synthesis of the two theories, arguing by analogy with the development of a federal State that the voluntary character of the international legal order would, in the course of time, give way to a mandatory order.[55]

Krabbe based the priority of treaty law on a different theoretical assumption. In his view, a larger worldwide society has by its nature a greater value than a smaller regional society; consequently, rules stemming from the larger society, such as rules essential for the preservation of mankind, prevail as a matter of law over rules originating from the smaller entity.[56]

The common purpose of these theoreticians was to provide a solid foundation for the supremacy of international law. They were rather successful; the concept of the superiority of treaty law became a keynote in the Dutch legal theory. Of great importance, of course, was that the Permanent Court of International Justice plainly confirmed this supremacy in its jurisprudence. In its advisory opinion of 1930 it held that "it is a generally accepted principle of international law in the relations between powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[57]

Since its fundamental revision in 1953, the starting-point of the Constitution is the superiority of international law over municipal law. This supremacy, however, is not explicitly stated, but it underlies the Constitution.[58] Before the 1953 revision, the power to conclude treaties was a duplicate of that to make laws. Pursuant to the principle that all legislation must be hierarchically related, in the sense that lower legislation may not conflict with higher, the treaty-making organs were not authorized to conclude treaties that conflict with the Constitution, just as it is not permissible for the legislator to enact a Bill which deviates from the Constitution. In the Constitution of 1953, the assumed superiority of treaty law led to an extension of the treaty-making power. Article 91(3) now empowers the treaty-making organs to conclude treaties which conflict with the Constitution, provided that two-thirds of the votes in Parliament are cast in favor of such a treaty.

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[55] J. Josephus Jitta, "*Over de aard van het aard en plaats van het internationale recht* (About the Character of the International Order)," 1899 *Rechtsgeleerd Magazijn*, 99; 1900 *Rechtsgeleerd Magazijn* 155.

[56] H. Krabbe, *De Moderne Staatsidee* (A Modern Concept of State), 185 (1915).

[57] Advisory Opinion No. 17, "Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration," 1930 *P.C.I.J.* (ser. B), at 32.

[58] *See, e.g.*, Annex A (Neth. Const., Art. 91(3), Art. 94)).

3. *The Legal Duty to Comply with Treaty Law*

As a consequence of the precedence of international law, states are compelled to comply with treaty obligations. When states ratify a treaty, they exchange mutual undertakings to observe the terms agreed therein, and this of course implies an obligation undertaken towards some other party or parties. If this instrument relates to matters that concern the domestic legal order, the State that has contracted valid international obligations is bound to add or to modify its domestic law as may be necessary to ensure that its national law is in harmony with international obligations that is has accepted.[59] This principle is applicable not only for legislation in the limited sense of the term, but also to the municipal law in its widest connotation. A State cannot justify its noncompliance with treaty obligations because of any provisions of, or deficiencies in, its municipal law, or because of any special feature of its governmental organization.[60]

4. *The Implementation System*

International law grants sovereign states a wide choice of methods of incorporating treaties into national legal systems without attributing any absolute value to one or another doctrine. States are considered to be free to secure the conformity of their domestic law with treaty law in the way that seems to them most appropriate. International law imposes an obligation not of method but of result.[61]

Basically there are two different systems to perform treaty law: a system based on the doctrine of incorporation and another one founded on the doctrine of transformation. Since 1953, the Dutch Constitution adheres to the doctrine of incorporation. On the occasion of the revision of the

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[59] However, this is not to say that the mere existence of a measure in domestic law could *ipso facto* constitute an infringement of a treaty obligation in question; it is generally recognized that there is no breach of an international obligation unless and until the measure in question is actually applied and the practice violates or threatens to violate provisions guaranteed in the treaty.

[60] The Vienna Convention on the Law of Treaties reiterates this principle in Art. 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The only exception to this rule is Article 46 of the Vienna Convention which deals with the situation in which there is a manifest defect in the consent to be bound by a treaty.

[61] The principle of domestic jurisdiction, which is to determine by which means the compliance with international obligations is to be achieved by a State, has one clear exception. In a series of decisions, beginning with a famous case, *Costa v. Enel*, the Court of Justice in Luxembourg ruled that treaties creating the European Community operate as such within the national legal jurisdiction by their own nature and quality regardless of the constitutional system of a member State. European constitutional community law simply bypasses the national constitutional provisions. It compels members to accept the doctrine of incorporation.

Constitution, the treaty-making power was democratically legitimized by providing that treaties can only bind the Kingdom after parliamentary approval. With that constitutional revision, a main obstacle for giving direct effect to international treaties in the domestic legal order was removed.

Therefore, since 1953, treaty provisions binding the Kingdom are an integral part of the law of the land without any alteration or revision of the text, provided that they have been published.[62] As a rule, treaties are published in the Treaty Series of the Kingdom of the Netherlands (*Tractatenblad*). In exceptional cases, however, notification to certain persons of a treaty by the Minister for Foreign Affairs shall, for them, be the equivalent of publication.[63]

Once a treaty has come into force in international law, legislative, administrative and judicial authorities must accept the newly created legal situation as lawful and must take it into consideration when making their decisions. They must do all that is possible to apply the terms of the treaty considering their constitutional position in the State organization.

For the courts, the switch to a system of incorporation has had a consequence. Since the changeover, Article 120 of the Constitution has prohibited the courts from pronouncing on the constitutionality of treaties; that it is to say, the courts are not authorized to verify whether treaties have been concluded in accordance with the formal procedures of the Constitution, as worked out in 1994 in the Kingdom Act on the Approval of Treaties. The validity of a treaty, which has domestic effect as a norm of international origin, depends only on international requirements.[64] Neither Article 120 of the Constitution, nor any other rule of Dutch Law forbids courts to test whether an approved and internationally binding treaty violates another treaty or any other rule of international law.[65]

5. *Treaty Law within the Domestic Order*

The constitutional choice for the method of incorporation has an enormous impact on a municipal legal system. In a transformation system, for example, the treaty rules may be substituted at any level in the hierarchy of internal laws and regulations, either at a constitutional level (if there is a written constitution superior to the other laws), or at a level of an Act of Parliament. By contrast, in an incorporation system treaty

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[62] *See* Annex A (Neth Const., Art. 93).
[63] *See* Annex C (Kingdom Act, Art. 20).
[64] HR (Supreme Court) 1973 NJ No. 4. (August 31, 1972).
[65] HR (Supreme Court), 1991 NJ No. 4 (Nov. 10, 1989).

law is, in the nature of things, the superior law of the land. It is, after all, the international, prevailing norm that operates in the municipal system.

In an incorporation system, a duly ratified and approved treaty enters into force municipally at the same time as it does internationally. As a consequence, the Legislature is obliged to enact the implementing legislation required to make the treaty applicable, to repeal incompatible municipal law or to appropriate the funds necessary to execute the treaty obligations by the time the treaty enters into force for the Kingdom. The same holds for the executive. Executive organs are compelled to bring administrative regulations into line and to execute the municipal law in conformity with international obligations, provided that the requirement of publication, pursuant to Article 93 of the Constitution, has been fulfilled.[66]

In principle, the courts must also apply a treaty, provided that it is published and binding on the Kingdom and on the condition that the application of the treaty does not conflict with the judiciary's constitutional task. The Supreme Court considers that interpreting treaty-implementing legislation in harmony with this international obligation falls within its constitutional task.[67]

6. *Judicial Review*

In the recent past, there has been much debate about the contents and the bounds of the judiciary's task. Its main bone of contention is the introduction in 1956 of the concept of self-executing treaty provisions in Article 94 of the Constitution. This provision was intended to settle the power of the courts in case of a conflict between the applications of statutory rule – in particular an Act of Parliament – and a treaty provision.

A major consequence of the 1953 revision of the Constitution was that from then on, the international and prevailing norm established by a treaty has been part of the municipal system. Significance was given to this supremacy in Article 94 by stating that courts may not apply municipal law that conflicts with provisions of treaties in general.[68] However, on the occasion of the 1956 revision of the Constitution, this provision was amended. The power of the courts in Article 94 became

[66] Royal Decree, 1993 AB No. 385 (Feb. 19, 1993).

[67] HR (Supreme Court) 1919 NJ 371–374 (March 3, 1919); HR 1935 NJ pp. 5–8 (Dec. 17. 1934); HR 1976 NJ No. 551 (June, 15, 1976); HR 1992 NJ No. 107 (Nov. 16, 1990).

[68] J.G. Brouwer, *Verdragsrecht in Nederland* (Treaty Law in the Netherlands: A study of the Relationship between International Law and Municipal Law in a Historical Context) 142–145 (1992).

restricted to provisions of treaties that are self-executing: "Statutory regulations . . . [may not be applied] . . . if such application is in conflict with provisions . . . that are binding on all persons . . ."[69]

The Supreme Court regards treaty-law to be self-executing if the relevant treaty provision does not require additional legislation to make it legally effective in the municipal order.[70] To determine whether any legislative action is necessary, the court examines the terms of the treaty provision and the parties' explicit intentions.[71] The Supreme Court has never required the provision to explicitly address itself to individuals. In the *Cognac* case, for example, the Supreme Court determined that the treaty provision's orientation was only an important indication of its self-executing character.[72] If, at first sight, a treaty provision is meant to bind only the contracting parties, neither the Supreme Court nor other courts regard this wording as an impediment to the application of this treaty provision.[73] During the last ten years, courts have applied treaty provisions that have had nothing to do with the rights of individuals.[74]

The answer to the question of whether any action of the legislature is necessary to make a treaty provision effective in the municipal order is heavily dependent on what remedies a court has at its disposal. In order to ascertain the range of the court's power to apply treaty law, we have to return to the 1956 revision of Article 94, *id est* the amendment's background.

Where municipal law is in conflict with treaty law, a court may be confronted with two different options. A court can either (1) settle the conflict by setting aside a conflicting rule and applying the substituting treaty-provision or, where this offers no solution, (2) render an interpretation of the incompatible domestic rule in harmony with the treaty obligations. This method of interpretive transformation can have such far-reaching effects that in fact a court creates a completely new rule.

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[69] The term "self-executing treaty provision" was considered to be a synonym: *Kamerstukken II*, 1955–1956 4133 (R 19), No. 3, 5.

[70] HR (Supreme Court) 1960 NJ No. 483 (Feb. 24, 1960); HR 1998 NJ No. 724 (Jan. 19, 1998).

[71] HR 1986 NJ No. 688 (May 30, 1986).

[72] HR (Supreme Court) 1958 NJ (June 1, 1956).

[73] HR (Supreme Court), 1991 NJ No. 4 (Nov. 10, 1989); HR, 1984 NJ No. 96 (Sept. 27, 1983); and CRvB (Central Court of Appeal), 1996 AB No. 501 (May 29, 1996).

[74] Nollkaemper, P.A., *Toepassing van verdragsrecht door de Nederlandse rechter en het vereiste van een rechtsbelang*, (The Application of Treaty Law by Dutch Courts and the Requirement of a Legal Interest) *in Ongebogen Recht* (Straight Law), *Meijers-bundel* 107–117 (The Hague, 1998). *See e.g.*, "Administrative Law Division (Conciliation Department) of the Council of State," 1995 *AB* 24 (Dec. 30, 1994).

Concern about the reach of the latter method resulted in an amendment of Article 94 in 1956. In fact, the wish to sharpen this provision has its source in the separation-of-powers doctrine. The constitutional revisers thought that courts should be more reserved in modifying conflicting provisions of acts of Parliament in those cases in which the implementation of treaty law requires a decision to be made by the legislative and executive branches.

That is why courts narrowly interpreted "self-executing" for almost two decades thereafter. In case the application of an act of Parliament conflicted with a treaty provision, the Supreme Court only considered a relevant treaty provision to be self-executing when setting aside the domestic rule and applying the substituting treaty provision that could realize its enforcement.

However, courts gradually gave a broader interpretation of the notion of self-executing treaty. In 1972, the Supreme Court considered Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), which unmistakably contain an individual right to be self-executing, although the treaty provision in this particular case was applicable only by adding a new rule to Articles 14 through 16 of the Law of Criminal Procedure.[75]

In 1980, the Supreme Court modified the Law of the Civil Procedure by interpreting the statutory term "relative" in Article 959 in harmony with international obligations undertaken in Article 8 and Article 14 of the ECHR.[76]

Taking one thing with another, the Supreme Court was back in the constitutional situation that it was in before the 1956 revision. Consequently, new bounds had to be found. In a 1980 decision, the Supreme Court stated *obiter dictis* that if the enforcement of Article 8 of the ECHR by the court in the future would be against the principle of legal certainty, it would be obliged to refuse the application. Since 1982, the Supreme Court has employed a more general formula: if the enforcement of a treaty provision which in another case was determined to be self-executing, requires a legislative decision, the Court has not been able to apply the treaty provision.[77] Examining the Court's case law, one may say that such will be the case if there is a lack of judicially manageable standards

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[75] HR (Supreme Court), 1974 NJ No. 272 (April 23, 1974).

[76] HR (Supreme Court), 1980 NJ No. 463 (Jan. 18, 1980). Article 8 of the ECHR reads: "Everyone has the right to family life . . .;" Article 14 reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground . . ."

[77] HR (Supreme Court) 1985 NJ No. 230 (Oct. 12, 1984).

for resolving the question,[78] or when the issue involved ought to be resolved by the legislator.[79]

The Court's standard exactly fits the legislative intent which underlies the concept of provisions that are binding on all persons. For that reason, in my view and also of other authors,[80] the Supreme Court decides no more and no less than that the treaty provision in that particular case has a non-self-executing character. However, it should be admitted that the Supreme Court has never explicitly drawn this conclusion. That is why some authors argue that the Supreme Court's method of determining whether a treaty provision is self-executing or not still consists of an isolated approach to the international qualities of the treaty provision.[81]

Other courts have clearly and openly worked with the integrated approach of determining whether a treaty provision is self-executing.[82] With this method, courts no longer exclusively examine the treaty terms, but also the domestic statutory context in which the court is requested to give effect to the treaty provision.[83] If, in its domestic legal context, the treaty provision is unequivocal, and if its application does not compel the court to overstep its constitutional competence, it will be enforced.

As a consequence of this approach, the courts can enforce the very same treaty provision in some cases and not in others. Or, to put it differently, the self-executing character of a treaty provision may vary with the domestic situation.[84]

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[78] HR (Supreme Court), 1989 NJ No. 740 (Sept. 28, 1988); HR 1990 NJ No. 449 (Sept. 27, 1989).

[79] HR (Supreme Court) 1985 NJ No. 230 (Oct. 12, 1984); HR 1995 NJ No. 619 (April 18, 1995).

[80] H.R.B.M. Kummeling, *Internationaal recht in the Nederlandse rechtsorde*, (International Law in the Dutch Municipal Order) *in De Grondwet Als VoorWerp Van Aanhoudende Zorg* (The Constitution as an Object of Constant Care; *Burkensbundel* 369–385 (Zwolle, 1995); F.M.C. Vlemminx, *Een ieder verbindend verdragsrecht en de bevoegdheden van de bestuursrechter* (Self-Executing Treaty Law and the Powers of the [Administrative] Courts, 1999 NJB 949–955.

[81] Fleuren, J.W.A. & Viering, M.L.W.M., *Rechtstreekse werking en een ieder verbindende kracht: Europese inspiratie voor de nationale rechter*, (Direct effect and self-executing force: European Inspiration for Municipal Courts) *in Grensverleggend Staatsrecht*, (Opening New Constitutional Horizons), *C.A.J.M. Kortmannbundel* 101–139 (*Deventer*, 2001).

[82] CRvB (Central Court of Appeal), 1986 AB No. 299 (July 3, 1986); CRvB, 1989 NJB No. 6 (Feb. 16, 1989); CRvB, 1987 AB No. 543 (May 14, 1987); CRvB, 1988 AB No, 253 (Jan. 5, 1988).

[83] Provided that the constitutional system of incorporation is not thwarted by a treaty provision or a reservation; see HR 1969 NJ, No. 10 (Nov. 8, 1968).

[84] P.J. Boon, J.G. Brouwer and A.E. Schilder, *Regelgeving in Nederland* (Legislation in the Netherlands) 180–184 (*Deventer*, 1999).

III. Basic Data and Documentation

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ANNEX A

RELEVANT PROVISIONS OF THE NETHERLANDS CONSTITUTION

[Translation by the Dutch Ministry of Home Affairs]

Article 68

Ministers and State Secretaries shall provide, orally or in writing, the Chambers, either separately or in joint session, with any information requested by one or more members, provided that the provision of such information does not conflict with the interests of the State.

* * *

Article 90

The Government shall promote the development of the international rule of law.

Article 91

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States-General. The cases in which approval is not required shall be specified by Act of Parliament.
2. The manner in which approval shall be granted will be laid down by Act of Parliament, which may provide for the possibility of tacit approval.
3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the States-General only if at least two-thirds of the votes cast are in favor.

Article 92

Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3.

Article 93

Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Article 94

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

Article 95

Rules regarding the publication of treaties and decisions by international institutions shall be laid down by Act of Parliament.

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Article 120

The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

ANNEX B

RELEVANT PROVISIONS OF THE CHARTER OF THE KINGDOM OF THE NETHERLANDS

[As amended December 15, 1994]

[Translation by the Dutch Ministry of Foreign Affairs]

Article 24

1. Agreements with other Powers and with international organizations which affect the Netherlands Antilles or Aruba shall be submitted to the Representative Body of the Netherlands Antilles or Aruba simultaneously with their submission to the States-General.
2. If an agreement has been submitted for the tacit approval of the States-General, the Ministers Plenipotentiary may, within the period of time laid down for this purpose for the Chambers of the States-General, notify their wish that the agreement shall be subject to the express approval of the States-General.
3. The preceding paragraphs shall apply *mutatis mutandis* in respect of the denunciation of international agreements, with the proviso in the case of the first paragraph that the intention to denounce them shall be communicated to the Representative Body of the Netherlands Antilles or of Aruba.

Article 25

1. The King shall not bind the Netherlands Antilles or Aruba to international economic and financial agreements if the Government of the Country, setting forth the reasons for considering that this would be detrimental to the Country, has declared that the Country should not be bound by them.
2. The King shall not denounce international economic and financial agreements in so far as the Netherlands Antilles or Aruba are concerned if the Government of the Country, setting forth the reasons for considering that a denunciation would be detrimental to the Country, has declared that denunciation should not take place with respect to that Country. Denunciation may nevertheless be effected if exclusion of the country concerned from the denunciation is incompatible with the provisions of the agreement.

Article 26

If the Government of the Netherlands Antilles or of Aruba notifies its wish that an international economic or financial agreement should be concluded which applies exclusively to the Country concerned, the Government of the Kingdom shall co-operate in concluding such an agreement, unless this would be inconsistent with the partnership of the Country in the Kingdom.

Article 27

The Netherlands Antilles or Aruba shall be consulted in the preparation of agreements with other Powers which affect either of them in accordance with Article 11. They shall also be consulted in the performance of agreements which affect them and are binding on them.

Article 28

In accordance with international agreements entered into by the Kingdom, the Netherlands Antilles or Aruba may, if they so desire, accede to membership of international organizations.

ANNEX C

KINGDOM ACT ON THE APPROVAL AND PUBLICATION OF TREATIES
(August 20, 1994)

[Translation by the Dutch Ministry of Foreign Affairs]

We, Beatrix, by the grace of God Queen of the Netherlands, Princess of Orange-Nassau, etc., etc., etc.

Greetings to all those who shall see or hear these presents! Be it known:

Whereas we have considered that in accordance with Article 91, paragraphs 1 and 2 of the Constitution, the cases in which approval of treaties or of the intention to denounce them is not required, and the manner in which approval shall be granted, shall be laid down by Act of Parliament, and that furthermore, amendment of the rules regarding the publication of treaties and decisions of international organizations as referred to in Article 95 of the Constitution is desirable, *inter alia* because of amendments to the Constitution and to the Charter of the Kingdom of the Netherlands;

We, therefore, having heard the Council of State of the Kingdom of the Netherlands, and in consultation with the States-General, and having taken into account the provisions of the Charter of the Kingdom, have approved and decreed as we hereby approve and decree:

Article 1

1. Our Minister for Foreign Affairs shall periodically submit to the States-General and to the Parliaments of the Netherlands Antilles and of Aruba a list of draft treaties on whose conclusion negotiations are proceeding on behalf of the Kingdom.
2. The list referred to in the preceding paragraph shall contain for each draft treaty:
   a. the purport of the treaty;
   b. the future contracting parties who are involved in negotiations;
   c. where necessary, the international organization under whose auspices the negotiations are being conducted;
   d. the ministries concerned.
3. The list referred to in paragraph 1 shall not include draft treaties in respect of which the interests of the Kingdom dictate that the fact that negotiations are proceeding may not be made public.

Article 2

1. Treaties by which the government considers it desirable for the Kingdom to be bound shall be submitted as soon as possible to the States-General for approval.
2. They shall at the same time be submitted to the Parliament of the Netherlands Antilles or Aruba, if the treaties concerned relate to the Netherlands Antilles or Aruba respectively.

Article 3

Approval may be tacit or express.

Article 4

Express approval shall be granted by Act of Parliament.

Article 5

1. Tacit approval shall be granted, if within 30 days of the treaty in question being submitted to the States-General, the wish has not been expressed by or on behalf of one of the Houses or at least a fifth of the number of members laid down in the Constitution of one of the Houses that the treaty be subject to express approval.
2. The Minister Plenipotentiary for the Netherlands Antilles or Aruba respectively may express the same wish within the same time-limit if the treaty concerns the Netherlands Antilles or Aruba.
3. If the wish referred to in paragraph 1 or 2 is expressed, a bill for approval shall be introduced as soon as possible.

Article 6

1. If a treaty contains provisions which conflict with the Constitution or result in such conflict, it shall be submitted for express approval.
2. A bill for approval of such a treaty shall state that approval is granted having regard to the provisions of Article 91, paragraph 3 of the Constitution.

Article 7

Unless a treaty contains provisions which conflict with the Constitution or result in such conflict, approval shall not be required:

a. if this is laid down by Act of Parliament for such treaties;
b. if the treaty is solely concerned with the implementation of an approved treaty, without prejudice to the provisions of Article 8, paragraph 2;
c. if the treaty involves no substantial financial obligations for the Kingdom and has been concluded for a period not exceeding one year;

d. if in exceptional circumstances of a compelling nature the interests of the Kingdom dictate that the treaty should remain secret or confidential;
e. if the purpose of the treaty is to extend a treaty which is about to expire, without prejudice to the provisions of Article 9, paragraph 2;
f. if the purpose of the treaty is to amend an annex which is an integral part of an approved treaty and its contents aim to implement the provisions of the approved treaty of which it is an annex, unless a reservation on this subject has been made in the Act of Parliament approving the treaty.

Article 8

1. If the government proposes to conclude a treaty that solely concerns the implementation of an approved treaty, it shall notify the States-General of this in writing, and, if the implementing treaty is to apply to the Netherlands Antilles or Aruba, shall notify the Parliament of the Netherlands Antilles or Aruba respectively.
2. If within 30 days of the notification referred to in paragraph 1, the wish that the implementing treaty be submitted for the approval of the States-General is expressed by or on behalf of one of the Houses or at least one-fifth of the number of members laid down by the Constitution of one of the Houses, or by the Minister Plenipotentiary for the Netherlands Antilles or Aruba respectively, the approval of the States-General shall be required, notwithstanding the provisions of Article 7b.

Article 9

1. If the government proposes to extend a treaty which is about to expire, it shall notify the States-General of this in writing, and, if the treaty applies to the Netherlands Antilles or Aruba, shall notify the Parliament of the Netherlands Antilles or Aruba respectively.
2. If within 30 days of the notification referred to in paragraph 1 the wish that the treaty extending the approved treaty be submitted for the approval of the States-General is expressed by one of the Houses or one fifth of the number of members laid down by the Constitution of one of the Houses, or by the Minister Plenipotentiary for the Netherlands Antilles or Aruba respectively, the approval of the States-General shall be required, notwithstanding the provisions of Article 7e.
3. If the government proposes not to extend a treaty which is about to expire although one or more of the parties to the treaty so desire, it shall notify the States-General of this in writing, and if the treaty

applies to the Netherlands Antilles or Aruba, it shall notify the Parliament of the Netherlands Antilles or Aruba respectively.

Article 10

1. A treaty that does not contain provisions which conflict with the Constitution or result in such conflict may become immediately binding if in exceptional circumstances of a compelling nature the interests of the Kingdom dictate that the Kingdom be bound by that treaty before it is submitted to the States-General for approval. In such cases, the treaty shall subsequently be submitted to the States-General for approval as soon as possible.
2. Such a treaty shall be entered into with the reservation that it will be terminated should approval be withheld.

Article 11

1. If pursuant to Article 7d the Kingdom becomes bound by a treaty without the approval of the States-General, such a treaty shall be submitted to the States-General for approval as soon as it no longer has to remain secret or confidential.
2. Such a treaty shall be concluded only if it contains a provision which allows for termination by the Kingdom within a reasonable period of time, unless the interests of the Kingdom expressly conflict with this.

Article 12

If in the cases referred to in Articles 10 and 11 approval is withheld, the treaty shall be terminated as soon as is legally possible.

Article 13

1. The States-General shall be notified as soon as possible of treaties that, pursuant to the provisions of Article 7, require no approval and by which the Kingdom is bound, and treaties to which, pursuant to the provisions of Article 10, paragraph 1, the Kingdom is bound before they have been approved by the States-General.
2. At the same time, the Parliament of the Netherlands Antilles or Aruba shall be notified, if the treaties concern the Netherlands Antilles or Aruba respectively.
3. Notification of treaties of a secret or confidential nature shall take place subject to conditions of secrecy unless the interests of the Kingdom dictate that notification shall not take place.
4. If a treaty is approved by the States-General and the government decides against the Kingdom being bound by that treaty, the government shall inform the States-General of its decision immediately; at

the same time it shall inform the Parliament of the Netherlands Antilles or Aruba if the treaty concerns the Netherlands Antilles or Aruba respectively.

Article 14

1. The provisions of Articles 2, 3, 4, 5, 6, 7a and 7b, 10, paragraph 1 and 13 shall apply *mutatis mutandis* to plans to denounce treaties.
2. If, pursuant to Article 10, paragraph 1, a treaty has been denounced without the prior approval of the States-General and the States-General subsequently withhold their approval, the denunciation or the consequences thereof shall be reversed as soon as legally possible.

Article 15

1. Except in the case of a treaty which conflicts with the Constitution or results in such conflict, the government may, if the interests of the Kingdom so require, have the treaty apply provisionally to the Kingdom pending its entry into force.
2. If a treaty requiring the approval of the States-General before it can enter into force contains provisions which conflict with an Act of Parliament or result in such conflict, such provisions may not be applied provisionally.
3. If a treaty contains provisions whose content in the opinion of the government may be binding on all persons, and the government wishes to have the said provisions provisionally applied, the text of the treaty and the fact that it is to be provisionally applied shall be published before the provisional application takes effect.
4. If a treaty is to be provisionally applied, the States-General shall be notified of this without delay. At the same time, the Parliament of the Netherlands Antilles or Aruba shall be informed if the treaty concerns the Netherlands Antilles or Aruba respectively.

Article 16

1. Treaties and decisions of international organizations shall be published in the Treaty Series of the Kingdom of the Netherlands.
2. Our Minister for Foreign Affairs shall be responsible for the publication of the Treaty Series.

Article 17

The Treaty Series shall publish:

a. the text of the treaty or decision in one or more languages;
b. the date of its entry into force, either for the Kingdom as a whole, or for one or more of the countries that make up the Kingdom;

c. the date of its expiry, either for the Kingdom as a whole, or for one or more of the countries that make up the Kingdom;
d. whether the treaty is to be provisionally applied as referred to in Article 15.

Article 18

The Treaty Series may also contain:
a. a Dutch translation of the treaty or decision;
b. information concerning parliamentary approval;
c. information concerning the date of its entry into force for other states or for international organizations;
d. information concerning the date of its expiry for other states or for international organizations;
e. other particulars.

Article 19

1. Treaties and decisions of international organizations shall be deemed to have been published in the entire Kingdom as of the first day of the second calendar month after the date of publication of the issue of the Treaty Series in which they appear.
2. Our Minister for Foreign Affairs may in certain cases amend this time-limit, either for the Kingdom as a whole or for one or more of the countries making up the Kingdom, by publishing a statement to that effect in the Treaty Series.

Article 20

1. Notification of treaties or decisions of international organizations by Our Minister for Foreign Affairs to certain persons shall for them be the equivalent of publication, provided a statement to that effect accompanies the notification.
2. Articles 16, paragraph 1, 17a, b, and c, and 19 of this Act shall not apply to treaties and decisions of international organizations the publication of which is regulated in or pursuant to a treaty published in the *Treaty Series*.
3. In exceptional cases Our Minister for Foreign Affairs may determine that annexes to a treaty or decisions of international organizations shall be published by being made available for public inspection rather than in the Treaty Series. A statement to this effect shall be published in the *Treaty Series*.

Article 21

The Kingdom Act of 22 June 1961 (Bulletin of Acts and Decrees 207) containing regulations relating to the publication of international agreements and of decisions of international organizations is hereby repealed.

Article 22

This Act shall enter into force on the 30th day after the date of its publication in the *Bulletin of Acts and Decrees*.

Article 23

This Act may be cited as the Kingdom Act on the Approval and Publication of Treaties.

We order and command that this Act shall be published in the *Bulletin of Acts and Decrees* of the Netherlands, in the *Official Bulletin* of the Netherlands Antilles and in that of Aruba, and that all ministerial departments, authorities, bodies and officials whom it may concern shall diligently implement it.

Done

The Minister for Foreign Affairs
The Minister of the Interior
The Minister for Netherlands Antilles and Aruban Affairs

ANNEX D

EXAMPLE OF A KINGDOM ACT[85] CONCERNING THE APPROVAL OF A TREATY

[Author's Translation]

We, Beatrix, by the grace of God Queen of the Netherlands, Princess of Orange Nassau, etc., etc., etc.

Greeting to all those who shall see or hear these presents! Be it known:

Whereas we have considered that the Treaty concluded [Date of conclusion of the Treaty] and relating to [Subject of the Treaty], requires the approval of the States-General;

We therefore, having heard the Council of State of the Kingdom of the Netherlands, and in consultation with the States-General, and having taken into account the provisions of the Charter of the Kingdom, have approved and decreed as we hereby approve and decree:

Article 1

The treaty of [Date of conclusion of the Treaty], relating to [Subject of the Treaty], of which a translation is published in the Netherlands Treaty Series, has been approved for the entire Kingdom.

Article 2

Having been approved that [Reservations if any]

Article 3

This Kingdom Act shall enter into force [The Date of the entry into force of the present Kingdom Act concerning the Approval of the Treaty].

[85] Whether it has the form of a Kingdom Act or a common Act of Parliament depends on whether the intention is to bind the entire Kingdom or just one or more of the countries.

ANNEX E

EXAMPLES OF FULL POWERS GIVEN BY THE QUEEN AND THE MINISTER FOR FOREIGN AFFAIRS

[Translation by the Dutch Ministry of Foreign Affairs]

1. ROYAL CREDENTIALS

WE BEATRIX,

by the grace of God
Queen of the Netherlands,
Princess of Orange-Nassau,
etc., etc., etc.,

To all to whom these presents
shall come, Greetings!

Desiring that the Kingdom of the Netherlands be represented at [The name of conference and where and when held].

Therefore by these presents We have appointed to represent the Kingdom of the Netherlands . . ., [Name and capacity of representative(s)] as Head of Delegation,

. . . , [Name and capacity of representative(s)] as Deputy Head of Delegation, and . . . [Name and capacity of representative(s)] as Delegates, while conferring upon the Head of Delegation the right to vote as well as upon the Deputy Head of Delegation and the Delegates, (and upon the Head of Delegation, or, in case of his absence, upon the Deputy Head of Delegation, the right to sign, subject to Our ratification, the instruments which will be adopted by the Conference). [This text is used only in case the delegation is entitled to sign the treaty the conference is to adopt.]

In witness whereof We have signed these presents with Our hand, and have caused Our Royal Seal to be affixed hereto.

The Hague, . . . [Date]

2. MINISTERIAL CREDENTIALS

THE MINISTER FOR FOREIGN AFFAIRS OF THE KINGDOM OF THE NETHERLANDS

Considering that it is desirable that the Government of the Kingdom of the Netherlands be represented at [Name of conference and where and when held]

HAS DECIDED

to form a delegation which shall participate in the said Conference and to designate as Head of Delegation: . . . [Name and capacity of representative(s)].

Deputy Head of Delegation: . . . [Name and capacity of representative(s)].

Delegates: . . .,[Name and capacity of representative(s)] and to confer upon the Head and the Deputy Head of Delegation as well as upon the Delegates the right to vote (and upon the Head of Delegation, or, in case of his absence, the Deputy Head, the right to sign, subject to acceptance/approval, [Depending on the draft of the treaty one of these possibilities is chosen] the instruments which will be adopted by the Conference). [This text is used only when the delegation is entitled to sign the treaty the conference is to adopt].

Signed and sealed at The Hague, . . . [Date]

3. ROYAL FULL POWERS

WE BEATRIX,

by the grace of God
Queen of the Netherlands,
Princess of Orange-Nassau,
etc., etc., etc.,

To all to whom these presents
shall come, Greetings!

Wishing to consult with . . .[1] with respect to the conclusion of . . . [The title of the treaty]. Therefore by these presents We confer upon . . . [Name and capacity of plenipotentiaries] or, in case of his absence, upon . . . [Name and capacity of plenipotentiaries] full power to sign together with the plenipotentiary of . . .[2] the aforesaid Treaty, [Subject to Our ratification].[3]

In witness whereof we have signed these presents with Our hand and have caused Our Royal Seal to be affixed hereto.

The Hague, . . . [Date]

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[1] In the case of a bilateral treaty the Head of State of the other party is referred to here; in the case of a multilateral treaty the text here reads as follows: 'The other High Contracting Parties.'

[2] In the case of a bilateral treaty the Head of State of the other party is referred to; in the case where a multilateral treaty is simultaneously signed for all parties the text here reads: '. . . the plenipotentiaries of the other High Contracting Parties;' where signature does not take place simultaneously this part of the text is not used.

[3] This text is used where the treaty does not itself contain the requirement of ratification.

4. MINISTERIAL FULL POWERS

THE MINISTER FOR FOREIGN AFFAIRS OF THE KINGDOM OF THE NETHERLANDS

Considering that it is desirable that a Treaty be concluded between the Kingdom of the Netherlands and . . . [Name of the State] relating to . . .;[1]

HAS DECIDED

to designate as plenipotentiary of the Government of the Kingdom of the Netherlands . . . [Name and capacity of plenipotentiaries] or, in case of his absence . . . [Name and capacity of plenipotentiaries] with a view to signing the said Treaty [Subject to acceptance/approval][2]

[AND DECLARES

that the provisions so agreed upon are accepted by the Kingdom of the Netherlands for [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] [Aruba][3] and shall be observed [in their entirety][4] [subject to the following reservation . . .][5]].[6]

Signed and sealed at The Hague, . . . [Date]

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[1] Object of the treaty. Re 1 and 2: this text is used only for bilateral treaties; in case of multilateral treaties this part of the text reads: "Considering that it is desirable that the treaty relating to . . . (concluded at . . . on . . .) be signed for the Kingdom of the Netherlands."

[2] This text is used only when the treaty does not itself contain the requirement of acceptance or approval.

[3] Dependent upon the actual situation within the Kingdom.

[4] In case no reservations are made.

[5] Here follows the text of the reservation(s) the Kingdom wishes to make.

[6] This text is used only where signature already binds the Kingdom at this date.

ANNEX F

EXAMPLES OF INSTRUMENTS OF RATIFICATION, ACCEPTANCE/APPROVAL, ACCESSION, AND DENUNCIATION

[Translation by the Dutch Ministry of Foreign Affairs]

1. INSTRUMENT OF RATIFICATION (ROYAL)

WE BEATRIX,

by the grace of God
Queen of the Netherlands,
Princess of Orange-Nassau,
etc., etc., etc.,

To all to whom these presents
shall come, Greetings!

Having seen and examined the . . . [The title of the Treaty], concluded at . . . on . . . [Place and date] (and the text of which has been deposited with . . . [Name of depositary]);[1] approve by these presents for [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] [Aruba],[2] the above Treaty, declare that it is accepted and ratified and promise that it shall be observed [in its entirety][3] [subject to the following reservation . . .].[4]

In witness whereof We have signed these presents with our Hand, and have caused Our Royal Seal to be affixed hereto.

The Hague, . . . [Date]

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[1] This text is used only when just one original remains with the depositary.
[2] Dependent upon the actual situation within the Kingdom.
[3] In case no reservations are made.
[4] Text of the reservation(s) the Kingdom wishes to make follows.

2. INSTRUMENT OF ACCEPTANCE/APPROVAL (MINISTERIAL)

THE MINISTER FOR FOREIGN AFFAIRS
OF THE KINGDOM OF THE NETHERLANDS

DECLARES, in conformity with Article . . . [Relevant treaty provision] of . . . [Title of the treaty] concluded at . . . on . . . [Place and date] that the Kingdom of the Netherlands ACCEPTS/APPROVES the said Treaty for [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] [Aruba][1] and that the Treaty so accepted/approved shall be observed [in its entirety][2] [subject to the following reservation . . .].[3]

Signed and sealed at The Hague, . . . [Date]

[1] Dependent upon the choice of instrument and on the actual situation within the Kingdom

[2] In case no reservations are made.

[3] Text of the reservation(s) the Kingdom wishes to make follows.

3. INSTRUMENT OF ACCESSION (MINISTERIAL)

THE MINISTER FOR FOREIGN AFFAIRS
OF THE KINGDOM OF THE NETHERLANDS

Considering that it is desirable that the Kingdom of the Netherlands becomes a Party to . . . [Title of the treaty] concluded at . . . on . . . [Place and date] (and entered into force for the States Parties to the Treaty on . . . [Date of entry into force]);[1]

DECLARES that the Kingdom of the Netherlands accedes to the said Treaty in conformity with its Article . . . [Relevant treaty provision], that the treaty will apply to [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] [Aruba][2] and that it shall be observed [in its entirety][3] [subject to the following reservation . . .].[4]

Signed and sealed at The Hague, . . . [Date]

[1] This text is used only when the treaty has already entered into force.
[2] Dependent upon the actual situation in the Kingdom.
[3] In case no reservations are made.
[4] Text of the reservation(s) the Kingdom wishes to make follows.

4. INSTRUMENT OF DENUNCIATION (MINISTERIAL)

THE MINISTER FOR FOREIGN AFFAIRS
OF THE KINGDOM OF THE NETHERLANDS

DECLARES, in conformity with Article . . . [Treaty provision on denunciation] of . . . [Title of treaty] done at . . . on . . . [Date and place] that the Kingdom of the Netherlands DENOUNCES the said Treaty for [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] [Aruba].[1] [The Treaty therefore remains in force with regard to . . .].[2]

Signed and sealed at The Hague, . . . [Date]

[1] Dependent upon the actual situation within the Kingdom.
[2] Where denunciation takes place for only one or two of the constituent parts of the Kingdom.

5. OFFICIAL REPORT OF THE EXCHANGE OF INSTRUMENTS OF RATIFICATION

The undersigned, . . . [Name and capacity of the two representatives], have met today in order to proceed to the exchange of instruments of ratification of . . . [Title of treaty]. The instruments of ratification have been produced and compared and, having been found in good and due form, the exchange has been carried out in such a way that the Treaty, in accordance with Article . . . [Reference to the treaty provision dealing with the entry into force] will enter into force on . . . [Date on which the treaty enters into force].

In witness whereof the undersigned have signed the present Procès-verbal.

Done at The Hague, in duplicate, . . . [Date]

ANNEX G

DEPOSITARY PROCEDURES (MULTILATERAL TREATIES DEPOSITED WITH THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS)

[Translation by the Dutch Ministry of Foreign Affairs]

A. *Ceremonies for the signing of Treaties and depositing of instruments*

1. *Arrangements*
Arrangements should be made with the Treaties Publication Section of the Treaties Department (Ministry of Foreign Affairs).

2. *Ceremonies*
Ceremonies will be held at the Treaties Department in the presence of the Director of Treaties or an official replacing him.

3. *Simplified deposit*
As regards the deposit of instruments of ratification, accession, etc., it is up to the embassy concerned to choose between the possibility of a formal ceremony and that of remitting the instrument to the Treaties Publication Section.

4. *Remitting the instrument to the Treaties Publication Section*
Should they choose the second possibility mentioned in paragraph 3 above, embassies are requested to have the instrument directly handed to an official at the Treaties Publication Section instead of forwarding it through external or internal mail, since, apart from the risk of loss, a document forwarded through those channels may not reach the Treaties Publication Section on the same day.

B. *Depositary practice*

5. *Authorities entitled to effect formalities*
Under the international practice adhered to by the Kingdom of the Netherlands, which has been codified to a large extent in the Vienna Convention on the Law of Treaties, formalities effected on behalf of a State in respect of treaties should emanate from the Head of State, the

Head of Government or the Minister of Foreign Affairs, or from a person designated in full powers issued by one of the three above-mentioned authorities.

6. *Formalities for the purpose of paragraph 5*
The practice described above is applicable to signatures, ratifications, approvals, acceptances, accessions and denunciations.

The formulation and withdrawals of reservations, notifications of provisional application or territorial application, designations of authorities and any other act that purports to implement the treaty concerned or to modify rights and obligations thereunder may be effected by a Letter or Note from the (Head of the) Embassy.

All instruments should be worded in English or French, or should be accompanied by an official translation in English or French.

7. *Authorization of deposit*
It will be noted that when an instrument of ratification, accession, etc., is issued under the signature of the Head of State, Head of Government or Minister for Foreign Affairs, and to the extent that the instrument clearly expresses the willingness of the State to be bound by the treaty concerned, an additional document authorizing a plenipotentiary to effect the deposit is not necessary.

8. *Cables and telexes (emergencies)*
In emergencies, it has been the practice of the Director of Treaties to accept cables or telexes in lieu of regular full powers or instruments, on the following conditions:

a. in case the signature is subject to ratification, acceptance or approval;
b. the cable or telex should emanate from one of the three authorities customarily considered as authorized to bind the State on the international plane (see paragraph 5 above), it should bear the name of that authority and the wording should be in English or French;
c. the original itself of the cable or telex should be deposited with the Director of Treaties (a copy, transcription or translation is not sufficient);
d. the cable or telex is received subject to regularization, meaning that the document in due form should be forwarded at the earliest possible time.

ANNEX H

EXAMPLE OF PROCÈS-VERBAL OF DEPOSIT OF INSTRUMENTS OF RATIFICATION, ACCEPTANCE, APPROVAL, AND ACCESSION

[Translation by the Dutch Ministry of Foreign Affairs]

The first undersigned, . . . [Name and capacity of representative(s)] declares that he has transmitted, and the second undersigned, . . . [Name and capacity of representative(s)] declares that he has received, for deposit with the Government of the Kingdom of the Netherlands[1] the instrument of ratification/acceptance/approval/accession[2] by . . . [Name of the State] of/to . . . [Title of the treaty].

In witness whereof this Procès-verbal has been drawn up.

Done at The Hague, in duplicate, . . . [Date]

[1] This text may also read: 'for deposit in the archives of the Ministry of Foreign Affairs of the Kingdom of the Netherlands.'

[2] Dependent upon the actual nature of the instrument.

IV. Bibliography

Abbreviations

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Am. J. Int'l L.	American Journal of International Law, Washington, D.C.
CRVB	Centrale Raad van Beroep (Court of Appeal)
HR	Hoge Raad der Nederlanden (Supreme Court)
NILR	Netherlands International Law Review, The Hague
NJ	Nederlandse Jurisprudentie (Netherlands Case Law)
NJB	Nederlands Juristen Blad (Netherlands Law Review), The Hague
NJCM-B	Nederlands Juristen Comite Mensenrechten-Bulletin (Netherlands Law Review on Human Rights), Leyden
NJV	Nederlandse Juristen Vereniging (Netherlands Lawyers Society)
NTIR	Nederlands Tijdschrift voor Internationaal Recht (Netherlands Journal of International Law), The Hague
NVIR	Nederlandse Vereniging voor Internationaal Recht (Netherlands Society of International Law), The Hague
NYIL	Netherlands Yearbook of International Law, The Hague
PCIJ	Permanent Court of International Justice
RvdW	Rechtspraak van de Week (Belgium Law Weekly)
RMT	Rechtsgeleerdheid Magazijn Themis (Law Magazine Themis), Zwolle
TBP	Tijdschrift voor Bestuurswetenschappen en Publiek-recht (Journal of Administrative and Constitutional Law), Wemmel, Belgium
TvO	Tijdschrift voor Openbaar Bestuur (Journal for the Public Administration), Alphen aan de Rijn
SEW	Sociaal Economische Wetgeving (Social and Economic Legislation), Zwolle
WPNR	Weekblad voor Privaatrecht, Notaris-ambt en Re-gistratie (Private Law Weekly for Notaries)
TMA	Tijdschrift voor Milieuaansprakelijkheid (Environmental Liability Law Review)

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CHAPTER FIFTEEN

NATIONAL TREATY LAW AND PRACTICE: RUSSIA

W.E. Butler

Background

The treaty-making process in Russia is more comprehensible against the background of basic information about the state structure. The Constitution of the Russian Federation ("the 1993 Constitution"), adopted by an all-people's referendum on 12 December 1993, entered into force on 25 December 1993, at which time it replaced the Constitution of the Russian Soviet Federated Socialist Republic (RSFSR) adopted 12 June 1978, as amended.

The 1993 Constitution established a presidential/parliamentary form of rule with a strong President. The President is the Head of State, directly elected for a four-year term. The President appoints, with the consent of the State Duma, and removes the Chairman of the Government and takes the decision concerning the resignation of the Government. The structure of the Government is determined by the President, who upon the proposal of the Chairman of the Government appoints to and relieves from office the deputy chairmen of the Government and federal ministers.

The bicameral legislature is called the *Federal Assembly*. (Prior to the 1993 Constitution it was known as the Supreme Soviet.) The two chambers are the lower chamber, called the *State Duma*, and the upper chamber, called the *Soviet of the Federation*. The deputies of the State Duma are elected for a five-year term. The composition of the Soviet of the Federation changes as the Subjects of the Russian Federation hold new elections or experience a change of government.

The Government of Russia consists of the Chairman, deputy chairmen, and Federal ministers. The Chairman is appointed by the President of Russia with the consent of the State Duma.

The judicial system of Russia includes the Federal courts and the constitutional or statutory courts and justices of the peace of the Subjects of the Russian Federation. The Federal courts are the Constitutional Court of the Russian Federation, the Supreme Court of the Russian

Federation, the supreme courts of the republics, territory and regional courts, courts of cities of federal significance, courts of the autonomous region and autonomous national areas, district courts, and military and specialized courts, the Supreme Arbitrazh Court, and Federal arbitrazh courts.

Although treaty issues could arise before any of these courts in principle, to date they are considered primarily in the Constitutional Court, which consists of 19 judges appointed by the Soviet of the Federation upon the recommendation of the President of Russia.

I. Introduction

The procedure for the conclusion, fulfillment, and termination of treaties of the Russian Federation is determined by the 1993 Constitution,[1] the Federal Law on International Treaties of the Russian Federation, of 16 June 1995 ("the 1995 Law"),[2] the 1969 Vienna Convention on the Law of Treaties,[3] more than a dozen subordinate normative legal acts issued by the President of the Russian Federation, the Government of the Russian Federation, the Ministry of Foreign Affairs of the Russian Federation, and others,[4] and in documents of the Supreme Court of the Russian Federation.[5]

There are in Russia, in addition to the classic international treaties regulated by public international law, the so-called "Treaties of the Federation" concluded between the Federal authorities in Moscow and the so-called "Subjects of the Russian Federation" – some 89 entities enumerated in the Russian Constitution as having that stature. Whether these Treaties of the Federation are governed by public international law or are purely documents of Russian constitutional law, is a contro-

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[1] Translated in W.E. Butler and J.E. Henderson, *Russian Legal Texts* 3–50 (1998); *see also* Butler, *Russian Law* (2d ed., 2003); Annex A.

[2] *See* Annex B (Translation by W.E. Butler).

[3] Vienna Convention On The Law Of Treaties, UN A/Conf. 39/27 (May 23, 1969) (English text), *reprinted in* 8 *ILM* 679 (1969). The Union of Soviet Socialist Republics acceded to the Vienna Convention as of 9 April 1986. The Russian Federation is a party to the said Convention in its capacity as the legal continuer of the USSR.

[4] The most extensive account of these is W.E. Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States* (2002).

[5] *See* Decree No. 5, of 10 October 2003, of the Plenum of the Supreme Court of the Russian Federation "On the Application by Courts of General Jurisdiction of Generally Recognized Principles and Norms of International Law and International Treaties of the Russian Federation," published in *Vestnik Vysshego arbitrazhnogo suda Rossiiskoi Federatsii* [Herald of Supreme Arbitrazh Court of Russian Federation], no. 2, 69–77 (2004).

versial issue in Russian doctrinal writings. It is believed that there were at one time more than 1,000 Treaties of the Federation in force.[6]

A. *General Structure of the State*

The Russian State system as laid down in the 1993 Constitution is based on the separation of powers between legislative, executive, and judicial branches and recognizes in practice the "checks and balances" principle to some extent. The conclusion of international treaties belongs to the executive branch of State, but the legislature and the judicial system are vested with the constitutional right and duty to become involved to some extent and under certain conditions.

As noted above, the Subjects of the Russian Federation conclude treaties with the Federal authorities and among themselves. Certain treaties of the Subjects of the Russian Federation have clarified their foreign affairs powers and empowered them to conclude treaties with foreign States or otherwise authorized them to become involved in matters of foreign affairs. The Yaroslav Region, for example, by 1993 had concluded agreements with Belarus, Kazakhstan, Moldova, Uzbekistan, Ukraine, and individual German provinces. Tatarstan opened its own representative office in Washington D.C. in 1994.[7]

In common with other legal systems of the Commonwealth of Independent States (CIS) and with many legal systems of the civilian tradition, Russian Law recognizes a hierarchy of sources of law. The 1993 Constitution stands at the apex of this hierarchy, but international treaties consistent with the Constitution are accorded primacy in the Russian legal system (Article 15, Russian Constitution). This formulation has led to interesting developments in Russian judicial practice and legal doctrine.

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[6] The three foundation Treaties of the Russian Federation are translated in Butler and Henderson, *supra* note 1, together with examples of treaties concluded between Tatarstan and the Russian Federation. Many of these treaties are being terminated by mutual agreement between the Federal Government and the respective Subjects of the Federation on the grounds that they have served their purpose and are no longer required. The process of termination began in earnest from about November 2002.

[7] For literature on the status of Treaties of the Federation and foreign relations of Subjects of the Federation, *see* M.Iu. Alekseev, *Ob aktual'nosti issledovaniia mezhdunarodno-pravovykh problem vneshneekonomicheskikh sviazei subektov Federatsii, Iuridicheskii mir*, no. 4 (1998); Iu.I. Fedorov, *O pravosub"ektnosti chlenov Federatsii v mezhdunarodnom prave, Moskovskii zhurnal mezhdunarodnogo prava*, no. 4 (1994); G.V. Ignatenko, *Mezhdunarodno-pravovoi status sub"ektov Rossiiskoi Federatsii, Rossiiskii iuridicheskii zhurnal*, no. 1 (1996); V.V. Pustogarov, *Sub"ekty Federatsii. Pravovye problemy mezhdunarodnoi deiatel'nosti* (Ufa, 1995); L.B. Vardomskii, F.D. Demidov, and N.I. Marchuk, *Sub"ekty Rossiiskoi Federatsii v mezhdunarodnykh sviaziakh* (1997).

B. *Federalism*

As the name of the country itself indicates, the Russian Federation is a federative system. It bears a certain analogy with the former Soviet Union, which was formed on the basis of the Treaty of the Union of 30 December 1922. When it was decided to abolish the Soviet Union, this was accomplished by denunciation of the Treaty of the Union.[8] The structure of the Russian Federation itself, however, although based on elements of treaty practice, falls well short of emulating the legal foundations of the former USSR.

II. Russian Treaty Law and Practice

A. *Definition of International Treaty*

The Russian Constitution itself contains no definition of an international treaty. However, the Russian Federation is a party to the Vienna Convention, and Article 2(a) of the 1995 Law incorporates into Russian legislation verbatim the definition laid down in the 1969 Vienna Convention. And even if that were not the case, the 1969 Vienna Convention, being an integral part of the Russian legal system, would be treated as laying down the definition for the purposes of Russian Law.

Although the 1993 Constitution refers to international treaties generally, without drawing any distinctions among them, subordinate Russian legislation distinguishes among inter-State treaties, intergovernmental treaties, and interdepartmental treaties. Internal procedural consequences turn upon the distinction.[9]

B. *Civil-Law Contracts*

What may be described as the normal civil-law relationships of the State and Subjects of the Russian Federation as among themselves and with other contracting parties do not fall under the 1995 Law. Instead, they are governed by the applicable law of the contract, as a rule, the law of the Russian Federation. The normal difficulties which can arise in

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[8] Most of the relevant documents appear in W.E. Butler, *Basic Legal Documents of the Russian Federation* 3–11 (1992).

[9] The procedural consequences concerned do not relate to treaties of the Russian Federation. These also must be concluded at the federal level in compliance with procedural steps, but those steps are very different from the procedural formalities associated with the conclusion or termination of classical international treaties.

distinguishing between a private-law contract and an international-law treaty are compounded in Russia because the word normally used for contract (*dogovor*) is the same word used for treaty (*dogovor*). Russian legislation seeks to forestall confusion by using the term "international treaty" when a document governed by public international law is contemplated. Nonetheless, the subject matter of the document and the capacity in which the contracting parties concluded the document may need to be examined closely in order to determine precisely what the parties intended. A translation of the title of the document may not, in and of itself, be conclusive.

C. *Classification of Treaties*

The 1995 Law establishes a hierarchy of levels at which international treaties of the Russian Federation may be concluded.[10] Inter-State treaties are those concluded in the name of the Russian Federation at the highest level. Those concluded in the name of the Government of the Russian Federation are designated as "intergovernmental." So-called "interdepartmental" treaties are concluded by individual ministries, State committees, or other empowered departments. The general view is that despite these distinctions, they all are treaties of the State as a whole, which bears responsibility for the fulfillment thereof. Irrespective of the level of agencies representing the State, treaties according to international law possess equal legal force.

The hierarchy is not without legal importance. Bilateral treaties concluded at the highest level with the Russian Federation will take precedence over bilateral treaties concluded by the same State with the Russian Federation at a lower level. However, this hierarchical principle does not extend to multilateral treaties.

Moreover, the Supreme Court of the Russian Federation has taken the view in Decree No. 5 of its Plenum on 10 October 2003 that the "rules of an international treaty of the Russian Federation in force, consent to the bindingness of which was adopted not in the form of a federal law, shall have priority in application with respect to subordinate normative acts issued by the agency of State power which concluded the particular treaty" (point 8). This view in effect would deprive treaties

[10] For the view that there are inconsistencies between Russian concepts of the hierarchy of sources of law and the classification of treaties, *see* S.Iu. Marochkin, "The Realization of International Legal Norms in the Russian Legal System," *Sudebnik*, VIII, 53–62 (2003).

of the Russian Federation not ratified by the State Duma of the Russian Federation of their supremacy over inconsistent Russian legislation.

D. *Executive Authorization and Approval Procedures*

The 1993 Constitution (Article 71(j)) has relegated international treaties to the jurisdiction of the Russian Federation. Responsibility for the negotiation and conclusion of an international treaty lies with the administrations of the President and the Government of the Russian Federation. The President is concerned principally with inter-State treaties; the Government with intergovernmental treaties, and departments or ministries of the State with interdepartmental treaties. The Ministry of Foreign Affairs acts as the principal central agency in treaty matters.

The 1995 Law distinguishes between a "recommendation" and a "proposal" to conclude an international treaty. Recommendations concerning the conclusion of international treaties of the Russian Federation may be submitted, depending upon the character of the questions affected, for consideration of the President of the Russian Federation or the Government of the Russian Federation, by each of the chambers of the Federal Assembly of the Russsian Federation and by Subjects of the Russian Federation in the person of their respective agencies of State power. Such recommendations may also be submitted by the Supreme Court of the Russian Federation, the Supreme Arbitrazh Court of the Russian Federation, the General Procuracy of the Russian Federation, the Central Bank of the Russian Federation, and the Plenipotentiary for Human Rights with regard to questions within their jurisdiction. A reply to the recommendation should be given within one month of receipt.

Proposals concerning the conclusion of international treaties in the name of the Russian Federation should be submitted to the President of the Russian Federation, except that proposals concerning the conclusion of international treaties in the name of the Russian Federation relating to questions relegated to the jurisdiction of the Government of the Russian Federation should be submitted to the Government of the Russian Federation.

Proposals are to be submitted to the President of the Russian Federation by the Ministry of Foreign Affairs of the Russian Federation. Other Federal agencies of executive power submit to the President of the Russian Federation proposals concerning the conclusion of international treaties in the name of the Russian Federation with regard to questions within their competence jointly with the Ministry of Foreign Affairs of the Russian Federation or by agreement with it.

However, proposals concerning the conclusion of international treaties in the name of the Russian Federation that are subject to submission to the President of the Russian Federation, but which require preliminary consideration by the Government of the Russian Federation, should be submitted to the Government of the Russian Federation. Decisions of the Government of the Russian Federation concerning the submission to the President of the Russian Federation of proposals regarding the conclusion of international treaties in the name of the Russian Federation are adopted in the form of a decree.

Proposals concerning the conclusion of international treaties in the name of the Government of the Russian Federation should be submitted to the Government of the Russian Federation by the Ministry of Foreign Affairs of the Russian Federation. Other Federal agencies of executive power submit to the Government of the Russian Federation proposals concerning the conclusion of international treaties in the name of the Government of the Russian Federation regarding questions within their competence jointly with the Ministry of Foreign Affairs of the Russian Federation or by agreement with it.

Proposals concerning the conclusion of international treaties of the Russian Federation of an interdepartmental character are to be submitted to the Government of the Russian Federation by Federal agencies of executive power with regard to questions within their competence jointly with the Ministry of Foreign Affairs of the Russian Federation or by agreement with it. But proposals concerning the conclusion of international treaties of the Russian Federation should, before their submission to the President of the Russian Federation or to the Government of the Russian Federation, be agreed with the interested Federal agencies of executive power, other agencies of State power of the Russian Federation, and agencies of State power of the respective Subjects of the Russian Federation. Proposals concerning the conclusion of an international treaty must contain the draft treaty or its basic provisions, substantiation of the advisability of the conclusion thereof, a determination of the conformity of the draft treaty to legislation of the Russian Federation in force, and an evaluation of the possible financial-economic and other consequences of the conclusion of the treaty.

By agreement with the Ministry of Foreign Affairs of the Russian Federation, Federal agencies of executive power have the right to conduct consultations with their counterpart agencies of foreign States or international organizations for the purpose of preparing draft international treaties for submission of proposals to the President of the Russian Federation or to the Government of the Russian Federation.

There is a general rule that proposals concerning the conclusion of international treaties which would establish rules other than those provided for by Russian legislation in force must be agreed with the Ministry of Justice of the Russian Federation. Neither the procedure nor the form for such agreement is stipulated by the 1995 Law.

E. *Legislative Approval*

The legislature has a paramount role in treaty making. Article 15 of the 1995 Law provides that the following international treaties of the Russian Federation are subject to ratification:

- treaties, the performance of which requires changes of prevailing Federal laws or the adoption of new Federal laws, or which establish other rules than those provided for by a law;
- treaties, the subject of which is the basic rights and freedoms of man and citizen;
- treaties concerning the territorial demarcation of the Russian Federation with other States, including treaties on the location of the State boundary of the Russian Federation, and also on the demarcation of the exclusive economic zone and continental shelf of the Russian Federation;
- treaties regarding the basic principles of inter-State relations, questions affecting the defense capability of the Russian Federation, questions of disarmament or international control over armaments, questions of ensuring international peace and security, and also peace treaties and treaties on collective security;
- treaties on the participation of the Russian Federation in inter-State unions, international organizations, and other inter-State associations, if such treaties provided for the transfer to them of part of the powers of the Russian Federation or provide that decisions of their organs are legally binding on the Russian Federation.

In addition, treaties that expressly require ratification are subject to ratification.

Article 15 of the 1995 Law needs to be read in conjunction with Article 6(2), which provides that the decision to consent to be bound by an international treaty of the Russian Federation is adopted by agencies of State power of the Russian Federation in accordance with their competence. Article 6(2) and of Article 15(1)(a), read together with Article 14, leads one to conclude that an international treaty whose performance requires a change of a prevailing Federal law, or the adoption of new Federal laws, can be consented to by the Russian Federation only by means of a Federal Law.

There is some ambiguity in connection with the phrase of Article 15(1)(a) ". . . which establish other rules than provided for by a law . . .," as the word "law" [*zakon*] is not modified by the word "Federal" and could be construed to include a law adopted by a Subject of the Russian Federation. The general view, it should be said, does not understand the word "law" in this broader sense, but rather assumes the legislature had in view a Federal law.

Contrary to the general view is the view that neither the President, nor the Government, nor any Federal agency of executive power has the right to adopt a decision consenting to an international treaty becoming binding upon the Russian Federation if the execution of that treaty requires a change of a prevailing Federal law or the adoption of a new Federal law or establishes other rules than provided for by any law. This latter view finds confirmation in the 1993 Constitution, which establishes: (a) that edicts and regulations of the President must not be contrary to the Constitution and Federal laws (Article 90); (b) that the Government issues entirely subordinate acts, decrees and regulations, on the basis of and in execution of the Constitution, Federal laws, and normative edicts of the President (Article 115); and (c) that Federal departments may operate only within their competence and also issue only subordinate normative acts.

The list in Article 15 of the 1995 Law of the types of international treaties which require ratification is greatly enlarged in comparison with earlier Soviet legislation. Should a dispute arise between the legislative and executive branches as to whether a particular treaty is subject to ratification, the dispute is subject to resolution in the Constitutional Court of the Russian Federation.[11] The question before the Constitutional Court would be to determine whether a particular agency of the Russian Federation had the right to give consent to the treaty entering into force for the Russian Federation. If the Constitutional Court were to give a negative decision, this agency would be obliged to take measures in accordance with the provisions of the treaty and international law to terminate the treaty or to change it.

Article 16 of the 1995 Law regulates in detail the procedure for submitting treaties for ratification. If the decision to sign an international treaty was adopted by the President of the Russian Federation, the treaty must be submitted to the State Duma of the Federal Assembly of the

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[11] *See* Article 125 of the 1993 Constitution and Article 3, paragraph one, (2)(a) of the Federal Constitutional Law on the Constitutional Court of the Russian Federation. *See* L.V. Lazarev, *in* N.V. Vitruk, L.V. Lazarev, and B.S. Ebzeev (eds.), *Federalinyi konstitutsionnyi zakon o konstitutsionnom sude Rossiiskoi Federatsii. Kommentarii* 41–42 (1996).

Russian Federation for ratification by the President of the Russian Federation. If the decision to sign an international treaty was adopted by the Government of the Russian Federation, the treaty must be submitted to the State Duma for ratification by the Government of the Russian Federation. The Government of the Russian Federation has the right, when necessary, to submit to the President of the Russian Federation a proposal concerning the submission for ratification of the treaty.

Proposals concerning the approval of and submission for ratification of international treaties are to be submitted respectively to the President of the Russian Federation and to the Government of the Russian Federation by the Ministry of Foreign Affairs of the Russian Federation autonomously or jointly with other Federal agencies of executive power if the treaty affects questions within their competence. When an international treaty is subject to preliminary consideration by the Government of the Russian Federation, followed by submission to the President of the Russian Federation for ratification, the treaty must be submitted initially to the Government.

Decisions of the Government of the Russian Federation concerning the approval and the submission for ratification of international treaties, and also concerning approval and submission to the President of the Russian Federation of international treaties for ratification are adopted by the Government of the Russian Federation in the form of a Decree.

A proposal concerning ratification of an international treaty must contain a certified copy of the official text of the international treaty, substantiation of the advisability of its ratification, a determination of the conformity of the treaty to legislation in force for the Russian Federation, and an evaluation of the possible financial-economic and other consequences of ratification of the treaty, including, when necessary, an Opinion of the Government of the Russian Federation as provided for by Article 104 of the 1993 Constitution.

In the event a subject with a right of legislative initiative, on the basis of Article 104 of the Constitution of the Russian Federation, submits to the State Duma a draft law not mentioned in Article 16(1) of the 1995 Law regarding the ratification of an international treaty that has not yet entered into force for the Russian Federation, but that is subject to ratification in accordance with Article 15 of said Federal Law, the State Duma shall send the draft law to the President of the Russian Federation for a proposal regarding this draft law.

The procedure for legislative consideration of a treaty is laid down in Article 17 of the 1995 Law and in the Regulations of the State Duma and the Soviet of the Federation (the lower and upper chambers, respectively, of the Federal Assembly of the Russian Federation). The State

Duma considers proposals concerning the ratification of international treaties and, after preliminary discussion in committees and commissions of the State Duma, adopts a decision on whether or not to recommend ratification. Federal laws adopted by the State Duma concerning the ratification of international treaties are subject, in accordance with the Constitution of the Russian Federation, to obligatory consideration in the Soviet of the Federation.

In accordance with the 1993 Constitution, a Federal law adopted by the Federal Assembly of the Russian Federation and concerning the ratification of an international treaty of the Russian Federation is sent to the President of the Russian Federation for signature and promulgation.

F. *Reservations*

Under Article 25 of the 1995 Law, which reflects the provisions of Article 19 of the 1969 Vienna Convention, reservations to a treaty may be entered upon signature, ratification, confirmation, acceptance, or accession on two conditions: compliance with the treaty provisions themselves, and compliance with the respective norms of international law. Compliance with the treaty provisions means that a reservation may not be entered if the treaty prohibits reservations or limits reservations to certain matters. As regards norms of international law, at a minimum, reservations may not be made that are incompatible with the principles and purposes of the treaty or with general principles of international law.

The former Soviet Union routinely entered reservations to international treaties during the 1960–70s on certain matters of ideological consequence in those days. These reservations are gradually being reviewed and, in many cases, withdrawn by the Russian Federation.[12] Russian doctrinal writings recommend that a reservation not be declared unilaterally by one branch of State without coordinating with the other branches. With respect to an international treaty subject to ratification, such an approach would entail the reservation being formulated during the first reading of the Federal law concerning ratification of the treaty and then agreed with other agencies of State power.

Reservations in the broad sense have been formulated by Russia with respect to bilateral treaties, notably in relations with Ukraine. The reservations policies of the Commonwealth of Independent States (CIS) States in general, including Russia, have been the subject of special consideration

[12] *See generally* on Russian reservations policies generally, A.V. Zharskii, "Reservations to International Treaties in CIS Practice," *Sudebnik*, IV, 519–604 (1999).

by the Economic Court of the CIS, which has declared certain reservations illegal under international law.[13]

The 1995 Law follows the 1969 Vienna Convention in providing that reservations may be removed at any time (unless provided otherwise by an international treaty of the Russian Federation) by following the same procedure by which they were made.

The agency that adopted the decision consenting to be bound by the international treaty on behalf of the Russian Federation may accept (or object to) a reservation made by another contracting State to the treaty in accordance with the conditions of the treaty itself and with the norms of international law. Proposals concerning the acceptance of or objection to reservations to be effectuated in the form of a Federal Law must be submitted in conformity with the procedures established by Article 16 or Article 9 of the 1995 Law.

When ratifying, for example, the Agreement between the Russian Federation and Norway on the construction of housing for military servicemen of the Armed Forces of the Russian Federation who withdrew from the countries of the Baltic, the following Statement was made and recorded in the Federal law on ratification: "The Russian Federation for the purposes of the Agreement understands by the term 'countries of the Baltic' the Estonian Republic and the Latvian Republic."[14]

The legislative procedure is a cumbersome one, and has been criticised in Russian doctrinal writings, which observe that it departs from "international practice," which normally vests in the executive branch the right to accept or object to a reservation.

G. *Consultations with the Courts*

International treaties that have not entered into force for the Russian Federation and that are deemed by the Constitutional Court of the Russian Federation not to conform to the 1993 Constitution may not be introduced into operation and application. The Law on the Constitutional Court of the Russian Federation lays down procedures for obtaining the views of the Court concerning the constitutionality of a proposed international treaty.

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[13] *See* the Advisory Opinion of 15 May 1996 and the Decision of 22 June 1998, both translated by W.E. Butler in *Sudebnik*, IV, 937–972 (1999).

[14] Signed at Oslo on 11 September 1995, *Biulleten' mezhdunarodnykh dogovorov*, no. 12 (1996), p. 51.

Under Article 34 of the 1995 Law, the Constitutional Court of the Russian Federation, in the procedure determined by a Federal constitutional law, is empowered to decide cases concerning the conformity with the 1993 Constitution of international treaties that have not entered into force for the Russian Federation, or of individual provisions thereof. It also decides disputes concerning the competence between Federal agencies of State power, and also between agencies of State power of the Russian Federation and agencies of State power of Subjects of the Russian Federation in connection with the conclusion of international treaties of the Russian Federation.

H. *Consultations with the Public*

Such consultations, if they occur, do so as part of the ordinary legislative process, including parliamentary hearings.

I. *Legal Bases for Agreements Not Formally Approved by the Legislature*

Russian legislation and treaty practice distinguish between the ratification of an international treaty (*See supra* Section II.E.), which is the prerogative of the legislative branch of the State, and the confirmation or adoption (or acceptance) of a treaty. Confirmation and adoption operate when a treaty does not enter into force immediately upon signature and an additional formality is required. Article 20 of the 1995 Law lays down the relevant procedures, stipulating who shall confirm or adopt as follows:

(a) with respect to treaties to be concluded in the name of the Russian Federation with regard to questions specified in Article 15(1) of the 1995 Law: confirmation or adoption shall be in the form of a Federal law according to the procedure for the ratification of international treaties established by Article 17 of the 1995 Law;
(b) with respect to treaties to be concluded in the name of the Russian Federation (except for treaties provided for in the preceding point): confirmation or adoption shall be by the President of the Russian Federation;
(c) with respect to treaties to be concluded in the name of the Russian Federation with regard to questions relegated to the jurisdiction of the Government of the Russian Federation: confirmation or adoption shall be by the Government of the Russian Federation; and
(d) with respect to treaties to be concluded in the name of the Government of the Russian Federation: confirmation or adoption shall be by the Government of the Russian Federation.

The President of the Russian Federation adopts decisions concerning the confirmation and adoption of international treaties with regard to questions relegated to the jurisdiction of the Government of the Russian Federation, if such is necessary.

The confirmation or adoption of international treaties of an interdepartmental character which provide for the entry into force thereof after confirmation or adoption is effectuated by the Federal agency of executive power in whose name the treaty was signed.

Proposals concerning the confirmation or adoption of international treaties in the form of a Federal Law are submitted in conformity with the procedure established by Article 16 or Article 9 of the 1995 Law.

These provisions are a rather unsuccessful attempt, in compliance with Article 11 of the 1969 Vienna Convention, to import terminology from the Convention by using Russian equivalents which have a long-established meaning in Russian (and Soviet) legislative practice. Confirmation, in the sense of Article 20(1) of the 1995 Law, is the final consent of the State to the respective treaty entering into force and does not connote any form of preliminary endorsement. Insofar, therefore, as confirmation means the final consent by the Federal Assembly in the form of a Federal law to an international treaty being binding upon the Russian Federation, it is identical to ratification and, as a term, is redundant. The same applies to the term "acceptance" insofar as the Federal Assembly is concerned. No wonder that in Russian State practice the use of both terms is virtually unknown. One instance is known, when in 1992 the Supreme Soviet of the Russian Federation adopted a decision "to accept" the respective Agreements concerning Russia joining the International Bank for Reconstruction and Development and the International Monetary Fund. No examples are known since the enactment of the 1995 Law. It also follows from Article 20 that ratification, where required, can not be evaded by having the parties agree to "confirmation."

J. *Publication and Transmittal Requirements*

The Ministry of Foreign Affairs is vested with jurisdiction over a unified State system for the registration and recording of international treaties of the Russian Federation. Within the Ministry, the Legal Department maintains two card indexes to register and record treaties, one for bilateral and the other for multilateral treaties. Doctrinal sources describe the system as follows: a special card is prepared for each multilateral treaty to which the Russian Federation is a party. This card contains the registration number of the treaty, the number of parties, the name

of the treaty, the date and place of signature, the depositary(ies), the conditions for entry into force, the date of entry into force, the period of operation of the treaty, the date of signature by Russia, the date of entry into force for Russia, information concerning municipal law procedures within Russia essential for entry into force, publication data regarding the treaty, and data concerning registration of the treaty with an international organization, if such occurred. The index entry also contains a complete list of parties to the treaty, specifying the date of signature, the date of handing over the ratification, confirmation, acceptance, accession, or legal succession document, and the date of handing over documents concerning denunciation, if there are such.

An analogous card is compiled for each bilateral treaty, although the data recorded vary somewhat: the registration number of the treaty, the name of the treaty, the place and date of signature, the persons who signed for the Russian Federation and for the foreign State, ratification and confirmation data, entry into force, period of operation, period for declaring an extension or denunciation, conditions for extension, and publication data. Work is underway to transfer the two card indexes to a computer data base.

The card indexes also include data concerning treaties concluded by the former USSR to which the Russian Federation remains a party in its capacity as the "State-continuer" of the former Soviet Union.

On the principle that the Russian Federation is not the legal successor of the former Soviet Union, but rather the "State-continuer," it follows that the date of entry into force for the Russian Federation of multilateral treaties which were in force for the former USSR is the date of entry into force for the USSR. The Russian Federation simply replaced the former USSR in such treaties, and did not succeed it. With regard to bilateral treaties, the Russian Federation has operated on the presumption that those concluded by the former Soviet Union remain in force for the Russian Federation, although in certain circumstances the changed frontiers of the Russian Federation or the economic realities of a transition to a market economy make it impossible to apply these treaties in their original sense. At the time of its dissolution in December 1991, the former Soviet Union had concluded more than 15,000 bilateral treaties, all of which have been or are being reviewed by the Russian Federation with a view to determining their status and the need to renegotiate or replace them.

Traditionally, the publication of international treaties in the twentieth century has been associated with the demise of secret diplomacy and the rise of more democratic foreign policies. Soviet diplomacy played its

own role in that process, although by the time the Soviet period had come to an end, only a small percentage of the 15,000 plus bilateral treaties concluded by the former USSR had been published.

The 1993 Constitution placed the issue of treaty publication in a rather different context. The Constitution does not explicitly make official publication a requirement for the domestic applicability of treaties in the national legal system.[15] However, Article 15(4) of the 1993 Constitution provides that international treaties of the Russian Federation are an integral part of the legal system and that treaties in force take priority over inconsistent laws in the event of a contradiction between them. Moreover, Article 15(3) of the 1993 Constitution prohibits the application of any normative legal acts affecting the rights, freedoms, and duties of man and citizen unless they have been published officially for general information. And while the presumption of knowledge of the law operates generally in the Russian Federation, as in other legal systems, that presumption is subject to challenge if international treaties of all levels are not accessible to the general public, for treaty making is inherently not as open an operation as is domestic law making. It has accordingly been suggested that a broad interpretation of "normative legal act" could encompass international treaties of the Russian Federation in force, as they too are part of the national legal system and are normative in character.

Only international treaties that have entered into force may be officially published in Russia.[16] Upon their entry into force, such treaties become part of the legal system pursuant to Article 15(4) of the 1993 Constitution. However, the 1995 Law further qualifies the position by requiring that the Ministry of Foreign Affairs recommend publication and that publication occur in the *Sobranie zakonodatel'stva Rossiiskoi Federatsii* ("*SZ RF*"). The 1993 Constitution imposes no requirement of "recommendation," which implies a discretion on whether or not to publish a treaty. Moreover, the 1995 Law does not take full account of the distinction between publication of the Federal law concerning ratification of an international treaty and publication of the text of the treaty. The Federal law concerning ratification falls into the category of all Federal laws and therefore is subject to publication not only in the *SZ RF*, but also in the newspaper *Rossiiskaia gazeta*. There is an appreciable time lag between

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[15] *See* G. Danilenko, "The New Russian Constitution and International Law," 88 *Am. J. Int'l L.* 456 (1994). Such a requirement was recommended by many Russian specialists. *See* Danilenko, *Mezhdunarodno-pravovye aspekty novoi Konstitutsii Rossii*, *Konstitutsionnyi vestnik*, no. 13, 135 (1992).

[16] On Russian judicial practice turning on issues of publication, *see* Marochkin, *supra* note 10, at 60–61.

the appearance of the newspaper and the *SZ RF*, which would allow in many cases for the text of the treaty to appear in a timely manner. It also should be noted that with respect to publication the 1995 Law draws distinctions between treaties subject to ratification and international treaties of an interdepartmental character. The 1993 Constitution does not recognize such a distinction, regarding all of them as part of the legal system. For these reasons, the constitutionality of the 1995 Law must be open to doubt, for if the Constitution treats all treaties as part of the Russian legal system, all of them must be published.

The Federal Law on the Procedure for the Publication and Entry into Force of Federal Constitutional Laws, Federal Laws, and Acts of the Federal Assembly, adopted 25 May 1994, provides: "International treaties ratified by the Federal Assembly shall be published simultaneously with the Federal laws concerning the ratification thereof." (Article 3)

A second source of official publication is offered by the 1995 Law. The *Biulleten' mezhdunarodnykh dogovorov* commenced publication in March 1993 and is issued monthly on the basis of the Edict of the President of the Russian Federation, No. 11 ("On the Procedure for the Publication of International Treaties of the Russian Federation"), adopted on 11 January 1993, as amended.[17] The *Bulletin*, however, contains only a fraction of the international treaties of the Russian Federation recommended for publication by the Ministry of Foreign Affairs.

The *Bulletin* also contains the texts of international treaties of the Russian Federation that are not subject to ratification by the Federal Assembly and are not interdepartmental, that is, international treaties that entered into force on the basis of a decision of the President of the Russian Federation or of the Government. By Edict of the President of the Russian Federation ("On the Procedure for the Publication and Entry into Force of Acts of the President of the Russian Federation and Government of the Russian Federation and Normative Legal Acts of Federal Agencies of Executive Power"), adopted 23 May 1966, edicts and regulations of the President and decrees and regulations of the Government are subject to obligatory official publication except for those acts or individual provisions thereof the contents of which comprise a State secret or information of a confidential character. This requirement includes edicts, decrees, and regulations concerning international treaties.

Pursuant to the Edict of the President on the Procedure for the Publication and Entry into Force of Federal Laws, issued 5 April 1994 as amended: "Federal laws adopted with regard to questions of the

[17] *SAPP RF* (1993), no. 3, item 182; *SZ RF* (1995), no. 49, item 4777.

ratification of international treaties also shall be published in the *Biulleten' mezhdunarodnykh dogovorov*."

The publication of international treaties of the Russian Federation of an interdepartmental character is discretionary, depending upon the decision of the Federal agency of executive power in whose name the treaty was concluded. There is no centralized official gazette designated for such treaties, nor are the *SZ RF* or the *Bulletin* authorized to include such. Most Federal agencies of executive power do not publish their own gazettes, so that for many the possibility opened by the 1995 Law is unrealistic.

K. *Incorporation into National Law*

Article 15(4) of the 1993 Constitution provides that "generally recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If other rules have been established by an international treaty of the Russian Federation than are provided for by a law, the rules of the international treaty shall apply."[18] The same formulation with slight adjustments is reproduced in Article 5 of the 1995 Law.

A literal interpretation of Article 5 of the 1995 Law requires that it extend to all treaties of the Russian Federation, including interdepartmental treaties. Some Russian jurists have taken the view that Article 5, read in conjunction with Article 15(1) of the 1995 Law, must be construed to mean that only ratified treaties take precedence over laws of the Russian Federation, with the result that treaties that are not subject to ratification fall outside the scope of Article 15(4) of the 1993 Constitution and Article 15 of the 1995 Law. This view was accepted in a Decree of the Plenum of the Supreme Court of the Russian Federation adopted on 31 October 1995, which provided that other rules of a treaty are subject to application only if the decision concerning consent to be bound was adopted in the form of a Federal law,[19] and reiterated in a Decree of the Plenum of 10 October 2003. A Decree of the Plenum is binding upon the courts of the Russian Federation. It should be noted, however, that this question has not been placed before the Constitutional Court of the Russian Federation. There is a strong argument that reading Article 15(1) of the 1995 Law so as to limit the operation of both Article

[18] *See* Butler and Henderson *supra* note 1, at 7; Butler *supra* note 1.

[19] Point 5, Decree of the Plenum of the Supreme Court of the Russian Federation, No. 8, 31 October 1995. *Biulleten' Verkhovnogo Suda Rossiiskoi*, no. 11 (1995).

15(4) of the 1993 Constitution and Article 5 of the 1995 Law produces a result that is unconstitutional, and that Article 15(4) of the 1993 Constitution means exactly what it says: all treaties of the Russian Federation.[20] Both in the Constitutional Conference,[21] which drafted the 1993 Constitution, and in the working groups that prepared the draft 1995 Law, a proposal was made to insert the requirement of "ratification" with respect to this supremacy clause, and both times the proposal was rejected.[22]

The view that Article 5 of the 1995 Law refers to all treaties of the Russian Federation, including interdepartmental treaties, has been questioned by many Russian jurists.[23] Narrower constructions of Article 5 have been suggested, although these constructions are also reluctant to accept the literal meaning of Article 5. One such approach observes that two variants may arise with respect to a treaty establishing rules other than those laid down by a law. The first arises when a treaty introduces appreciable changes in legislation by adding to or replacing norms or laying down different general rules, whereas in the second instance the treaty establishes "other rules" only for a specific situation without affecting the operation of the rules of a normative act as a whole, for example by creating an exception from the general legislative norm for a determined particular case. "In the first instance one speaks of the priority of the rule of a treaty over a rule of law; in the second, about the priority of the application of the rule of a treaty in specific conditions."[24] Understanding these two variant situations, it is argued, helps explain why the criterion of ratification was excluded from Article 15(4) of the 1993 Constitution and from Article 5 of the 1995 Law. Refusing to apply a treaty concluded without ratification would prejudice the authority of the State, which bears State responsibility for the obligations it

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[20] *See, e.g.*, G.M. Danilenko, who while acknowledging that Article 15 does not use the word "ratified," says it must refer "above all to such treaties. At the same time, in principle, the application is permitted also of those treaties which were concluded in the name of the Russian Federation by respective agencies competent to do so without the obligation of submitting them to the Federal Assembly for ratification." B.N. Topornin, Iu. M. Baturin, and R.G. Orekhov (eds.), *Konstitutsiia Rossiiskoi Federatsii* 117–118 (1994).

[21] For the verbatim transcripts of the Constitutional Conference, *see Konstitutsionnoe soveshchanie. Stenogrammy. Materialy. Dokumenty. 29 aprelia – 10 noiabria 1993 g.* (1995–96). 21 vols.

[22] *See* Lukashuk, *in* V.M. Zhuikov (ed.), *Mezhdunarodnye normy o pravakh cheloveka i primenenie ikh sudami Rossiiskoi Federatsii. Prakticheskoe posobie* 10 (1996).

[23] *See, e.g.*, S. Polenina, who criticized the 1993 Constitution for not including the term "ratification" and urging that the provision be interpreted as though the word had been included. *See* S. Polenina, *in* L.A. Morozova, *Rossiiskaia pravovaia sistema i mezhdunarodnoe pravo: sovremennye problemy vzaimodeistviia*, 2 *Gosudarstvo i pravo* 5 (1996).

[24] Lukashuk, *in* Zhuikov *supra* note 22, at 10.

has assumed under such treaties and would severely limit the role of intergovernmental treaties in the regulation of international relations.

Nonetheless, there is great reluctance to extend this understanding to include interdepartmental treaties. The Commentary argues that interdepartmental treaties do not fall within Article 15(4) of the 1993 Constitution and Article 15 of the 1995 Law, but rather enjoy priority only with respect to acts of the respective ministry, State committee, or other department.[25] There is no language in Article 5 to sustain this view, and most interdepartmental treaties address general normative issues within the competence of the respective department.

The primacy of international treaties of the Russian Federation extends to Federal laws, including constitutional laws, laws adopted by Subjects of the Russian Federation, and all other normative acts. "These norms affect all laws irrespective of the time of their adoption: before or after the conclusion of the treaty."[26]

L. *Legally Binding Decisions of International Organizations*

The 1993 Constitution, like all of its predecessors, is silent with regard to the competence of branches of the State to approve, ratify, or otherwise integrate the decisions of inter-State international organizations into Russian Law. In practice such decisions are regarded as a form of international obligation if the resolution or decision was adopted under circumstances in which the Russian Federation would regard itself as being legally bound. Such resolutions and decisions are not gazetted in the Russian Federation.

The Russian Federation is not a member of any supranational organizations, such as the European Union. Russian legal doctrine has yet to fully address the legal nature of documents, for example, emanating from the Commonwealth of Independent States and its organs and agencies. Some jurists would advance a treaty theory with respect to them.

Confronting Russian legal doctrine, however, is the status of judicial decisions of the European Court for Human Rights and the extent to which the body of judicial practice not expressly involving a Russian party nonetheless is binding upon the Russian Federation and its courts either as a species of judicial precedent or as a form of treaty interpretation by the European court.

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[25] *See* Lukashuk, *in* V.P. Zvekov and B.I. Osminin (eds.), *Kommentarii k Federal'nomy zakonu "O mezhdunarodnykh dogovorakh Rossiiskoi Federatsii"* 16 (M., 1996) (Commentary).

[26] V.I. Andrianov, *in* Iu.V. Kudriavtsev (ed.), *Kommentarii k Konstitutsii Rossiiskoi Federatsii* 80–81 (1996).

M. *Implementation*

Rather unusually perhaps, Article 31 of the 1995 Law formally addresses the legal obligation to comply with treaty obligations and what should transpire in the event of a breach: "International treaties of the Russian Federation shall be subject to good-faith fulfillment in accordance with the conditions of the international treaties themselves, norms of international law, the Constitution of the Russian Federation, the present Federal Law, and other acts of legislation of the Russian Federation." "Norms of international law" in this context include the United Nations Charter and generally recognized principles and norms of international law, including customary international law. "Good faith" in Russian doctrine has "autonomous significance" in international law and includes the obligations to: elicit the factual circumstances relating to the application of norms; determine the norms subject to application; ensure that the letter and spirit of norms are complied with; determine the limits of the applicable norms so as not to prejudice the rights and legal interests of other States; and not permit an abuse of right.

Article 31 also codifies the rule of the 1969 Vienna Convention to the effect that a State may not take actions before an international treaty enters into force that would deprive the treaty of its object and purpose; that is, not to take actions that would make compliance with the treaty impossible or difficult. The duty arises from general international law and not from the treaty itself; the 1969 Vienna Convention merely codified the principle of general international law.

Insofar as an international treaty of the Russian Federation is an integral part of the Russian legal system, a treaty violation may be appealed to State agencies in the same manner as a violation of a Federal law.

Under the 1995 Law, ensuring compliance with treaty obligations is vested in the official or agency responsible for concluding the type of treaty concerned; that is, the President of the Russian Federation in the case of an inter-State treaty; the Government in the case of an intergovernmental treaty; and the relevant State agency in the case of an interdepartmental treaty. The Ministry of Foreign Affairs of the Russian Federation also has responsibility for general observation over the fulfillment of international treaties of the Russian Federation.

Article 60 of the 1969 Vienna Convention provides for the options of States in the event of a material breach of a treaty. Article 33 of the 1995 Law addresses any kind of breach by a party other than the Russian Federation to an international treaty of the Russian Federation. It is essentially a procedural Article; it does not in any way dictate what the response of the Russian Federation should be to such a violation. Moreover,

it addresses only a violation of an international treaty, although a violation of a customary norm of international law might be handled through the same procedure by analogy.

The approach taken by Article 33 centralizes a response to the alleged violation. A proposal must be submitted to the President or to the Government, depending upon whose competence the questions regulated by the treaty fall within, to take the necessary measures in accordance with the norms of international law and the conditions of the treaty itself. The Ministry of Foreign Affairs plays a key role, for it must either submit the proposal or do so jointly with other Federal agencies of executive power.

The 1995 Federal Law on the State Regulation of Foreign Trade Activity also authorizes the Russian Federation to take retaliatory measures against a foreign State that fails to fulfill international treaty obligations to the Russian Federation.[27] The 1995 Law does not address procedures to be followed in the event an international treaty of the Russian Federation is violated by the Russian side.

N. *Treaty Termination*

The 1995 Law regulates in detail the internal procedures for submitting proposals to terminate or suspend the operation of international treaties. For the most part, these mirror the procedures for submitting a proposal to conclude a treaty. Article 37 of the 1995 Law requires that the termination (including denunciation) and suspension of the operation of international treaties of the Russian Federation be effectuated in accordance with the conditions of the treaty itself and with norms of international law by the agency which adopted the decision consenting to be bound by the international treaty on behalf of the Russian Federation.

The President of the Russian Federation may adopt, if necessary, decisions concerning the termination or suspension of the operation of international treaties of the Russian Federation in those cases where the consent to be bound was given by the Government of the Russian Federation. The State Duma is empowered to consider proposals concerning the termination or suspension of the operation of international treaties of the Russian Federation and, after the preliminary discussion in committees and commissions of the State Duma, to adopt the respective decisions.

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[27] Article 34. *SZ RF* (1995), no. 42, item 3923 (translated in *Sudebnik*, I, 427–455 (1996)).

Federal laws adopted by the State Duma concerning termination (including denunciation) or suspension of the operation of international treaties of the Russian Federation are subject, in accordance with the Constitution, to obligatory consideration in the Soviet of the Federation. A Federal law adopted by the Federal Assembly (the Russian Parliament) concerning the termination (including denunciation) or suspension of the operation of an international treaty of the Russian Federation is sent, in accordance with the 1993 Constitution, to the President for signature and promulgation.

Where the decision concerning consent to be bound was adopted in the form of a Federal law, the operation of an international treaty of the Russian Federation may be suspended by the President in instances requiring the taking of urgent measures. In such a case, the President must immediately inform the Soviet of the Federation and the State Duma and must submit to the State Duma an appropriate draft respective Federal law. In the event the State Duma rejects the draft Federal law concerning the suspension of the operation of an international treaty of the Russian Federation, the operation of the treaty is subject to immediate renewal.

The termination and suspension of the operation of international treaties of an interdepartmental character is done: (a) by the Federal agencies of executive power in whose name such treaties were concluded by agreement with the Ministry of Foreign Affairs of the Russian Federation; (b) by other interested Federal agencies of executive power; (c) by agencies of State power of Subjects of the Russian Federation, and in all cases with the authorization of the Government of the Russian Federation. The Government of the Russian Federation may adopt decisions concerning the termination or suspension of the operation of international treaties of an interdeparmental character if the respective questions have important significance for State interests of the Russian Federation.

The consequences of termination are laid down in Article 38 of the 1995 Law, incorporating the relevant provisions of the 1969 Vienna Convention:

> The termination of an international treaty of the Russian Federation, unless provided otherwise by the treaty or there is another arrangement with its other participants, shall relieve the Russian Federation from any obligation to fulfill the treaty thereafter and shall not influence the rights, obligations, or legal status of the Russian Federation which arose as a result of the fulfillment of the treaty before the termination thereof.

Termination of a treaty does not have retroactive effect in the sense of eliminating the rights, duties, or legal consequences which came into being during the operation of the treaty. For example, the Agreement

in the Form of an Exchange of Notes between the Russian Federation and Poland concerning the termination of the operation of military agreements signed by them on 20 and 22 May 1992 expressly stipulated, "The termination of the operation of the aforesaid documents shall not affect the legal consequences which arose as a result of the operation of these treaties."[28]

O. *Depositary*

Russia is the depositary of a substantial number of international treaties. Under the 1995 Law, the Ministry of Foreign Affairs of the Russian Federation performs the functions of depositary of multilateral international treaties if in accordance with the provisions of such treaties these functions have been entrusted to the Russian Federation.

Correspondence with agencies of foreign States, international organizations, or their chief executive officials which are fulfilling the functions of a depositary of multilateral international treaties is the responsibility of the Ministry of Foreign Affairs of the Russian Federation.

P. *Treaties Concluded by Sub-National Entities*

As noted above, subjects of the Russian Federation have concluded international treaties with foreign States. The power to do so flows from those provisions of the 1993 Constitution that grant residual exclusive jurisdiction over certain matters and from Treaties of the Federation, which themselves confer the right on the particular subject of the Federation to conclude an international treaty.

The 1995 Law does not address treaties concluded by Subjects of the Federation. It does, however, make provision for consultations with the Subjects of the Federation when international treaties of the Russian Federation under consideration will be concerned with matters that fall within the joint jurisdiction of the Federation and the Subjects of the Federation. The Subjects of the Federation also may submit proposals to the central government concerning the conclusion of an international treaty.

Treaties concluded among subjects of the Federation are becoming less important, and treaties concluded between subjects of the Federation and the central Russian Government have been mostly terminated by consent of the parties on the grounds that they have fulfilled their purpose and are no longer required.

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[28] 10 *Biulleten' mezhdunarodnykh dogovorov* 64 (1996).

III. Basic Data and Documentation

Annex A: Constitution of the Russian Federation (1993) (excerpts)
Annex B: Federal Law on International Treaties of the Russian Federation (1995) (excerpts)

ANNEX A

CONSTITUTION OF THE RUSSIAN FEDERATION (1993)[29]

Article 15

1. The Constitution of the Russian Federation shall have the highest legal force, direct effect, and be applied throughout the entire territory of the Russian Federation. Laws and other legal acts applicable in the Russian Federation must not be contrary to the Constitution of the Russian Federation.
2. Agencies of State power, agencies of local self-government, officials, citizens, and their associations shall be obliged to comply with the Constitution of the Russian Federation and laws.
3. Laws shall be subject to official publication. Unpublished laws shall not be applied. Any normative legal acts affecting the rights, freedoms, and duties of man and citizen may not be applied if they have not been published officially for general information.
4. Generally recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If other rules have been established by an international treaty of the Russian Federation than provided for by a law, the rules of the international treaty shall apply.

Article 71

There shall be within the jurisdiction of the Russian Federation:

(a) the adoption and change of the Constitution of the Russian Federation and federal laws, and control over compliance therewith;
(b) the federated structure and territory of the Russian Federation;
(c) the regulation and defense of the rights and freedoms of man and citizen; citizenship in the Russian Federation; regulation and defense of the rights of national minorities;
(d) the establishment of the system of Federal agencies of legislative, executive, and judicial power, and the procedure for their organization and activity; the formation of Federal agencies of State power;
(e) Federal State ownership and the administration thereof;

[29] The articles of the 1993 Constitution that are discussed in this essay are reprinted below as translated by W.E. Butler in Butler & Henderson, *supra* note 1, and reprinted with permission.

(f) the establishment of the fundamental principles of federal policy and federal programs in the domain of State, economic, ecological, social, cultural, and nationality development of the Russian Federation;
(g) the establishment of the legal foundations of a single market; financial, currency, credit and customs regulations, monetary emission, foundations of price policy; federal economic services, including federal banks;
(h) federal budget; federal taxes and charges; federal regional development funds;
(i) federal electric power system, nuclear power, fissionable materials; federal transport, railways, information, and communications; activity in outer space;
(j) foreign policy and international relations of the Russian Federation, international treaties of the Russian Federation; questions of war and peace;
(k) foreign economic relations of the Russian Federation;
(l) defense and security; defense production; determination of the procedure for the sale and purchase of weapons, ammunition, combat technology, and other military property; production of poisonous substances, narcotic means, and the procedure for the use thereof;
(m) determination of the status and defense of the State boundary, territorial sea, airspace; exclusive economic zone, and continental shelf of the Russian Federation;
(n) court organization; procuracy; criminal, criminal procedure, and criminal executory legislation; amnesty and pardon; civil, civil procedure, and arbitrazh procedure legislation; legal regulation of intellectual property;
(o) federal conflicts of law;
(p) meteorological service, standards, metric system, and calculation of time; geodesy and cartography; names of geographic objects; official statistical and bookkeeping records;
(q) State awards and titles of honor of the Russian Federation;
(r) federal State service.

Article 90

1. The President of the Russian Federation shall issue edicts and regulations.
2. Edicts and regulations of the President of the Russian Federation shall be binding for execution throughout the entire territory of the Russian Federation.

3. Edicts and regulations of the President of the Russian Federation must not be contrary to the Constitution of the Russian Federation and federal laws.

Article 104

1. The right of legislative initiative shall belong to the President of the Russian Federation, the Soviet of the Federation, members of the Soviet of the Federation, deputies of the State Duma, the Government of the Russian Federation, and legislative (or representative) agencies of Subjects of the Russian Federation. The right of legislative initiative shall also belong to the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, and the Supreme Arbitrazh Court of the Russian Federation with regard to questions of their jurisdiction.
2. Draft laws shall be submitted to the State Duma.
3. Draft laws concerning the introduction or abolition of taxes, exemption from the payment thereof, the issuance of State loans, change of financial obligations of the State, and other draft laws providing for expenses to be covered at the expense of the federal budget may be submitted only when there is an opinion of the Government of the Russian Federation.

Article 115

1. On the basis of and in execution of the Constitution of the Russian Federation, federal laws, and normative edicts of the President of the Russian Federation, the Government of the Russian Federation shall issue decrees and regulations and ensure their execution.
2. Decrees and regulations of the Government of the Russian Federation shall be binding for execution in the Russian Federation.
3. Decrees and regulations of the Government of the Russian Federation may in the event of their failure to conform to the Constitution of the Russian Federation, federal laws, and edicts of the President of the Russian Federation be repealed by the President of the Russian Federation.

Article 125

1. The Constitutional Court of the Russian Federation shall consist of 19 judges.
2. The Constitutional Court of the Russian Federation shall, at the requests of the President of the Russian Federation, Soviet of the Federation, State Duma, one-fifth of the members of the Soviet of

the Federation or deputies of the State Duma, Government of the Russian Federation, Supreme Court of the Russian Federation and Supreme Arbitrazh Court of the Russian Federation, agencies of legislative and executive power of Subjects of the Russian Federation, settle cases concerning the conformity to the Russian Constitution of:

(a) federal laws, normative acts of the President of the Russian Federation, Soviet of the Federation, State Duma, and Government of the Russian Federation;
(b) constitutions of the republics, charters, and also laws and other normative acts of Subjects of the Russian Federation issued with regard to questions relegated to the jurisdiction of agencies of State power of the Russian Federation and the joint jurisdiction of agencies of State power of the Russian Federation and agencies of State power of Subjects of the Russian Federation;
(c) treaties between agencies of State power of the Russian Federation and agencies of State power of Subjects of the Russian Federation, and treaties between agencies of State power of Subjects of the Russian Federation;
(d) international treaties of the Russian Federation which have not entered into legal force;

3. The Constitutional Court of the Russian Federation shall settle disputes concerning the competence:
   (a) between Federal agencies of State power;
   (b) between agencies of State power of the Russian Federation and agencies of State power of Subjects of the Russian Federation;
   (c) between the highest State agencies of Subjects of the Russian Federation.
4. The Constitutional Court of the Russian Federation shall verify the constitutionality of a law being applied or subject to application in a specific case in the procedure established by a federal law with regard to appeals against a violation of constitutional rights and freedoms of citizens and at the requests of courts.
5. The Constitutional Court of the Russian Federation shall at the requests of the President of the Russian Federation, Soviet of the Federation. State Duma, Government of the Russian Federation, and agencies of legislative power of Subjects of the Russian Federation give an interpretation of the Constitution of the Russian Federation.
6. Acts or individual provisions thereof deemed to be unconstitutional shall lose force; international treaties of the Russian Federation which do not conform to the Constitution of the Russian Federation shall not be subject to introduction into operation and application.

7. The Constitutional Court of the Russian Federation at the request of the Soviet of the Federation shall give an opinion concerning the compliance with the established procedure of the putting forward of an accusation against the President of the Russian Federation of treason against the State or commission of another grave crime.

ANNEX B

FEDERAL LAW ON INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION (1995)[30]

Article 2

Use of Terms

For the purposes of the present federal law:

(a) "international treaty of the Russian Federation" means an international agreement concluded by the Russian Federation with a foreign State(s) or with an international organization in written form and regulated by international law, irrespective of whether such agreement is contained in one or in several related documents, and also irrespective of its specific name;

(b) "ratification," "confirmation," "adoption" and "accession" mean, depending upon the event, the form of expression of the consent of the Russian Federation to the bindingness of an international treaty upon it;

(c) "signature" means either the stage of concluding a treaty, or the form of expression of consent by the Russian Federation to the bindingness of an international treaty upon it if the treaty provides that signature has such force, or an arrangement of the Russian Federation and other States participating in negotiations has established otherwise that the signature must have such force, or the intention of the Russian Federation to attach such force to the signature arises from the powers of its representative or was expressed during the negotiations;

(d) "conclusion" means the expression of the consent of the Russian Federation to the bindingness of the international treaty for it;

(e) "powers" means a document which emanates from a competent agency of the Russian Federation and by means of which one person or several persons are appointed to represent the Russian Federation for the purposes of: conducting negotiations; adopting the text of a treaty or establishing the authenticity thereof; expressing the consent of the Russian Federation to the bindingness of the treaty for it; performing any other act relating to the treaty;

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[30] The articles of the 1995 Law that are discussed in this chapter are reprinted below as translated by W.E. Butler, in Butler *supra* note 2 and reprinted with permission.

(f) "reservation" means a unilateral declaration made when signing, ratifying, confirming, or adopting a treaty or acceding thereto by means of which the wish is expressed to exclude or change the legal operation of specified provisions of the treaty in their application to the Russian Federation;

(g) "international organization" means an inter-State or intergovernmental organization;

(h) "depositary" means a State, international organization, or its chief executive official to whom the original of the international treaty is handed over for keeping and who fulfills with respect to this treaty the functions provided for by international law.

Article 5

International Treaties of the Russian Federation in the Legal System of the Russian Federation

1. International treaties of the Russian Federation shall, together with generally recognized principles and norms of international law, be an integral part of its legal system in accordance with the Constitution of the Russian Federation.

2. If other rules have been established by an international treaty of the Russian Federation than those provided for by a law, then the rules of the international treaty shall apply.

3. The provisions of officially published international treaties of the Russian Federation which do not require the publication of intra-State acts for application shall operate in the Russian Federation directly. Respective legal acts shall be adopted in order to effectuate other provisions of international treaties of the Russian Federation.

Article 6

Expression of Consent of the Russian Federation to the Bindingness of an International Treaty for It

1. The consent of the Russian Federation to the bindingness for it of an international treaty may be expressed by means of: signature of the treaty; the exchange of documents which form a treaty; ratification of the treaty; confirmation of the treaty; adoption of the treaty; accession to the treaty; and the use of any other means of expressing consent which the contracting parties have stipulated.

2. Decisions concerning consent to the bindingness for the Russian Federation of international treaties shall be adopted by agencies of State power of the Russian Federation in accordance with their competence established by the Constitution of the Russian Federation, by the present Federal Law, and by other acts of legislation of the Russian Federation.

Article 9

Proposals Concerning Conclusion of International Treaties of the Russian Federation

1. Proposals concerning the conclusion of international treaties in the name of the Russian Federation shall be submitted to the President of the Russian Federation, and proposals concerning the conclusion of international treaties in the name of the Russian Federation relating to questions relegated to the jurisdiction of the Government of the Russian Federation shall be submitted to the Government of the Russian Federation.

2. Proposals concerning the conclusion of international treaties in the name of the Russian Federation shall be submitted to the President of the Russian Federation by the Ministry of Foreign Affairs of the Russian Federation.

Other Federal agencies of executive power shall submit to the President of the Russian Federation proposals concerning the conclusion of international treaties in the name of the Russian Federation with regard to questions within their competence jointly with the Ministry of Foreign Affairs of the Russian Federation or by agreement with it.

Proposals concerning the conclusion of international treaties in the name of the Russian Federation which are subject to submission to the President of the Russian Federation and which require the preliminary consideration thereof by the Government of the Russian Federation shall be submitted to the Government of the Russian Federation. Decisions of the Government of the Russian Federation concerning the submission to the President of the Russian Federation of proposals concerning the conclusion of international treaties in the name of the Russian Federation shall be adopted in the form of a decree.

Proposals concerning the conclusion of international treaties in the name of the Russian Federation with regard to questions relegated to the jurisdiction of the Government of the Russian Federation shall be submitted in the procedure established by point 3 of the present Article.

3. Proposals concerning the conclusion of international treaties in the name of the Government of the Russian Federation shall be submitted to the Government of the Russian Federation by the Ministry of Foreign Affairs of the Russian Federation.

Other Federal agencies of executive power shall submit to the Government of the Russian Federation proposals concerning the conclusion of international treaties in the name of the Government of the Russian Federation regarding questions within their competence jointly with the Ministry of Foreign Affairs of the Russian Federation or by agreement with it.

4. Proposals concerning the conclusion of international treaties of the Russian Federation of an interdepartmental character shall be submitted

to the Government of the Russian Federation by Federal agencies of executive power with regard to questions within their competence jointly with the Ministry of Foreign Affairs of the Russian Federation or by agreement with it.

5. Proposals concerning the conclusion of international treaties of the Russian Federation shall, before their submission to the President of the Russian Federation or to the Government of the Russian Federation, be agreed with the interested Federal agencies of executive power, other agencies of State power of the Russian Federation, and agencies of State power of the respective Subjects of the Russian Federation.

Proposals concerning the conclusion of an international treaty must contain the draft treaty or its basic provisions, a substantiation of the advisability of the conclusion thereof, a determination of the conformity of the draft treaty to legislation of the Russian Federation, and also an evaluation of the possible financial-economic and other consequences of the conclusion of the treaty.

6. Federal agencies of executive power shall have the right to conduct, by agreement with the Ministry of Foreign Affairs of the Russian Federation, consultations with respective agencies of foreign States or international organizations for the purpose of preparing draft international treaties for the submission of proposals in the procedure established by points 1–5 of the present Article concerning the conclusion thereof to the President of the Russian Federation or to the Government of the Russian Federation.

Article 14

Ratification of International Treaties of the Russian Federation

In accordance with the Constitution of the Russian Federation the ratification of international treaties of the Russian Federation shall be effectuated in the form of a Federal Law.

Article 15

International Treaties of the Russian Federation Subject to Ratification

1. International treaties of the Russian Federation shall be subject to ratification:

(a) the performance of which requires changes of prevailing, or the adoption of new, federal laws, and also which establish other rules than those provided for by a law;
(b) the subject of which is the basic rights and freedoms of man and citizen;

(c) concerning the territorial demarcation of the Russian Federation with other States, including treaties on the course of the State boundary of the Russian Federation, and also the demarcation of the exclusive economic zone and continental shelf of the Russian Federation;

(d) on the basic principles of inter-State relations, regarding questions affecting the defense capability of the Russian Federation, regarding questions of disarmament or international control over armaments, regarding questions of ensuring international peace and security, and also peace treaties and treaties on collective security;

(e) on the participation of the Russian Federation in inter-State unions, international organizations, and other inter-State associations, if such treaties provided for the transfer to them of the effectuation of part of the powers of the Russian Federation or establish the legal bindingness of decisions of their organs for the Russian Federation.

2. International treaties of the Russian Federation likewise shall be subject to ratification when during the conclusion of which the parties have stipulated subsequent ratification.

Article 16

Procedure for Submitting International Treaties for Ratification

1. International treaties, decisions concerning the signature of which were adopted by the President of the Russian Federation, shall be submitted to the State Duma of the Federal Assembly of the Russian Federation for ratification by the President of the Russian Federation.

International treaties, decisions concerning the signature of which were adopted by the Government of the Russian Federation, shall be submitted to the State Duma for ratification by the Government of the Russian Federation.

The Government of the Russian Federation shall have the right, when necessary, to submit to the President of the Russian Federation a proposal concerning the submission for ratification of an international treaty, the decision to sign which was adopted by the Government of the Russian Federation.

2. Proposals concerning the approval and submission for ratification of international treaties shall be submitted respectively to the President of the Russian Federation and to the Government of the Russian Federation by the Ministry of Foreign Affairs of the Russian Federation autonomously or jointly with other Federal agencies of executive power if the treaty affects questions within their competence.

International treaties which are subject to submission to the President of the Russian Federation for submission for ratification, the fulfillment of which requires the preliminary consideration thereof by the Government of the Russian Federation, shall be submitted to the Government of the Russian Federation.

3. Decisions of the Government of the Russian Federation concerning the approval and the submission for ratification of international treaties, and also concerning approval and submission to the President of the Russian Federation for the submission of international treaties for ratification shall be adopted in the form of a Decree.

4. The proposal concerning ratification of an international treaty must contain a certified copy of the official text of the international treaty, a substantiation of the advisability of its ratification, a determination of the conformity of the treaty to legislation of the Russian Federation, and also an evaluation of the possible financial-economic and other consequences of ratification of the treaty, including, when necessary, an Opinion of the Government of the Russian Federation as provided for by Article 104 of the Constitution of the Russian Federation.

5. In the event a subject of the right of legislative initiative submits to the State Duma on the basis of Article 104 of the Constitution of the Russian Federation a draft law not mentioned in point 1 of the present Article regarding a question of the ratification of an international treaty which has not yet entered into force for the Russian Federation but is subject to ratification in accordance with Article 15 of the present Federal Law, the State Duma shall send the draft law submitted to the President of the Russian Federation for proposals regarding this draft law.

Article 17

Decisions Concerning Ratification of International Treaties of the Russian Federation

1. The State Duma shall consider proposals concerning the ratification of international treaties and after preliminary discussion in committees and commissions of the State Duma shall adopt respective decisions.

Federal laws adopted by the State Duma concerning the ratification of international treaties of the Russian Federation shall be subject in accordance with the Constitution of the Russian Federation to obligatory consideration in the Soviet of the Federation.

(a) A Federal Law adopted by the Federal Assembly of the Russian Federation concerning the ratification of an international treaty of the Russian Federation shall be sent, in accordance with the Constitution of the Russian Federation, to the President of the Russian Federation for signature and promulgation.

Article 20

Confirmation and Adoption of International Treaties

1. The confirmation and adoption of international treaties which are subject to confirmation and adoption shall be effectuated:

(a) with respect to treaties to be concluded in the name of the Russian Federation with regard to questions specified in Article 15(1) of the present Federal Law: in the form of a Federal Law in the procedure established by Article 17 of the present Federal Law for the ratification of international treaties;

(b) with respect to treaties to be concluded in the name of the Russian Federation (except for treaties provided for by subpoint (a) of the present point): by the President of the Russian Federation, and with respect to treaties to be concluded in the name of the Russian Federation with regard to questions relegated to the jurisdiction of the Government of the Russian Federation: by the Government of the Russian Federation;

(c) with respect to treaties to be concluded in the name of the Government of the Russian Federation: by the Government of the Russian Federation.

2. The President of the Russian Federation shall adopt decisions concerning the confirmation and adoption of international treaties with regard to questions relegated to the jurisdiction of the Government of the Russian Federation if such is necessary.

3. The confirmation or adoption of international treaties of an interdepartmental character which provide for the entry into force thereof after confirmation or adoption shall be effectuated by Federal agencies of executive power in whose name such treaties were signed.

4. Proposals concerning the confirmation or adoption of international treaties in the form of a Federal Law shall be submitted in the procedure established by Article 16 of the present Federal Law, and in other instances, in the procedure provided for by Article 9 of the present Federal Law.

Article 25

Reservations to International Treaties of the Russian Federation

1. When signing, ratifying, confirming, or adopting international treaties of the Russian Federation or acceding to treaties, reservations may be made while complying with the conditions of the treaty and respective norms of international law.

2. Reservations may be removed at any time (unless provided otherwise by an international treaty of the Russian Federation) in the same procedure in which they were made.

3. The acceptance of a reservation made by another contracting State to an international treaty of the Russian Federation or an objection to such shall be effectuated in accordance with the conditions of the treaty itself and the norms of international law by the agency which adopted the decision concerning consent to the bindingness of the international treaty for the Russian Federation.

Proposals concerning the acceptance or objection to reservations to be effectuated in the form of a Federal Law shall be submitted in the procedure established by Article 16 of the present Federal Law, and in other instances, in the procedure provided for in Article 9 of the present Federal Law.

Article 31

Fulfillment of International Treaties of the Russian Federation

1. International treaties of the Russian Federation shall be subject to good-faith fulfillment in accordance with the conditions of the international treaties themselves, norms of international law, the Constitution of the Russian Federation, the present Federal Law, and other acts of legislation of the Russian Federation.

2. The Russian Federation shall, before the entry into force for it of an international treaty, refrain from actions which would deprive the treaty of its object and purposes, taking into account the respective norms of international law.

3. An international treaty shall be subject to fulfillment by the Russian Federation from the moment of the entry into force thereof for the Russian Federation.

Article 33

Measures Applicable in Event of Violation of an International Treaty of the Russian Federation by Other Participants Thereof

In the event of a violation of obligations under an international treaty of the Russian Federation by other participants thereof, the Ministry of Foreign Affairs of the Russian Federation or other Federal agencies of executive power shall, jointly with the Ministry of Foreign Affairs of the Russian Federation, submit to the President of the Russian Federation or to the Government of the Russian Federation, depending upon within whose competence the questions are, proposals concerning the taking of necessary measures in accordance with norms of international law and the conditions of the treaty itself.

Article 34

Conformity of International Treaties to the Constitution of the Russian Federation

1. The Constitutional Court of the Russian Federation shall in the procedure determined by a federal constitutional law settle cases concerning the conformity to the Constitution of the Russian Federation of international treaties which have not entered into force for the Russian Federation, or individual provisions thereof, and shall settle disputes concerning the competence between Federal agencies of State power, and also between agencies of State power of the Russian Federation and agencies of State power of Subjects of the Russian Federation in connection with the conclusion of international treaties of the Russian Federation.

2. International treaties which have not entered into force for the Russian Federation and deemed by the Constitutional Court of the Russian Federation to not conform to the Constitution of the Russian Federation shall not be subject to introduction into operation and application.

Article 37

Termination and Suspension of Operation of International Treaties of the Russian Federation

1. The termination (including denunciation) and suspension of the operation of international treaties of the Russian Federation shall be effectuated in accordance with the conditions of the treaty itself and norms of international law by the agency which adopted the decision concerning consent to the bindingness of the international treaty for the Russian Federation.

2. The President of the Russian Federation shall adopt, if this is necessary, decisions concerning the termination or suspension of the operation of international treaties of the Russian Federation, the consent to the bindingness of which for the Russian Federation was given by the Government of the Russian Federation.

3. The State Duma shall consider proposals concerning the termination or suspension of the operation of international treaties of the Russian Federation and after the preliminary discussion in committees and commissions of the State Duma shall adopt respective decisions.

Federal Laws adopted by the State Duma concerning termination (including denunciation) or suspension of the operation of international treaties of the Russian Federation shall be subject, in accordance with the Constitution of the Russian Federation, to obligatory consideration in the Soviet of the Federation.

A Federal Law adopted by the Federal Assembly of the Russian Federation concerning the termination (including denunciation) or suspension of the operation of an international treaty of the Russian Federation shall be sent, in accordance with the Constitution of the Russian Federation, to the President of the Russian Federation for signature and promulgation.

4. The operation of an international treaty of the Russian Federation, the decision concerning consent to the bindingness of which for the Russian Federation was adopted in the form of a Federal Law may be suspended by the President of the Russian Federation in instances requiring the taking of urgent measures, with the obligatory immediate informing of the Soviet of the Federation and the State Duma and the submission to the State Duma of a draft respective Federal Law.

In the event the State Duma rejects the draft Federal Law concerning the suspension of the operation of an international treaty of the Russian Federation, the operation of the treaty shall be subject to immediate renewal.

5. The termination and suspension of the operation of international treaties of the Russian Federation of an interdepartmental character shall be done by Federal agencies of executive power in whose name such treaties were concluded by agreement with the Ministry of Foreign Affairs of the Russian Federation, by other interested Federal agencies of executive power, by agencies of State power of respective Subjects of the Russian Federation, and with the authorization of the Government of the Russian Federation.

6. The Government of the Russian Federation shall adopt decisions concerning the termination or suspension of the operation of international treaties of the Russian Federation of an interdepartmental character if the respective questions have important significance for State interests of the Russian Federation.

7. Decisions concerning the termination (including denunciation) and suspension of the operation of international treaties in which the Russian Federation is a party as the State-continuer of the U.S.S.R. shall be adopted by agencies of State power of the Russian Federation in accordance with their competence established by the Constitution of the Russian Federation, by the present Federal Law, and by other acts of legislation of the Russian Federation.

The making of respective proposals and draft laws shall be effectuated according to the procedure established by Article 36 of the present Federal Law.

Article 38

Consequences of Termination of an International Treaty of the Russian Federation

The termination of an international treaty of the Russian Federation, unless provided otherwise by the treaty or there is another arrangement with its other participants, shall relieve the Russian Federation from any obligation to fulfill the treaty thereafter and shall not influence the rights, obligations, or legal status of the Russian Federation which arose as a result of the fulfillment of the treaty before the termination thereof.

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CHAPTER SIXTEEN

NATIONAL TREATY LAW AND PRACTICE: SOUTH AFRICA

N.J. Botha

I. Introduction

2004 marks the tenth year of the new South African democracy. The past ten years have seen momentous changes in the regulation of treaties in South African law. The country has moved from the pre-1993, essentially Westminster, approach originating in its colonial past and characterized by legislative silence; through initial legislative regulation in section 231(2) and (3) of the Interim Constitution of 1993;[1] to the current regulation in a separate section 231 in the present supreme Constitution of 1996 (the Constitution).[2] During the same period, South Africa has emerged apace from international isolation. Nowhere is this more evident than in the proliferation in its treaty commitments, both bilateral and multilateral.[3] Together with the country's readmission to international interaction has come a domestic restructuring of most government departments – not least the Department of Foreign Affairs.[4]

While in principle the legislative regulation of a country's treaty commitments is to be welcomed, in the case of South Africa the process has raised a number of questions to which there are at present no clear-cut answers. The country is facing issues that simply did not arise within

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[1] Republic of South Africa Constitution Act 200 of 1993 (hereinafter Interim Constitution), *available at* www.polity.org.2a/govodcs/legislation/1993/constit0.html. For an exposition of the pre-1993 position, *see* John Dugard, *International Law – A South African Perspective*, Ch. 4 (1st ed., 1994).

[2] Republic of South Africa Constitution Act 108 of 1996 (hereinafter the Constitution).

[3] Between 1980 and 1989, the treaty-conclusion rate averaged fourteen per annum. Between 1990 and 1998 this had risen to 70 per annum and now stands at approximately 90 per annum. A full list of the treaties (bi- and multilateral) concluded by South Africa in a particular year appears in the *South African Yearbook of International Law* published annually.

[4] For an idea of just how far-reaching these changes have been within the Department of Foreign Affairs, *see* Marie Muller, "Developments in the Conduct of South African Diplomacy," 23 *SAYIL* 139 (1998). The line-functions within the department are also set out in this article. The changes have been no less profound in other state departments.

the isolationist context of the previous dispensation and is doing so with a heavily reduced personnel contingent, many of whom are inexperienced in the niceties of the practice of international law. Although policies are in place for many processes, in certain instances no clear guidelines exist and the official approach is still evolving. In these instances, issues are addressed ad hoc as they arise. Where no clear guidelines exist, reliance has been placed on basic international theory to provide answers that are, of necessity, tentative.

These problems are further compounded by the provisions of the 1996 Constitution governing international law. Specifically as regards treaties, section 231 cannot be regarded as a model of clarity. The dual role accorded international law within the Constitution[5] precludes glib answers to questions surrounding the municipal application of treaties by South African courts. These provisions are, furthermore, to be applied by a legal fraternity for whom international law is largely a closed book.[6] Because the Constitution is a relatively new law, and because many of the country's treaty commitments are even more recent, there have as yet been few opportunities for the courts to pronounce expressly on sections 231 or 233 of the Constitution. Consequently, as with the policy issues above, discussion must be to some extent speculative.

II. South African Treaty Law and Practice

A. *Definition and Classification of International Agreements*

The drafters of both the Interim and the 1996 Constitutions opted for the term "international agreement" in preference to "treaty."[7] International

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[5] There is a clear division within the 1996 Constitution between the application of substantive international law in sections 231 (treaties) and 232 (customary international law), and the use of international law as a tool for the interpretation of the rights enshrined in the Constitution (section 39 – the Bill of Rights) and in South African municipal legislation (section 233 – interpretation of any legislation).

[6] The years of neglect of public international law as a legal discipline in the training of South African lawyers have meant that practitioners on both sides of the bench/bar are ill equipped to either present or evaluate international law – a fact recognized by the South African Truth and Reconciliation Commission in the following terms: "All persons within the justice system (from clerks to judges) [must] undergo intensive training in the values of the new South African Constitution and *in the requirements of international law and standards. . . .*" *See also* John Dugard, "The Conflict Between International Law And South African Law: Another Divisive Factor in South African Society," 1986 *So. Afr. J. Hum. Rts.* 1; N.J. Botha, "The Coming of Age of Public International Law In South Africa," 18 *SAYIL* 36 (1992/93).

[7] The Republic of South Africa Constitution Act 110 of 1983, section 6(3)(e) detailed

agreement, although not defined in the Constitution, does not bear any particular technical meaning, but should rather be understood as a generic term encompassing all forms of treaties.[8] In determining whether a specific agreement qualifies as a treaty, the general criteria laid down in the Vienna Convention on the Law of Treaties of 1969 apply,[9] even though South Africa is not a party to the Convention. Consistent with these criteria, the international character of the agreement is determined by the capacity and intention of the parties rather than the subject matter of the agreement.

In line with the provisions of the Vienna Convention, international agreements are in writing and between States.[10] No provision is made for oral agreements, which are consequently without official sanction, or for unilateral acts.[11] It should further be noted that no mention is made in either the Constitution or the President's *Manual on Executive Acts* of agreements with international organizations. To the extent that such organizations have the capacity to conclude treaties, an agreement between the Republic and such an organization would, it may be argued, qualify

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the powers of the State President to enter into and ratify "international agreements, treaties and conventions."

[8] The term would include bilateral and multilateral treaties, conventions, protocols, exchange of notes, etc. *See* M. Olivier, "The Status of International Law in South African Municipal Law: Section 231 of The 1993 Constitution," 19 *SAYIL* 1, 5 (1993/94). Ms. Olivier represented the Department of Foreign Affairs on the negotiating team for the Interim Constitution. In her subsequent article, "Informal International Agreements under the 1996 Constitution," 22 *SAYIL* 63–75 (1997), Olivier argues for the concept of including informal agreements within the meaning of the term "treaty." This is rejected by John Dugard, *International Law – A South African Perspective* 59 (2d ed., 2000). *See also Harksen v. President of the RSA*, Cape Provincial Division case A394/99 (unreported), *discussed in* N.J. Botha, "Lessons from Harksen: A Closer Look at the Constitutionality of Extradition in South African Law", 33 *CILSA* 274 at 287ff. (2000); J. Schneeberger, "A Labyrinth of Tautology: The Meaning of the Term 'International Agreement' and its Significance for South African Law and Treaty-Making Practice," 26 *SAYIL* 1 (2001).

[9] Vienna Convention on the Law of Treaties (1969), U.N. Doc. A/CONF 39/27 (1969), *reprinted in* 8 ILM 679 (1969), Part 1, Art. 2(1). South Africa is not a party to the Convention, but to the extent that its provisions represent a codification of customary international law, it is "law" in the Republic in terms of section 232 of the Constitution, save where it is incompatible with the Constitution or an act of Parliament. *See Harksen v. President of the RSA*, 2000 1 SA 1185(C) (judgment of the Cape Provincial Division); *Harksen v. President of the RSA and Others, 2005 BCLR 478 (CC)* (judgement of the Constitutional Court).

[10] *See* Office of the President, *Manual on Executive Acts of the President of the Republic of South Africa, Office of the President* (March 1999) (hereafter *Manual*). The *Manual*, which has not been published, is aimed at guiding state departments in the correct processes for the drafting and submission of documents to the President in accordance with the Constitution. Chapter 5 is titled "International Agreements and Representation of the Government at International Level." In the *Manual*, an international agreement is defined as "any written agreement between South Africa and another state or states." *Id.* at 23.

[11] *See* the discussion of President's acts in Section II.B. below, particularly note 17.

as a treaty under general principle.[12] Because the capacity to conclude international agreements vests exclusively in the national executive,[13] South Africa does not make use of agency-to-agency agreements in the sense that any body other than the national executive is empowered to conclude international agreements on an ongoing and independent basis. This would not, however, preclude an agreement between the Republic and the authorized agency of a foreign State with the capacity to conclude treaties being classified as a treaty for purposes of South African law. Similarly, were a South African parastatal or body other than the national executive to receive specific authorization from the President, an agreement between it and a foreign State would qualify as a treaty,[14] although this must be regarded as highly exceptional and has not in fact happened save in the country's very earliest history.[15] Special provision is made for so-called implementing agreements, notably in the case of routine development aid agreements functioning within a specific framework agreement. Fewer formalities are required for their conclusion and specific presidential approval is not required for each implementing agreement.[16] These instances aside, all agreements negotiated by parties other than the national executive will, irrespective of content, be regarded as contracts governed by municipal law and will not give rise to binding international law rights and duties.

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[12] The binding decisions of international organizations to which South Africa is a party are more problematic and are considered below under Section II.G.

[13] *See Manual*, Ch. 5, § 5.25, at 29.

[14] It is stated clearly in the *Manual* (Ch. 5, § 5.25, at 29) that the provinces (see Chapter 6 of the Constitution) "may not enter into agreements governed by international law except as agents of the National Executive." The possibility therefore exists that the power to conclude an international agreement may be delegated to a province. However, this would be for a specific instance only and would require the issuing of full powers by the President. There have been instances where, borne along by the euphoria of international acceptance, provincial executives concluded what they regarded as international agreements with foreign states. The Government's attitude is, however, clear that these are no more than contracts "not governed by international law." *Id.* The possibility of subsequent confirmation by the national executive in accordance with Article 8 of the Vienna Convention also exists, although no record could be traced of this in fact having been done.

[15] Interestingly, the only record of what may be regarded as the equivalent of the agency-process in South Africa's history is to be found in the first 140 years of its existence while it was under Dutch rule and treaty-making capacity was vested in the Dutch East India Company. N.J. Botha, *The History, Basis and Current Status of The Right or Duty to Extradite in Public International and South African Law* (1992) (unpublished thesis, University of South Africa). Perhaps surprisingly, even at the height of its international isolation, South Africa was not amenable to the agency concept. Again, with the withdrawal of recognition from the Republic of China on Taiwan, one might have expected a maintenance of relations – at least on the trade level – through a structure analogous to that adopted by the United States. This has, however, not been the official response.

[16] *Manual*, Ch. 5, § 5.19, at 27; *see* Section II.B. below; Schneeberger *supra* note 8.

B. *Negotiation and Signature of International Agreements*

In terms of section 231(1) of the 1996 Constitution, the negotiation and signature of all international agreements is the responsibility of the national executive which consists of the President and the Cabinet. As the President is both head of State and head of Government, he may act in either capacity. As head of State, the President acts outside the normal executive function as a symbol of the State by way of the President's acts.[17] When acting as head of the national executive, the President acts by way of Presidential Minute[18] "together with the other members of the cabinet."[19] The phrase "together with" is understood to mean that the Cabinet must agree on its *modus operandi* and that all matters of substance, both presidential and ministerial, must be placed before the Cabinet. While entrenching the concept of collective responsibility, this phrase does not mean that every routine or departmental matter must be considered by the entire Cabinet. Ministers may be authorized by delegation to perform the consultative function of the Cabinet.[20]

Routine or department-specific matters or functions need therefore not be referred to the entire Cabinet. Whether a matter is routine or department-specific is determined by the minister concerned in an explanatory memorandum presented to the President for signature explaining the reasons for the recommended Presidential Minute. The President may at this point decide that the matter is in fact one that should be considered by the Cabinet and so direct. However, all issues of policy, significant decisions, decisions with financial consequences, and matters that the Cabinet previously has resolved should be referred to it, must be considered by

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[17] *Manual*, Ch. 2, at 3ff. & Ch. 3, at 9. These powers are listed in section 84(2) of the 1996 Constitution and, as regards international law, include the power to receive and recognize foreign diplomatic and consular representatives (§ 84(2)(g)) and to appoint ambassadors, plenipotentiaries and diplomatic and consular representatives (§ 84(2)(h)). Although in theory the President may act alone in performing these functions, section 101(2) of the Constitution provides that when an executive decision concerns a function assigned to any other member of the Cabinet, it must be countersigned by that member. So, while under the Interim Constitution the appointment or recognition of diplomatic representatives was effected by way of a President's act, it is now done by a Presidential Minute.

[18] *Manual*, Ch. 3, at 9ff. The Presidential Minute is a declaration by the President confirming/authorizing certain conduct. For an example, see Annex I.

[19] Constitution § 85(2).

[20] Under the 1983 and Interim Constitutions, this power to delegate was entrenched (§§ 23 and 83(1) respectively). Prior to 1983, the President acted "on the advice" of Cabinet although in practice, as head of Government, the Prime Minister could act on his own. Although the express provision has been removed from the Constitution, the practice of allowing a minister(s) to fulfil the Cabinet's consultative function has been retained.

the Cabinet. Counter-signature of the Presidential Minute by the responsible minister serves as proof of the required cooperation.[21]

The negotiation and signature of international agreements are regarded as executive acts and are effected by way of Presidential Minute. On the international plane, two species of international agreement are identified: international agreements requiring ratification or accession to bring them into effect; and international agreements for which the signature of a duly authorized representative of a contracting State party is sufficient to bring them into effect.[22] In both instances the negotiation of the agreement falls to the minister within whose portfolio the subject of the treaty falls.

In addition to the international requirements, sections 231(2) and (3) of the Constitution lay down procedures governing domestic approval for the conclusion of international agreements. Section 231(2) provides that an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.[23] An exception is, however, created in section 231(3) in that international agreements "of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession" but which is entered into by the national executive, will bind the Republic without the approval of Parliament. Nevertheless, these agreements must be tabled in both the National Assembly and the National Council of Provinces within a reasonable time.

Consequently, in considering the State's consent to international agreements, the Constitution requires that a distinction be drawn between agreements that require only executive approval but must be tabled in Parliament; and agreements that require both executive and parliamentary approval before they will be binding on the Republic.

1. *Agreements Requiring Executive Approval Only*

One of the criticisms leveled at the treatment of treaties in the Interim Constitution was that no clear distinction was made between "high treaties" on the one hand, and the day-to-day or "mundane" contact between States in the administrative sphere, on the other. It was felt that to subject "mundane" State agreements to the stringent and time-

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[21] *Manual*, Ch. 2, § 2.14, at 7; *id.* Ch. 3, § 3.4, at 9. Only the minister, or acting minister, within whose portfolio the matter falls may countersign. Deputy ministers are excluded from this function. *Id.*, Ch. 3, § 3.7, at 10.

[22] *Id.*, Ch. 5, § 5.1, at 23. The terms ratification and accession bear the normal meaning ascribed to them in international law. *See* N.J. Botha, "Incorporation of Treaties under the Interim Constitution: A Pattern Emerges," 20 *SAYIL* 196 (1995).

[23] The two houses of Parliament sit separately when approving international agreements. *Manual*, Ch. 5, § 5.10, at 25.

consuming process of parliamentary approval would clog up the already overburdened parliamentary system.[24] An attempt was made to address this problem through section 231(3)'s qualification to the general "approval by both houses" rule set forth in section 231(2) of the 1996 Constitution.

Section 231(3) identifies four instances in which parliamentary approval is not required for a treaty to bind the Republic internationally:

> An international agreement of a technical, administrative or executive nature, or an agreement that does not require either ratification or accession, entered into by the national executive, binds the Republic without approval of the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

Since this specific provision of section 231 has not yet been considered by the courts, and as the exceptions are also not defined in the Constitution, their determination is open to interpretation. At first glance, the phrasing of the exceptions would seem to imply, as a matter of language, that we are in fact concerned with two categories.[25] In the first place, we have "technical, administrative or executive" treaties as category one, followed, in the second place, by treaties not requiring "ratification or accession" as category two.

Starting with the simpler of the two, category two presents few problems of identification; one can, after all, determine from the provisions of a treaty whether accession is permitted or ratification required.[26] Can the same be said of category one?

As pointed out, the term "technical, administrative or executive" is not defined. Two possibilities emerge. One can take each of the terms to have a distinct meaning. We then have technical treaties, administrative treaties, and executive treaties – or three different types of treaty, each with an individual meaning and each constituting a separate subcategory. Alternately, the three terms may be read together as indicative of a single type or genus of treaty. If this latter approach is adopted, however, what are the characteristics of this type of agreement, or what characteristics do the three agreements share? Can the terms "technical," "administrative" and "executive" be classed as international "terms of art" to which a clear meaning can be attached?

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[24] *See* Olivier (1993/94), *supra* note 8, at 7–8.

[25] The phrasing of the section where we find "an international agreement of technical, administrative or executive nature" juxtaposed with a repetition of the phrase "or an agreement," would suggest that the legislature had two distinct types of agreement in mind.

[26] For the process of ratification, *see* John Dugard, *supra* note 8, at 54–57; Botha, *Incorporation of Treaties*, *supra* note 22.

Furthermore, if the "two category" approach is adopted, one must ask whether these categories are mutually exclusive. Taking category two again: if a treaty requires accession or ratification it does not fall within the section 231(3) exception and must be approved by both houses of Parliament. However, if categories one and two are mutually exclusive, can a treaty which indeed allows for accession or requires ratification, avoid the need for parliamentary approval by being classified as a category one (administrative, technical or executive) treaty that would then be exempt from section 231(2)? This possibility is recognized by the Office of the President, which cautions departments not to "lightly determine" that agreements requiring ratification are technical, administrative or executive as parliamentary exclusion from the ratification process could result in "a defect in the conclusion of the agreement."[27]

The official attitude, as expressed in the *Manual*, is that only two categories exist under section 231(3).[28] The term "technical, administrative and executive agreements"[29] forms a single category and are interchangeable. It refers to department-specific agreements; agreements without major political or other significance; and agreements which have no financial consequences and do not affect domestic law. These agreements flow from the everyday activities of government departments and are drafted in simplified form.[30] The second category comprises agreements that do not require accession or ratification.

Parliamentary approval is therefore required only for agreements which require ratification or accession and that are not technical, administrative or executive.[31]

This raises a crucial question in regard to the classification of treaties, namely: in whose hands does the determination of the nature of the agreement – and consequently the path it must follow to bind the Republic – rest? Ideally, this decision should lie outside of the party negotiating the treaty. Without in any way impugning the integrity of

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[27] *Manual*, Ch. 5, § 5.6, at 25; *See generally* Schneeberger *supra* note 8, at 4–8.

[28] *Manual*, Ch. 5, § 5.4, at 24.

[29] With regard to executive agreements, a somewhat strange footnote occurs in the *Manual* to the effect that "[t]he term 'executive' agreement is not a reference to 'self-executing' agreements which are those international agreements which are not internally operative and are often also described as 'non-law-making treaties.'" *Id.*, Ch. 5, § 5.5 n.10, at 24.

[30] *Id.*, Ch. 5, § 5.5, at 24. The *Manual* points out that no particular significance was attributed to possible differences in meaning between the terms by the drafting team at the Constitutional Assembly. They were simply intended to create a simplified and accelerated way of dealing with "minor everyday issues" that could be the subject of agreement between States but should not clog up the parliamentary roll.

[31] *Id.*, Ch. 5, § 5.4, at 24.

these decisionmakers, one must question the wisdom of a process in which the party who negotiated a treaty at the same time decides on its nature and therefore on the way in which it will be dealt with by Parliament. There is, after all, a considerable difference between an agreement being subjected to parliamentary approval (with the possibility of rejection which this process holds) and the mere tabling of a provision in both houses which, although allowing an opportunity for debate and criticism, is in the final instance no more than a process of notification of a *fait accompli*.

The provisions of section 231(2) imply a democratization of the treaty process unprecedented in South African law before 1993. In terms of this section, the individual citizen has, through parliamentary representation, at least as much say in what treaties will bind the Republic as he or she has in what laws will govern his or her life. It would appear that by failing to specify the entity which must decide on the nature of a treaty, section 231(3) holds the potential for the manipulation of the system and the undermining of this democratization in a very real sense. The highly commendable demystification of treaties inherent in section 231(2) runs the risk of again becoming obscured.

The Constitution is silent on this point. Current practice is that the determination of whether a treaty falls under section 231(3) and therefore does not require parliamentary approval, vests in the minister within whose portfolio the subject matter of the treaty falls. This decision must be taken in conjunction with the law advisors of the Departments of Justice and Foreign Affairs.[32] In the case of section 231(3) agreements, signature by the individual authorized by the national executive is sufficient to bring the agreement into effect if such signature is intended to indicate consent to be bound. The prior approval by the national executive to the signature of the agreement constitutes the formal authority to bind the Republic to the agreement.[33] The agreement must, furthermore, still be tabled in Parliament.[34]

The procedure for obtaining executive approval depends, as indicated above, on the nature of the agreement. In the case of routine or department-specific agreements, the line-function or portfolio minister acts on behalf of the Cabinet. This is done by way of an explanatory memorandum setting out the minister's reasons for classifying the agreement as routine or department-specific, and requesting written presidential

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[32] *Id.*, Ch. 5, § 5.5, at 24 & §§ 5.20–.21, at 27–28.
[33] *Manual*, Ch. 5, § 5.13, at 26.
[34] Constitution § 231(3).

approval of the agreement by way of a Presidential Minute countersigned by the portfolio minister.[35] Where, however, there is any doubt about the nature of the agreement, it is advisable for approval of the entire Cabinet to be sought by way of a cabinet memorandum requesting approval of the agreement and authorization of a particular individual to represent the Republic in the conclusion of the necessary formalities.[36] Failure to do so may prove fatal to the validity of the agreement.

Under agreements requiring only executive approval, specific mention must be made of what are termed "series or sets of agreements."[37] These are implementing agreements concluded on a frequent basis under a cooperation accord or framework agreement. Of particular relevance in this regard are development aid agreements. The negotiation and signature of these day-to-day agreements implementing an accord may be delegated by decision of Cabinet to the portfolio minister concerned. Having received this specific authorization, the minister may conclude "each of these minor agreements"[38] without prior presidential approval. The portfolio minister must still, however, consult the State law advisor and the legal section of the Department of Foreign Affairs, and copies of the agreements, together with proof of ministerial approval, must be forwarded to the President and Minister of Foreign Affairs for record purposes.

2. *Agreements Requiring Parliamentary Approval*

Agreements requiring ratification or accession and all agreements that are not technical, administrative or executive must be approved by both the National Assembly and the National Council of Provinces, sitting separately, before they will bind the Republic.[39] The executive appears to regard these requirements as cumulative in that parliamentary approval is required only for agreements meeting *both* criteria. In other words, an agreement requiring ratification or accession but which is classified as technical, administrative or executive will not require parliamentary approval.[40]

If an agreement requires parliamentary approval, the department responsible for the processing of the agreement submits the agreement to the Cabinet – by a cabinet memorandum – for consent to its submission

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[35] *Manual* Ch. 5, § 5.15, at 26; *id.* Ch. 5, § 5.17, at 27; and *id.* Ch. 2, § 2.11, at 7.
[36] *Id.*, Ch. 5, § 5.18, at 27.
[37] *Id.*, Ch. 5, § 5.19, at 27.
[38] *Id.; see also* Schneeberger *supra* note 8.
[39] Constitution § 231(2).
[40] *Manual*, Ch. 5, §§ 5.4–5.7, at 24 and *see* Section II.B.1, above.

to Parliament for ratification or accession. Before submission to the Cabinet, the agreement must have been considered by the law advisors of both the Departments of Justice and Foreign Affairs.[41] Once Cabinet approval for the submission of the agreement to Parliament has been obtained, the department concerned tables the agreement by way of a notice of motion together with a draft resolution and an explanatory memorandum.[42] The memorandum must detail the history, purposes and consequences of the agreement and whether its incorporation into domestic law in terms of section 231(4) is sought.[43]

It is stressed in the *Manual* that parliamentary committees are not authorized to negotiate or renegotiate the terms of treaties, and particularly not those of multilateral treaties negotiated in multilateral international forums. They may, however, insist on reservations in which case the agreement must be referred back to the executive.[44]

Once the agreement has been ratified by Parliament, the department responsible for the agreement submits an instrument of ratification to the Minister of Foreign Affairs. The minister deposits this instrument with the body specified in the agreement.[45]

Where the agreement requires municipal legislation in addition to parliamentary approval, this legislation must be prepared and submitted to Parliament by the department concerned.[46] No mention is made in the *Manual* of when this legislation must be submitted. One may only assume that this will be done as soon as is practicable.

The President's office lays down certain basic requirements that must be met before any agreement – whether it requires parliamentary approval or merely approval by the executive – will be submitted to the President. The following processes must be followed in the case of all international agreements.

The agreement is negotiated by the portfolio minister. Where the Government is to be represented at an international meeting by a person other than a minister, the line-function minister must give his/her approval and inform the Minister of Foreign Affairs before the meeting takes place. Credentials if required, are issued by the Minister of Foreign Affairs. Where the meeting is aimed at the negotiation or signature of

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[41] *Manual* Ch. 5, §§ 5.9, at 25; and *id.* §§ 5.20(a)–(b), at 28–29.

[42] *Id.*, Ch. 5, § 5.10, at 25.

[43] *Id.; see also* Section II.H. below for discussion of Constitution § 231(4).

[44] *Manual*, Ch. 5, § 5.11, at 25. The question of reservations is considered below in Section II.E.1.

[45] *Manual*, Ch. 5, § 5.12, at 26.

[46] *Id.*, Ch. 5, § 5.22, at 28; *see also* Section II.H. below.

an international agreement, authorization from the President, by way of a Presidential Minute, is required.[47]

The international agreement is then submitted to the law advisors of the Department of Justice who must examine the agreement and ensure its compatibility with South African domestic law. It is then submitted to the State legal drafters, also attached to the Department of Justice, for correct legal drafting.[48] The agreement is then submitted to the legal section of the Department of Foreign Affairs where it must be examined for consistency with international law, South Africa's international relations, and other international obligations.[49] The original agreement, or a certified copy, together with confirmation that the functions of the Departments of Justice and Foreign Affairs have been performed, the necessary Presidential Minute, and the explanatory memorandum are then submitted to the Office of the President for transmission to the executive.[50]

C. *The Role of the Legislature in the South African Treaty Process*

The legislature plays no role in the negotiation or signature of international agreements as these functions vest solely in the hands of the executive. However, as indicated in the previous section, in terms of section 231(2) of the Constitution all international agreements requiring ratification or accession, as well as those which are not classified as technical, administrative or executive, or which do not form part of a framework agreement or cooperation accord, will bind the Republic only after they have been approved by Parliament.

Agreements requiring legislative approval are therefore those which specifically provide for ratification or accession, and international agreements which "may have contentious consequences," which is generally understood to mean that the agreements impact on South African municipal law or have financial implications.[51] Approval is expressed by way of a resolution adopted by a simple majority[52] in each of the houses of Parliament –

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[47] *Manual*, Ch. 5, § 5.24, at 29.
[48] *Id.*, Ch. 5, § 5.20(a), at 28.
[49] *Id.*, Ch. 5, § 5.20(b), at 28.
[50] *Id.*, Ch. 5, § 5.20(c), at 28.
[51] *Id.*, Ch. 5, §§ 5.16 & 5.18, at 27.
[52] Constitution § 231(2). The Interim Constitution contained a similar provision save that no mention was made of how parliamentary approval was to be expressed. This resulted in confusion and was consequently modified to provide clarity in the 1996 Constitution.

the National Assembly and the National Council of Provinces[53] – in separate sittings. As indicated earlier, the classification of international agreements as technical, administrative or executive, is vested in the executive (in the person of the portfolio minister in consultation with the law advisors of the Departments of Justice and Foreign Affairs) and therefore does not involve the legislature. The agreements are subject to full parliamentary debate although this does not mean that the legislature may either negotiate or renegotiate the terms of a treaty. The relevant parliamentary portfolio committee does, however, have the power to *insist* on a reservation to the agreement before it or to refer the agreement back to the executive.[54]

D. *Consultation in the Treaty Process*

The idea of consultation in the treaty process was essentially unknown in South African law until 1993, when the possibility first emerged in the Interim Constitution. It was finally entrenched in 1996 under section 231(2) of the final Constitution. As such, consultation processes are undefined and, at best, somewhat arbitrary. There is no consultation with the legislature on the desirability of concluding a proposed agreement, this being left to the executive and subject to Cabinet consultation. As pointed out above, there is interdepartmental consultation in that the law advisors of the Departments of Justice and Foreign Affairs must be consulted, but only after the decision to enter into an international agreement has been taken. Parliamentary involvement arises only after the decision to conclude an agreement has been reached and approval in terms of section 231(2) of the Constitution is sought, or when an agreement is tabled in terms of section 231(3) of the Constitution – in so far as the latter process can be regarded as consultation.

Nevertheless, a growing trend in favor of consultation with the public can be discerned, in particular, in the case of human rights treaties,[55] treaties expected to have a marked domestic impact,[56] or those demanding

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[53] *See* Constitution §§ 46–59 and 60–72 for the National Assembly and National Council of Provinces respectively.

[54] *Manual*, Ch. 5, § 5.11, at 25.

[55] For example, when consideration was being given to South Africa's accession to the African Charter on Human and Peoples' Rights, information sessions were held and the involvement of nongovernmental organizations and other interested parties was encouraged.

[56] For example, the trade agreement scheduled to be signed with the European Union on October 11, 1999 was characterized by consultations with representatives from all interested sectors.

specific expertise.[57] There is, however, no statutory (constitutional or otherwise) provision demanding wide-ranging consultation. Nor is any mention made of consultation in the *Manual* as one of the formal requirements in the treaty-making process. It would appear that whether, and to what extent, there will be consultation is in the discretion of the portfolio minister within whose authority the proposed treaty falls.

Where consultation in fact takes place, its form is also free-ranging and by means of invitation. Apart from nongovernmental organizations (NGOs) and other identifiable interest groups, academics with particular expertise in the areas involved are often called upon to comment on the implications of proposed international agreements. There has been at least one instance of a general invitation to the public at large to comment on the desirability of committing the Republic to a certain regime, but this must be regarded as exceptional.[58]

In short, therefore, there is no formalized, compulsory consultation at any of the preliminary stages of the treaty-making process. Informal consultations, initiated by the line-function minister under whose portfolio the agreement resorts, do take place and the possibility of general participation by way of an invitation to comment published in the *Government Gazette* is not excluded. Proposed agreements, or proposed legislation embodying the principles of such agreements, can also be published as white papers to which the public is invited to respond.

E. *Reservations to Treaties, Treaty Termination and Implementation of Treaty Commitments*

1. *Reservations*

There is no clear official policy on reservations. Past attempts to articulate both policy and procedural guidelines have not yet borne fruit.[59]

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[57] For example, when considering whether or not to subscribe to the UNCITRAL Model Treaty governing arbitration, a call was made to any interested parties to submit comments.

[58] The only instance of this form of "general invitation" which I have seen so far is that referred to *supra*, note 57.

[59] In May 1998 the South African Department of Justice drafted an opinion in response to the International Law Commission's study on reservations to treaties. Department of Justice Document 8/8/5/4(MB) (May 5, 1998). This involved an investigation into the unity or diversity of the legal regime applicable to reservations based on the subject of the treaty (with specific reference to human rights treaties), and the machinery for monitoring the implementation of the reservation regime. In essence, a unitary regime based on the 1969 Vienna Convention on the Law of Treaties (as supplemented by the Vienna Convention of 1986) was advocated by the department's draft opinion. It was felt that the Convention was sufficiently flexible and adaptable to meet the needs of all types of

As far as could be determined, in principle the question of reservations does not arise in the case of bilateral treaties. Provision is made for parliamentary committees to insist on reservations when a treaty comes before them for consideration.[60] The matter is then referred back to the executive.[61] Where this involves a bilateral treaty, it is submitted that the reservation would be regarded as a counter-offer to the other party involved in the bilateral relationship. The amended terms of the treaty would then be referred by the executive, by way of a Presidential Minute, to the line-function minister concerned, and then to the negotiating team for renegotiation of what would essentially be a "new" agreement.

For practical purposes, consequently, the question of reservations will arise only in the case of multilateral conventions. As these are by definition treaties that require ratification or accession, they are subject to parliamentary approval in terms of section 231(2) of the Constitution. The question arising is: at what stage, and by whom, is the need for the entry of a reservation recognized? In terms of the negotiation process set out above, the treaty is negotiated by the line-function minister concerned. The need for a reservation would be set out in the cabinet memorandum accompanying the request for Cabinet consent to submit the agreement to Parliament for ratification or accession.[62] This memorandum must also confirm that the agreement was served before the law advisors of the Departments of Justice and Foreign Affairs.[63] These departments must respectively certify that the agreement is in accordance with South African domestic law, and also with international law and the country's international policies and obligations. This is the most likely stage at which the need for a reservation will be identified. Once the agreement

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treaties – including "normative" treaties – and that the "objects and purpose" criterion in the Convention would ensure that the essence of a treaty is preserved without the need for special regimes. The Vienna Convention was, as customary international law, regarded as part of South African law under Section 232 of the Constitution. As regards monitoring machinery, while it was conceded that human rights bodies should have a monitoring function, it was felt that this should not extend beyond what is necessary for the discharge of their main responsibility. Specifically, the Human Rights Committee should not attempt to act as the sole judge of the permissibility of reservations which, it was felt, should not be seen as the monopoly of monitoring bodies. The draft opinion emphasized that States may, through their objections, exercise a different – and very valuable – form of control. Although the opinion was submitted to the then-Minister of Justice for consideration, no record could be traced of its having been approved. The Department of Foreign Affairs is also unaware of any firm policy having been established in this regard.

[60] *Manual*, Ch. 5, § 5.11, at 25.

[61] *Id.*

[62] *Id.*, Ch. 5, § 5.8, at 25.

[63] *Id.*, Ch. 5, § 5.9, at 25.

reaches Parliament, it will be considered by the various parliamentary committees which, as indicated above, may insist on reservations.

The formulation and filing of a reservation is the function of the national executive.[64] Once ratified, the agreement, together with any reservations, is submitted by the line-function minister to the Minister of Foreign Affairs for signature and deposit of the instrument of ratification with the relevant body specified in the international agreement.[65]

2. *Termination*

Like reservations, treaty termination shows no clearly articulated policy. It appears that where a decision to terminate a treaty is taken, this will be done in accordance with international legal practice, including the provisions of the Vienna Convention on the Law of Treaties.[66] It was suggested, in the context of the 1993 Interim Constitution, that the decision to terminate a treaty, like the decision to conclude the negotiation of one, vests in the executive.[67] The legislature would, therefore, play no part in the decision to terminate the treaty. However, now that the legislature plays an active role through section 231(2) of the 1996 Constitution in the approval of international agreements, it is submitted that it should be required to play an equivalent role in the termination of treaty commitments. A distinction will therefore have to be made between treaties concluded by the executive alone[68] which should, at least in theory, be able to be terminated by the executive alone – subject to tabling in Parliament; and treaties requiring parliamentary approval before they come into force. These treaties would, it is submitted, also require parliamentary approval for their termination.

If a treaty has been incorporated into municipal law in terms of section 231(4) of the Constitution,[69] the legislation through which it acquired municipal application will also have to be repealed by the legislature. It is submitted that the form to be adopted in such an instance will be determined by the form used for its initial incorporation. In other words, a treaty incorporated by proclamation may be terminated by procla-

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[64] *Id.*, Ch. 5, § 5.11, at 25.

[65] *Manual*, Ch. 5, § 5.12, at 26.

[66] *See* Olivier (1993/94), *supra* note 8, at 5. Ms. Olivier here refers to Parliament electing to terminate a treaty. It is submitted that it is the executive which would take such a decision. *See also Harksen v. President of RSA*, 1998 2 SA 1011 (CPD); Botha (*Lessons from Harksen*) *supra* note 8, at 282–285 (discussing the termination or suspension of an extradition treaty between Britain and Germany, succeeded to by South Africa).

[67] Olivier (1993/94), *supra* note 8, at 5.

[68] The so-called "section 231(3) treaties."

[69] *See* Section II.H. below.

mation; one incorporated by an act of Parliament must be terminated by a corresponding act of Parliament, etc.[70] A crucial question is whether notification of the termination of a specific treaty will be published for general information, which does not appear to be the case at present. Like reservations, this is a matter which demands attention.

3. *Implementation*

Since its readmission to the international community, South Africa has faced a relatively new question: who bears responsibility for ensuring the implementation of the multilateral conventions to which South Africa is a party and for meeting the reporting obligations imposed by them? As with all treaties in South Africa, the implementation and reporting functions in regard to multilateral conventions fall to the line-function minister within whose portfolio the treaty falls. This is generally achieved through questionnaires sent by the ministry concerned to other relevant State departments requesting information on the implementation of the terms of a Convention. In the case of human rights conventions in particular, the independent "watchdog" bodies established under the Constitution have an important role to play.[71] Replies received are coordinated by the portfolio ministry and submitted to the relevant reporting bodies.

F. *Publication and Transmittal Requirements*

The publication of treaties in South Africa must be regarded as the exception rather than the rule. Day-to-day international agreements are not published at all. "Important" treaties may be published in the *Government Gazette*, but there is no imprimatur to this effect. Treaties classed as "technical, administrative or executive or not requiring accession or ratification" and which do not therefore require parliamentary approval, are likewise not published, although they are tabled in both houses of Parliament. Where treaties are incorporated into municipal law, they will be published as part of the incorporating legislation.[72]

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[70] This is borne out by the 1996 amendment to the Extradition Act 67 of 1962 which now specifically provides in section 2(3)(a) that the agreement will be without force and effect "until the ratification of, or accession to, or amendment or *revocation of such agreement* or designation *has been agreed to by Parliament*; . . . ." *Id.* (emphasis added).

[71] In particular the Human Rights Commission, the Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities, and the Commission for Gender Equality established under Chapter 9 of the Constitution.

[72] *See* Section II.H. below for the methods by which this can be done.

Although it is generally known that the apartheid Government concluded a number of "secret treaties,"[73] this was never officially acknowledged. With South Africa's readmission to the international fold, the need for such agreements has largely fallen away. However, the need for "classified" – as opposed to "secret" – treaties may still arise.[74] There is no specific provision governing classified treaties in the 1996 Constitution and no specific policy has been articulated. This must be seen as a lacuna. The need for classified treaties must be weighed against the public's right to information embodied in the Bill of Rights,[75] which has emerged as one of the major issues in the transformation of South African society.

During the apartheid years, the Republic was precluded from registering its treaties with the United Nations. The practice therefore arose of not submitting agreements for registration. However, under the new dispensation, the Republic acknowledges its duty to register under both the UN Charter and the Vienna Convention and a process of retrospective registration is under way. Needless to say, in view of the considerable backlog that has built up and the fact that personnel resources are severely limited, it will be some time before the country's treaty commitments are fully recorded.

The Department of Foreign Affairs published the *South African Treaty Series* covering treaties up to 1975, at which date budgetary constraints led to its suspension. It was briefly revived in 1986 when treaties concluded during the intervening eleven years were published retrospectively. The publication was again suspended in 1990. The demise of this very valuable publication is to be regretted as, in the absence of registration with the United Nations and the consequent publication in the *United Nations Treaty Series*, there is simply no ready general access to the treaties to which the Republic is a party. The Department of Foreign

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[73] *See* Olivier (1993/94), *supra* note 8.

[74] During the height of the apartheid Government, States that concluded treaties with the country ran the risk of international criticism. Treaties were nonetheless concluded during this period but because information of their existence was in the interests of neither the South African Government, nor the foreign States involved, this fact was often not reported. They were, in this sense, "secret" both for South Africans and for the international community as a whole. However, this "secrecy" was founded not in the nature or content of the agreement as such, but in considerations of expediency. Ironically, it was precisely South Africa's international isolation and the resultant non-registration of its treaties with the United Nations in terms of Article 102 of the UN Charter, which allowed for the conclusion of these "secret treaties." Classified treaties, on the other hand may be regarded as treaties the existence of which may be made public but the content of which, for purposes of, for example, national security, demand to be protected from general scrutiny.

[75] *Compare* Constitution §§ 32, 33 *with* Constitution § 36 (limitation clause).

Affairs maintains a full treaty index and the officials concerned are extremely helpful in providing specific treaties when required. Such a system, nonetheless, leaves much to be desired.

At present the *South African Yearbook of International Law*[76] provides the only generally accessible list of treaties concluded during the year of publication.

Lastly, as technology improves within State departments, electronic publication seems set to play an important part in the dissemination of international agreements. For example, the trade agreement between the European Union and the Republic of South Africa signed on October 11, 1999 is available for general information on the Department of Trade and Industry Web site. Again, publication in this form is not peremptory and is at the discretion of the line-function minister concerned.

G. *Legally Binding Decisions of International Organizations*

The position of legally binding decisions of international organizations of which South Africa is a member is another issue characterized by a large measure of uncertainty in the new dispensation.[77] South Africa's isolation under the apartheid Government meant that the country was effectively excluded, either entirely or through suspension of privileges and the right of participation, from all of the major international organizations. Consequently, the place of the decisions of international organizations received little attention in South African law.[78] After the enactment of the Interim Constitution, South Africa was accepted back into the international fold. The need to regulate this issue was recognized when the country wished to meet its obligations under Security Council Resolution 757 (1992),[79] placing an embargo on the supply of arms to the former Yugoslavia. The Application of Resolutions of the Security Council of the United Nations Act[80] was adopted to allow for the incorporation of Security Council resolutions into municipal law and for their implementation under South African law by presidential proclamation in the *Government Gazette*. However, this Act has never been brought into operation.

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[76] Published annually by the VerLoren van Themaat Centre for Public Law Studies of the University of South Africa, P.O. Box 392, Pretoria 0003.

[77] The *Manual*, for example, makes no mention whatsoever of international organizations or their decisions.

[78] Dugard, *supra* note 26, at 59–60.

[79] Security Council Res. 757, UN SCOR, 3082 mtg., UN Doc. S/RES/757 (May 10, 1992), *available at* <http://hq.nato.int/ifor/un/u920530a.htm>.

[80] Act 172 of 1993.

Consequently, while there would currently appear to be no official procedure for dealing with the binding decisions of international organizations, certain conclusions can be drawn. These agreements are apparently not regarded as treaties – as a different, case-specific procedure to govern United Nations resolutions was regarded as necessary. No particular significance should be attached to the fact that the only attempt to address the question to date has been directed specifically at United Nations resolutions – this was merely an exercise in "crisis management" as a need arose. The fact that the above Act has not been brought into operation suggests that the system proposed (in terms of which the President could incorporate the decision by proclamation) was based largely on the Interim Constitution, in which the conclusion of treaties was vested in the President rather than the executive and reflects a practice from which the country would appear to be moving away.[81] The need for the regulation of the decisions of international organizations is, however, recognized and in all likelihood a system approximating that applicable to treaties – showing greater involvement of the national executive in the decision on whether or not to comply with the decisions of international organizations and of the legislature in their municipal application – will emerge.

It should be noted, however, that although there has been no incorporation of the recommendations of international organizations, some recommendations, particularly those of the International Labour Organization, have been applied, or at least considered, by the courts.[82]

H. *Incorporation into National Law*

The incorporation of treaties into national law is governed by section 231(4) of the Constitution. After February 4, 1997,[83] therefore, "any international agreement" becomes law in the Republic once it has been enacted into law by both houses of Parliament. The use of the term "any" is significant in that it would appear to render the distinction made above between treaties under section 231(2) (those requiring par-

[81] Incorporation by proclamation in terms of an empowering statute, although not common in South African law, was authorized for certain types of treaty. The Extradition Act 67 of 1962 allowed for the incorporation of extradition treaties in this way under section 2(3). However this was amended in 1996 to bring the incorporation procedure into line with the incorporation provisions in the Constitution.

[82] *See* Dugard, *supra* note 26, at 61; *see also* Section II.H.2 below for a discussion of the role of the decisions of international organisations in the municipal law interpretation process.

[83] The date on which the final Constitution came into operation.

liamentary approval) and technical, administrative or executive treaties in section 231(3), which may be concluded by the executive alone, irrelevant as regards municipal application.

After the Cabinet has consented to the submission of an agreement to Parliament, the department concerned must table the agreement together with an explanatory memorandum by notice of motion. The memorandum, apart from detailing the history, purposes and consequences of the treaty, must also state whether incorporation into domestic law in terms of section 231(4) of the Constitution will be sought.[84] It falls to the department concerned to draft the necessary legislation which will be submitted to the State law advisors of the Department of Justice to ensure its compliance with domestic law; to the legal drafting section of the Department of Justice for formal drafting; and to the law advisors of the Department of Foreign Affairs for confirmation that it is consistent with international law and with the Republic's international relations and other obligations.[85] It then passes though Parliament like any other bill.[86]

However, the Constitution creates an exception to the general rule requiring legislative incorporation. Heeding academic criticism, the drafters of the final Constitution introduced the concept of the "self-executing treaty" into our law. This was again done without any definition. Section 231(4) provides not merely for the automatic application of self-executing treaties as a whole, but also for the automatic application of any "self-executing provision" in a treaty, thus opening the door not only to the piecemeal application of treaty provisions, but also to the application of certain provisions of an unincorporated treaty.

When dealing with self-executing treaties, the distinction between section 231(2) and section 231(3) treaties again comes into play. The self-executing provision of section 231(4) specifically applies only to treaties "approved by Parliament." These are section 231(2) treaties – in other words, all treaties that are not technical, administrative or executive or which require accession or ratification (as these categories of treaty do not, in terms of section 231(3), require parliamentary approval). The self-executing provision in section 231(4), which was taken over (unwisely it is submitted) from U.S. jurisprudence with no regard to its suitability in the South African context, has not yet been tested by the courts but can be expected to raise considerable problems when it is.[87]

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[84] *Manual*, Ch. 5, § 5.10, at 25.
[85] For the forms this legislation may take *see* Dugard, *supra* note 26, at 57.
[86] *See* Constitution Ch. 4 (the national legislative process).
[87] Johan van der Vyver, a leading former South African academic now stationed in

Application in South African law is further subject to consistency with the Constitution itself and with any act of Parliament. In theory this means that were a conflict to arise between a treaty provision and either the Constitution or an act of Parliament, the Constitution or the act would take precedence over the treaty provision. While the Constitution will always enjoy precedence as the supreme law of the land, in the case of acts of Parliament, inconsistency should in practice only arise in the case of a self-executing provision as such provisions do not require legislative incorporation in terms of section 231(4) of the Constitution. All other treaties require incorporation by national legislation, in other words, by act of Parliament. In such an event, the act incorporating the treaty would take precedence over the earlier (conflicting) act in terms of the normal rules of interpretation embodied in the *prior in tempore* rule. The enforcement of this "consistency rule" is in the hands of the courts at the instance of the party averring the inconsistency.

1. *The Interrelationship Between Treaties Concluded at Different Periods*

The municipal application of treaties in the Republic is further complicated by section 231(5) of the Constitution, which provides that: "The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect." To determine whether a treaty was binding on the Republic "when this Constitution took effect" it is necessary to consider the provisions governing treaty conclusion both pre-1993 and under the Interim Constitution to determine whether the treaty under consideration was validly concluded or incorporated within its individual timeframe. If, therefore, the treaty were regarded as binding in terms of the then-operative dispensation, it will remain so. Were it to prove that a treaty concluded under the apartheid Government is unacceptable to the present dispensation, the treaty termination route provided in the treaty itself or, failing that, in the Vienna Convention on the Law of Treaties, would have to be followed in terminating the treaty.[88]

The conclusion of a treaty pre-1993 was a so-called act of State in which the public, the courts or Parliament had little, if any, say.[89] The

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the United States, has commented that the provision is "entirely nonsensical." *See* J. van der Vyver, "Universal Jurisdiction In International Criminal Law," 23 *SAYIL* 107 (1998). For a different, and more positive view, *see* M. Olivier, "Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations," 27 *SAYIL* 99 (2002).

[88] *See* N.J. Botha, "International Law and The South African Interim Constitution," 1994 *SAPR/PL* 245, where this aspect is briefly considered in the context of § 231(4) of the Interim Constitution of 1993.

[89] Dugard, *supra* note 26, at 49 and 67–70.

municipal application of a pre-1993 treaty was subject to the general rule of legislative incorporation.[90] The *locus classicus* on the application of treaties within municipal law, pre-1993, was the *Pan American World Airlines* case,[91] in which it was held:

> The conclusion of a treaty . . . by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our law except by legislative process . . . In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the rights of the subject.

During the "interregnum" spanning the period April 27, 1994[92] to February 4, 1997 – in other words, the currency of the Interim Constitution – treaties were negotiated and signed by the President in terms of section 82(1)(i) of the Interim Constitution (Act 200) of 1993. Once the treaties had been concluded, their application was subject to the provisions of sections 231(2) and 231(3) of the Interim Constitution – dealing respectively with international and municipal ratification.

Section 231(2) of the Interim Constitution dealt with the way in which a treaty became binding for the Republic on the international plane and provided: "Parliament shall, subject to this Constitution, be competent to agree to the ratification or accession to an international agreement negotiated and signed in terms of section 82(1)(i)." Section 231(3), on the other hand, dealt with how a treaty was translated into municipal terms by providing:

> Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.

The interpretation problems inherent in this process have been pointed out elsewhere.[93] Suffice it to say that practice developed a simplified and

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[90] *Pan Am. World Airlines, Inc. v. SA Fire & Accident Ins. Co.*, 1965(3) SA 150(A), subject to the possible exceptions discussed in Dugard, *supra* note 26, at 61–62 and H. Booysen, *Volkereg en sy verhouding tot die Suid-Afrikaanse reg* 98–105 (2d ed., 1989).

[91] *Pan Am. World Airlines Inc. v. SA Fire & Accident Ins. Co.*, 1965(3) SA 150(A). For a more recent exposition by the Constitutional Court see *Azanian Peoples Organisation (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 671 (CC) at 688 ("International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorportaed into our municipal law by legislative enactment.").

[92] The date on which the interim constitution came into operation.

[93] *See, e.g.*, D.J. Devine, "Some Problems Relating to Treaties in The Interim South

effective method of expressing both international and municipal ratification in a single process. Illustrative of this speedy and effective incorporation is the following government notice issued by the Department of Finance and dealing with a double taxation agreement:

> It is hereby notified that Parliament has in terms of section 231(2) of the Constitution ratified the following Convention which is hereby published for general information, and has furthermore expressly provided in terms of section 231(3) of the Constitution that the Convention shall form part of the law of the Republic.[94]

Already we can see that the provisions governing both the international and the municipal application of treaties in South African law under the final Constitution are a far cry from the relatively simple "incorporate or ignore" approach of pre-constitutional regulation days. The matter does not, however, end here.

2. *The Role of International Law in Interpreting Legislation*

As pointed out above, the municipal application of treaties under the Constitution is, in the main, dependent upon the legislative incorporation of the treaty. In considering the treaty, the courts will therefore generally be faced with both the treaty itself and the piece of legislation by which it has been incorporated. This is where the "catch-all" terms of section 233 of the Constitution come into play. This section provides: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." Taken literally, this is an exceptionally wide provision which would appear to mandate all courts, from the highest to the lowest, to test any legislation coming before them against international law. It is unlikely that the courts will take so wide a view. Common sense dictates that before a court will feel obliged to consider section 233, and apply an interpretation from international law, the legislation will have to evince some "international element." However, in the cases under discussion, which involve the legislative incorporation of treaties, the required nexus will obviously exist. In interpreting such legislation, the courts will, therefore, be required to prefer "any reasonable interpretation" which accords with international law. To do this, of course, the courts must determine

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African Constitution and Some Suggestions for The Definitive Constitution," 20 *SAYIL* 1 (1995); T. Maluwa, "International Human Rights Norms and The South African Interim Constitution," 19 *SAYIL* 14 (1993/94).

[94] For a full discussion, *see* Botha, *Incorporation of Treaties, supra* note 22.

the international law position governing the subject matter of the legislation. The obvious case in point, which was heard under the Interim Constitution and was consequently not subject to section 233, is *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*.[95] Here the constitutionality of the Promotion of National Unity and Reconciliation Act 30 of 1995, which in section 20(7) excludes criminal or civil action against perpetrators of human rights violations under the apartheid regime who confess their wrongdoing, was challenged before the Constitutional Court. Because the case was heard under the Interim Constitution in which section 233 of the 1996 Constitution did not appear, the court was able merely to "consider" international law. It has been submitted elsewhere[96] that the court in fact failed to do so adequately in that the internationally recognized right of a victim to have crimes against humanity punished by a competent tribunal and his claim to compensation in a civil action were disregarded. However, were such a case to arise under the 1996 Constitution, section 233 would apply. As the case concerned the interpretation of legislation, the court would now be compelled to apply (rather than merely consider) "any reasonable interpretation [of the Promotion of National Unity and Reconciliation Act] consistent with international law" over any interpretation of the act which could be seen as being "inconsistent with international law." As international law recognizes both criminal and civil redress in cases of crimes against humanity, this would qualify as a "reasonable interpretation" which the court would be obliged to apply in striking down the legislation as being in violation of the Constitution.

3. *The Application of Unincorporated Treaties*

The clear prohibition on the application of unincorporated treaties articulated in the *Pan American World Airlines* case above, has also been somewhat diluted by the Constitution. It has been shown above that by authorizing the automatic application of self-executing "pieces" of a treaty, the courts could in fact end up applying provisions of an unincorporated treaty. Furthermore, the provisions of section 233 hold the potential for the application of unincorporated treaties, albeit indirectly –

[95] 1996 (8) BCLR 1015 (CC).

[96] *See* Z. Motala, "The Constitutional Court's Approach to International Law and Its Method of Interpretation in The "Amnesty Decision": Intellectual Honesty or Political Expediency?," 21 *SAYIL* 29ff. (1996). *See*, too, Dugard, *supra* note 26, at 62–64. For a general discussion of section 233 and its (lack of) application *see* M.G. Erasmus, "The Incorporation of Trade Agreements and Rules of Origin: The Extent of Constitutional Guidance," 28 *SAYIL* (2003).

in that in determining whether an interpretation is consistent with international law, a court may (or possibly must) consider the interpretation accorded treaties that are not part of South African law by international law (e.g., international courts, tribunals, etc.). Such an interpretation "must" then be preferred/applied.

Less stringent, in that they demand only consideration of international law as opposed to its application, are the provisions of section 39 of the Bill of Rights, which provides that, when interpreting the Bill of Rights, "(a) a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." As is clear from the court decisions so far, and particularly those of the Constitutional Court,[97] the sources applied by the courts in meeting the instruction to "consider international law" in interpreting the Bill of Rights are far-ranging and include unincorporated treaties.

I. *International Agreements Concluded by Subnational Entities*

South Africa is divided into nine provinces each of which may enact its own constitution.[98] The functional areas of the provinces are set out in Schedule 4 (Functional areas of concurrent national and provincial competence) and Schedule 5 (Functional areas of exclusive provincial competence) of the Constitution. The power to enter into international agreements is included in neither of these schedules.

In the first flush of South Africa's new democracy, a trend developed for the premiers of provinces, and even for certain municipalities,[99] to conclude "international agreements" during their frequent visits abroad. As can be imagined, this caused considerable confusion and embarrassment to the national executive which, in terms of the Constitution, is the only body authorized to negotiate and sign international agreements. The *Manual* is clear on the issue; it provides that: "Provinces may not enter into agreements governed by international law except as agents of the

[97] Notably *S v. Makwanyane*, 1995(6) BCLR 665 (CC); *see also* N.J. Botha, "International Law in The Constitutional Court," 20 *SAYIL* 222 (1995); N.J. Botha, "Riding The Tide: South Africa's 'Regular' Courts and The Application of International Law," 21 *SAYIL* 174 (1996).

[98] Constitution, Ch. 6, § 103.

[99] For the local government structures see Chapter 7 of the Constitution. So-called twinning agreements were very popular at one stage and were erroneously considered by some to qualify as "international agreements."

National Executive."[100] To bind the Republic, therefore, the individual official concerned would require specific authorization by way of a Presidential Minute together with, when necessary, credentials issued by the Minister of Foreign Affairs.[101] The possibility exists that unauthorized agreements concluded between the provinces and foreign entities enjoying treaty-making capacity could receive the subsequent approval of the national executive in accordance with Article 8 of the Vienna Convention on the Law of Treaties. Such an agreement would still be subject to parliamentary approval in terms of section 231(2) unless it qualified as a section 231(3) agreement. Consequently, although provinces and municipalities are free to conclude contracts with foreign companies or subnational entities, these contracts are not governed by international law.

[100] *Manual*, Ch. 5, § 5.25, at 29.
[101] *Id.*, Ch. 5, § 5.24, at 29.

III. Basic Data and Documentation

A. *National Legislation*

Annex A: Republic of South Africa Constitution Act 108 of 1996 (excerpts)
Annex B: Republic of South Africa Constitution Act 200 of 1993 (the Interim Constitution) (excerpts)
Annex C: Application of Resolutions of the Security Council of the United Nations Act No. 172 of 1993

B. *Selected Examples of Treaty Documents*

Annex D: Full Power
Annex E: Instrument of Ratification
Annex F: Registration Certificate
Annex G: Example of Message to the National Assembly
Annex H: Example of Message to the Senate (now National Council of Provinces)
Annex I: Example of President's Minute
Annex J: Example of Certificate by Minister
Annex K: Official Proclamation

C. *Statistical Data*

1. 1,800 treaties are currently regarded as in force between the Republic and other states.
2. Precise figures are not available on the number of treaties that were expressly approved by the legislature. However, the number would not be greater than 300 as only those adopted after 1996 mandate parliamentary approval for their entry into force.
3. At present South Africa concludes approximately 90 treaties per annum, although this number has shown a sharp increase since 1993 which may be expected to continue. This is borne out by the following approximate figures: 1980–89: on average 14 treaties concluded per annum; 1990–93: on average 70 treaties per annum; currently 90 treaties per annum.

ANNEX A

REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT 108 OF 1996

CHAPTER 2: BILL OF RIGHTS

* * *

Interpretation of Bill of Rights

39(1) When interpreting the Bill of Rights
- (a) a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

CHAPTER 14: GENERAL PROVISIONS

* * *

International Agreements

231(1) The negotiation and signing of all international agreements is the responsibility of the national executive.

231(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

231(3) An international agreement of a technical, administrative or executive nature, or an agreement that does not require either ratification or accession, entered into by the national executive, binds the Republic without approval of the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

231(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing

provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

231(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

* * *

Application of International Law

233 When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

ANNEX B

REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT 200 OF 1993 (THE INTERIM CONSTITUTION)

Section 82

82(1) The President shall be competent to exercise and perform the following powers and functions, namely

* * *

(i) to negotiate and sign international agreements.

Section 231

231(1) All rights and obligations under international agreements which immediately before the commencement of the Constitution [27 April 1994] were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.

231(2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1)(i).

231(3) Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.

ANNEX C

APPLICATION OF RESOLUTIONS OF THE SECURITY COUNCIL OF THE UNITED NATIONS ACT NO. 172 OF 1993*

[ASSENTED TO 8 DECEMBER, 1993]
[DATE OF COMMENCEMENT TO BE PROCLAIMED]
(*Afrikaans text signed by the Acting State President*)

ACT

To provide for the application in the Republic of certain resolutions taken by the Security Council of the United Nations; and to provide for matters connected therewith.

1. Application of Resolutions of Security Council of United Nations –
   (1) The State President may by proclamation in the *Gazette* declare that any resolution taken by the Security Council of the United Nations under the provisions of the Charter of the United Nations shall apply in the Republic to the extent specified in the proclamation, as from a date so specified, and such resolution shall be implemented in the Republic in such a manner as the State President may so determine.
   (2) A proclamation contemplated in subsection (1) may be amended, supplemented or repealed by the State President by proclamation in the *Gazette*.
2. Tabling of proclamations – A proclamation issued by the State President under section 1 shall be laid upon the Table in Parliament in the same manner as the list referred to in section 17 of the Interpretation Act, 1957 (Act No. 33 of 1957), and if Parliament by resolution disapproves any such proclamation or any provision thereof, such proclamation or provision shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such proclamation or such provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in terms of such proclamation or such provisions before it ceased to be of force and effect.

---

* This Act has never been brought into operation.

3. Offenses and penalties – Any person who contravenes or fails to comply with a provision of a proclamation contemplated in section 1 shall be guilty of an offence and be liable on conviction to a fine or to imprisonment for a period not exceeding 15 years.
4. Exemptions from liability – The State shall not be liable for any loss or damage suffered by any person which is caused by or arises from or is in any way connected with any *bona fide* act performed in accordance with a resolution made applicable in the Republic under section 1.
5. Short title and commencement – This Act shall be called the Application of Resolutions of the Security Council of the United Nations Act, 1993, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

ANNEX D

1. FULL POWER

In accordance with the powers vested in me by the State President's Minute No. ____ dated (*date*), I (*Fill in name*), Minister of Foreign Affairs of the Republic of South Africa, do hereby certify and declare that

(Fill in name)

Chargé d'Affairs of the Republic of South Africa in *(Fill in country)*, is hereby appointed as having full power to sign the *(Fill in name of agreement)* on behalf of the Government of the Republic of South Africa.

Thus done and sealed at _____ this _____ day of _____.

2. FULL POWER

WHEREAS the United Nations Convention to *(Fill in name)* was adopted on *(date)* in *(Fill in place)* and is now open for signature at the Headquarters of the United Nations in New York;

AND WHEREAS it is expedient that a fit and proper person be invested with full power and authority to sign the Convention on behalf of the Republic of South Africa;

NOW, THEREFORE, I, *(Fill in name)*, Minister of Foreign Affairs of the Republic of South Africa, do by these presents authorize and appoint

(Fill in name)

Ambassador Extraordinary and Plenipotentiary and Permanent Representative of the Republic of South Africa to the United Nations in New York, with full power and authority to sign the Convention on behalf of the Republic of South Africa.

IN WITNESS WHEREOF, I, *(Fill in name)*, Minister of Foreign Affairs of the Republic of South Africa, have signed and sealed these presents at _____ on this the _____ day of _____ in the Year Two Thousand and _____.

_____

MINISTER OF FOREIGN AFFAIRS
REPUBLIC OF SOUTH AFRICA

ANNEX E

INSTRUMENT OF RATIFICATION

WHEREAS the Convention on *(Fill in name)* was adopted and opened for signature at *(fill in place)* on (*date*),

AND WHEREAS the said Convention has been signed on behalf of the Government of the Republic of South Africa on *(date)*,

NOW, THEREFORE, I *(Fill in name)*, Minister of Foreign Affairs of the Republic of South Africa, declare that the Government of the Republic of South Africa, having considered the above mentioned Convention, ratifies the same and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF I have signed this instrument of ratification at _____ on *(date)*.

_____

MINISTER OF FOREIGN AFFAIRS
REPUBLIC OF SOUTH AFRICA

ANNEX F

REGISTRATION CERTIFICATE

OFFICE OF LEGAL AFFAIRS
Treaty Section

SUBMISSION OF TREATIES FOR REGISTRATION AND PUBLICATION IN ACCORDANCE WITH ARTICLE 102 OF THE U.N. CHARTER

MODEL FOR THE CERTIFYING STATEMENT REQUIRED UNDER THE GENERAL ASSEMBLY REGULATIONS TO GIVE EFFECT TO ARTICLE 102 OF THE CHARTER[102]

I, THE UNDERSIGNED [*name of the authority*], hereby certify that the attached text is a true and complete copy of [*title of the agreement, name of the Parties, date and place of conclusion*]; that it includes all reservations made by Signatories or Parties thereto (in the absence of any reservation, declaration or objection, the certifying statement would read "that no reservations or declarations or objections were made by the Signatories or Parties thereto"), and that it was concluded in the following languages: [_____].

I FURTHER CERTIFY that the Agreement came into force on [*date*] by [*method of entry into force*], in accordance with [*article or provision in the agreement*], and that it was signed by [_____] and [_____].[103]

[*Place and date of signature of certifying statement*]

[*Signature and title of the certifying authority*]

OFFICE OF LEGAL AFFAIRS
Treaty Section

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[102] For the text of the Regulations adopted by General Assembly Resolution 97(1) of 14 December 1946 and later amended by General Assembly Resolutions 364B(IV) of 1 December 1949, 482(V) of 12 December 1950 and 33/141A of 19 December 1978, *see United Nations Treaty Series*, volume 859/860, p. VIII. See also *Repertory of Practice of United Nations Organs*, Volume V, Articles 92–111 of the Charter, and Supplements 1 to 5.

[103] For multilateral agreements, a complete list of signatories will be provided.

SUBMISSION OF TREATIES FOR REGISTRATION AND PUBLICATION IN ACCORDANCE WITH ARTICLE 102 OF THE U.N. CHARTER – REQUIREMENTS

Documentation/Information to Be Provided	Format/type of Information
1. Treaty/Agreement	ONE certified true and complete copy of all authentic text(s), and TWO additional copies or ONE electronic copy (on diskette)
2. All Attachments (annexes, minutes, procès-verbaux, etc.)	Same as (1) above
3. Text of reservations, declarations, objections	Same as (1) above
4. Translations of the Agreement and all attachments into English and/or French (if available)	One paper copy and one electronic copy, if available, where necessary
5. Title of Treaty/Agreement	If not printed as part of the text (e.g., for exchange of notes)
6. Names of Signatories	If not appearing in typed form as part of signature block
7. Date of Signature	If not clear from the text
8. Place of Signature	If not clear from the text
9. Date of entry into force	In accordance with entry into force provisions
10. Method of entry into force	i.e., signature, ratification, approval, accession, etc. including: – date and place of exchange of the instruments of ratification or notifications for a bilateral agreement, or – in the case of a multilateral agreement, date and nature of the instruments deposited by each Contracting Party with the Depositary
11. Maps (if applicable)	In order of preference: – original document – facsimile document – high resolution scanned digital file – in the case of color originals, either same-size, color-separated film negatives or good quality, panchromatic, half-tone film negative – 4 × 5 inch color slide (original to be photographed with standard color bar and ruler) – high quality microfilm – same size, electrostatic, color or black and white copies [oversized originals are to be copied with overlaps and left as separate sheets (not taped together)]

ANNEX G

MESSAGE TO THE NATIONAL ASSEMBLY

Draft resolution (Minister of Foreign Affairs): That the request for ratification, in terms of section 231(2) of the Constitution, of the [*Fill in name of Convention*], be referred to the Portfolio Committee on Foreign Affairs, the Committee to have power to confer with the Portfolio Committee of (*Fill in name of relevant committee/s*) of the Senate [now National Council of Provinces] and the Select Committee on (*Fill in name of committee/s*) of the Senate [now National Council of Provinces].

ANNEX H

MESSAGE TO THE SENATE [NOW NATIONAL COUNCIL OF PROVINCES]

Draft resolution (Minister of Foreign Affairs): That the request for ratification, in terms of section 231(2) of the Constitution, of the [*Fill in name of Convention*], be referred to the Select Committee on [*Fill in name of committee/s*], the Committee to have power to confer with the Select Committee on [*Fill in name of committee/s*] of the Senate [now National Council of Provinces], the Portfolio Committee on [*Fill in name of committee/s*] of the National Assembly, the Portfolio Committee of [*Fill in name of committee/s*] of the National Assembly and the Portfolio Committee on [*Fill in name of committee/s*] of the National Assembly.

ANNEX I

PRESIDENT'S MINUTE NO. _____

In terms of section 231 of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), I hereby approve that the attached agreement on *(Fill in name)* between the Republic of South Africa and *(Fill in country)* be entered into, and I hereby authorise the Minister / Director-General of *(Fill in department / portfolio)* to sign the agreement / to take the necessary steps in this regard.

Given under my Hand and the Seal of the Republic of South Africa at *(Fill in place)* this ____ day of ____Two thousand and __ .

_____

PRESIDENT

_____

MINISTER OF THE CABINET

ANNEX J

CERTIFICATE BY THE MINISTER OF (*Fill in department/portfolio*).

I, *(Full names and surname)*, in my capacity as the Minister of *(Fill in department / portfolio)* of the Republic of South Africa, hereby certify that the attached document is a true version of *(Fill in name)* and forms part of President's Minute No. ___ of *(Fill in date)*.

_____

MINISTER

DATE: _____

ANNEX K

OFFICIAL PROCLAMATION

PROCLAMATION
by the
[State] President of the Republic of South Africa

No. R. _____

[GRANTING OF IMMUNITIES AND PRIVILEGES TO THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, THE INTERNATIONAL DEVELOPMENT AGENCY AND THE INTERNATIONAL FINANCE CORPORATION]

Under section 5 of the Diplomatic Immunities and Privileges Act, 1989 (Act No. 74 of 1989), and to give effect to the requirement contained in section 10 of Article 7 of the Articles of Agreement on the International Bank for Reconstruction and Development of 27 December 1945, in section 10 of Article 8 of the Articles of Agreement of the International Development Agency of 24 September 1960, and in section 10 of Article 6 of the Articles of Agreement of the International Finance Corporation of 20 July 1956, that member states shall take such action as is necessary to make effective in terms of their own law the principles set forth in the various Articles, I hereby publish the said Articles wherein provision is made for then granting of immunities and privileges to the said organizations as set out in the Schedules hereto.

Given under my Hand and the Seal of the Republic of South Africa at _____ this ___ day of January, Two thousand and _____ .

_____

[State] President
by Order of the [State] President-in Cabinet:

_____

Minister of the Cabinet

IV. Bibliography

Abbreviations

CILSA	Comparative and International Law Journal for Southern Africa
SALJ	South African Law Journal
SAPR/PL	South African Public Law
SAYIL	South African Yearbook of International Law
TSAR/JJS	*Suid-Afrikaanse Tydskrif vir Regswetenskap*/Journal of Juridical Science
Int'l L.J.	International Law Journal
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
So. Afr. J. Hum. Rts.	South African Journal of Human Rights

As pointed out in the text, the South African treaty dispensation is relatively new. There has, as yet, been little direct discussion of the treaty provisions in the 1996 Constitution and no discussion of how treaties are concluded. The Interim Constitution elicited considerable debate, much, although not all, of which remains relevant to the 1996 provisions. This is reflected below. Furthermore (and understandably given the country's history) human rights, the classic human rights treaties, and their role in South African law have drawn the lion's share of comment, at the expense of actual treaty practice. This is included for completeness.

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CHAPTER SEVENTEEN

NATIONAL TREATY LAW AND PRACTICE: SWITZERLAND

Luzius Wildhaber, Adrian Scheidegger and Marc D. Schinzel

I. Introduction[1]

A short introduction to Switzerland's system of government may be helpful for the understanding of some peculiarities in the Swiss treaty-making procedure and practice. These peculiarities conspicuously include, of course, the treaty referendum, but also the widespread consultation of cantons, political parties, pressure groups and interested associations before the initiation of new legislation on international treaties, as well as the extent of the cantonal agreement-making power. The regulation of specific legal aspects of treaty making and unmaking may also be better explained in the context of the following introductory section.

A. *Federalism*

Federalism is deeply rooted in Switzerland. For centuries, Switzerland was a military-political alliance of independent republics, consisting first of three cantons (from 1291), then of eight (from 1353), then 13 (from 1513), and finally of 25 (from 1815).[2] Only in 1848 did it become a federal state.

Switzerland has never been a nation-state in the classical, nineteenth-century meaning of the term. It has never been a state embracing one race, or one linguistic group, or one religion, nor has it ever aspired to be a melting pot for mainstream Swiss. Rather, it has been a strangely successful experiment in peaceful togetherness among various languages,

[1] We wish to thank very sincerely those who contributed to an earlier version of this chapter published in 1995: Dr. Eva Kornicker who was a co-author, Dr. Dieter Pfirter of the International Law Division of the Foreign Affairs Department for his precious help and his many useful suggestions and modifications, and Dr. Monica Koechlin Büttiker for her helpful contributions, stylistic and otherwise.

[2] In 1978 the number of cantons grew to 26 through the separation of Jura, a French-speaking and predominantly Catholic region, from the predominantly Swiss-German-speaking and Protestant Canton of Bern.

religions, races, and historical traditions. Of the 7.3 million inhabitants of Switzerland in 2000, 63% had Swiss-German as their mother tongue, 21% French, 6% Italian, and 0.5% Rhaeto-Romanic or Romansh. 35% were Protestants, while 42% were Catholics. Six cantons have a French-speaking majority (Fribourg, Geneva, Jura, Neuchâtel, Valais, and Vaud), while one has an Italian-speaking majority (Ticino). Three cantons are bilingual (Bern, Fribourg, and Valais), while the Grisons are even trilingual (speaking German, Italian, and Romansh). In order to keep this heterogeneous amalgamation together, the federal state has proven to be the best suited and probably the only apt system of government.

Swiss cantons enjoy a constitutionally protected sphere of autonomy. Only an amendment to the Constitution, ratified by a majority of the Swiss people voting and a majority of the cantons can bestow new powers on the federal government. (The majority of the population voting in each canton is reckoned as the voice of the canton.)

Nevertheless, the extent of federal powers to legislate is considerable. Civil and criminal law, wide fields of the economy and social security, environmental concerns, external and military affairs, principles of town and country planning, and many more powers have been given to the federal government.

However, there exist checks and balances insofar as the cantons in most cases execute and implement federal statutes. The execution of civil and criminal law, environmental measures, the administration of social security, old age and insurance pensions, and the levying of the federal income taxes all rest with the cantons. This "federalism of implementation" counterbalances, renders flexible, and adapts to local circumstances the comprehensive federal powers. Moreover, the cantons are free to delegate such execution of federal statutes to the municipalities, and most cantons do so delegate to a large extent.

Another check and balance against any danger of federal dominance lies in the fact that the cantons are not only represented in the second chamber of Parliament (the Council of States), but are represented, at least indirectly, in the National Council (the first chamber), the Federal Council (the chief executive), the Federal Tribunal, the political parties, and even in the composition of federal commissions of experts.

B. *Federal Assembly*

There are two chambers of Parliament, patterned to a large extent after the U.S. example. One house, the National Council, is composed of 200 representatives from the 26 cantons, each being represented according to their population. Zurich can elect 34 National Councilors, Bern 26,

and Uri and Glarus only one. The National Council is elected on the basis of proportional representation. While this would appear to be one of the fundamentals of the actual system, this change has only been in effect since 1919.

The other house, the Council of States, is composed of 46 representatives, two from each canton, regardless of population.[3] Although the cantons are free to determine the mode of election, all cantons provide today for an election by the people, on the basis of either the majority principle or proportional representation.

The Swiss legislature is not a professional Parliament. It consists of non- or semi-professionals who spend about half their working time as Parliamentarians. In the other half, they may be cantonal or communal executives, representatives or secretaries of a pressure group or trade union, entrepreneurs, farmers, employees, physicians, attorneys, or professors.

In the last three elections of 1995, 1999, and 2003, the political parties obtained the following number of mandates in the National Council:

Party	2003	1999	1995
	MANDATES		
Swiss People's Party	55	44	29
Social-Democrats	52	51	54
Radical-Democrats	36	43	45
Christian-Democrats	28	35	34
Ecologists	14	10	11
Liberals	4	6	7
Independents *Landesring*	–	1	3
Motorists *Autopartei*	–	–	7
Swiss Democrats (National Action), *Lega dei Ticinesi*	2	3	4
Communists, Leftists	4	2	3
Others	5	5	3

[3] The number of 46 representatives (instead of 52, as one might have expected) is readily explained: owing to some historical and constitutional peculiarities, six of the 26 cantons are considered to be "half-cantons." Accordingly, each of them can send only one representative to the Council of State, whereas the other 20 cantons are each represented by two Councilors.

Party discipline is not very strict and cannot be compared with a parliamentary system. The political parties are rather loosely organized on the federal level anyway because they consist, in essence, of a confederation of cantonal parties. Each federal politician is thus politically active on the cantonal or communal level also.

C. *Federal Council*

The Swiss government, the Federal Council, consists of seven members, each having the same rights, no one being the leader. The chief executive does not sit in Parliament and does not direct the parties and Parliamentarians, as does his or her counterpart in the British or German Government. It does not depend on their continued confidence, lest it be voted from office, for its term of office is a fixed four years, with a very reasonable assurance of reelection.

If Switzerland does not have a parliamentary system, one should not jump to the conclusion that therefore it must have a system of strict separation of powers. There is a separation of powers on the personal level, in the sense that Federal Councilors may not sit in the Federal Assembly. But functionally, there is no strict separation of powers: the Federal Council exercises legislative (or quasi-legislative) and to some extent still judicial (or quasi-judicial) powers. Similarly, the Federal Assembly exercises executive (or quasi-executive) powers. If one looks at the actual relations between the Federal Council and Federal Assembly, they are characterized by close cooperation, concordance, and consensus, rather than distrust and separation of powers.

The four major parties obtained together, in 1999 and in 2003, 173 and 171 out of 200 mandates in the National Council and 46 out of 46 mandates in the Council of States. All four of these parties are also represented in the Federal Council. From 1959 to 2003, the Radical-Democrats, Christian-Democrats, and Social-Democrats sent two representatives each into the Federal Council; the Swiss People's Party one delegate. On 8 December 2003, a second member of the Swiss People's Party was elected, whereas the Christian-Democrats lost one of their seats. Moreover, according to a long-established convention, not only the major parties, but also the important languages and regions should be represented in the composition of the chief executive. As former Federal Councilor Spühler once remarked, "In order to be elected to the Federal Council, one must be a member of the right party, in the right canton, at the right time," and (one is tempted to add) be of the right sex.

D. *Federal Tribunal*

In all cantons, two or three levels of civil and criminal courts and administrative tribunals exist. These cantonal courts administer both federal and cantonal law. On top of all these courts, there is a sole federal court, the Federal Tribunal, which is the court of last and highest instance in all civil, bankruptcy, criminal, administrative, constitutional, and other federal law issues. Even cantonal law issues can be brought before the Federal Tribunal because arbitrary interpretation or application of cantonal law is considered a violation of the guarantee of equality before the law. The Federal Tribunal is not empowered, however, to hold federal statutes invalid for unconstitutionality; it does not exercise judicial review in that respect.

E. *Political Rights of the Citizens*

The extent of the political rights of citizens is unique in Switzerland, as manifested mainly in the initiative and referendum. It must be understood, first of all, that there are considerably more votes on referendum and initiative demands on the cantonal and communal than on the federal level. Nevertheless, we shall concentrate here on the federal level. There we may usefully distinguish between mandatory votes, optional votes, and initiatives.

First, there are mandatory votes on each revision of the Federal Constitution, be it partial or total. Each modification of the Constitution must be approved by a majority of the people of the entire country and by a majority of the cantons. Further, there must be a mandatory vote on each emergency law which modifies the Constitution, within a year of the entry into force of the emergency law.

Second, there are optional votes. 50,000 Swiss citizens or eight cantons may ask that federal statutes and various categories of treaties be submitted to a vote (Article 141 of the Constitution). This is the so-called optional referendum. About 2,200 statutes and treaties (or rather bills) have been subject to the optional referendum between 1874 and the end of 2004. In 153 cases (6.9%), a referendum was successfully demanded.[4]

[4] On October 9, 2003, for the first time in Swiss history, the cantons demanded a referendum. The referendum was directed against a federal tax reduction project potentially encroaching upon the constitutionally protected competencies of the cantons. 11 out of the 26 cantons spoke out in favor of a referendum, thereby surpassing the necessary quorum of 8 cantons. In the vast majority of the cantons, the decision whether or not to demand the referendum was taken by the Parliament. The people clearly rejected the bill on May 16, 2004.

In 74 cases, the federal bill was rejected[5] and could therefore not enter into force.

Third, there are initiatives. 100,000 Swiss citizens can ask, at any time, that any part of the Federal Constitution or the entire Constitution be modified or revised. Such an initiative must be submitted to an obligatory vote. Only if a majority of both the people and the cantons assent can the initiative become valid constitutional law. Introduced in 1891, the constitutional initiative has become one of the fundamentals of the Swiss system of government. Until the end of 2004, out of 159 initiatives, 145 were rejected and only 14 were accepted, amongst the latter, *inter alia*, an initiative providing for the adherence of Switzerland to the U.N. Moreover, some 60 initiatives were proposed and at a later stage withdrawn by the sponsors, often after the Federal Assembly had taken up the subject and had introduced new legislation.

The average participation in these federal votes hovered around 70% at the beginning of this century, but has sunk to 42% since 1990. Of course, there have also been exceptions to these rather low participation rates. For instance, when the initiatives on the abolition of the Swiss army and the Treaty on the European Economic Area (EEA Treaty) were put to vote in 1989 and 1992 respectively, the participation significantly rose to almost 70 and 80%. The Swiss system of government bestows upon its citizens an unheard of amount of political rights. Yet it can express only the will of those who cared to vote, and not necessarily the will of all the people.

The initiative offers a creative outlet for small opposition and minority groups, especially groups which are not represented in the Federal Assembly. Such groups can propagate their ideas by means of the initiative, and they may gain support to an unexpected extent. The four biggest parties dominate both the Federal Council and the Federal Assembly. But the effect of this domination on other political parties or extra-parliamentary groups is not quite so crushing, owing to the citizens' political rights.

In contrast to the initiative, the referendum does not have an equally creative function. Its effect is to bring down a bill, and the opponents are not obliged to offer a counter-proposal. Nonetheless, the referendum has the same advantages of expressing the will of the people at large and of enabling the citizens to express opinions which may differ from

[5] In 78 cases, the outcome was positive. One cases is pending.

those of the elected authorities. Of course, this may carry some risks; yet a democracy without risk is hardly conceivable.

F. *Consensual Democracy*

The Swiss system of government is perhaps best described as a semi-direct democracy of concordance and consensus. Switzerland is a nation where four languages are spoken, that is religiously divided, that has a decentralized economic structure, and that looks back to a long history of deeply rooted diversity. It is fairly natural that in such a nation tolerance, compromise, and mutual understanding are inevitable. A consensual, compromise-oriented decision-making process is anchored psychologically and institutionally in Switzerland. It belongs to the political culture, historical experience, and the self-comprehension of the elites, as well as employers and employees.

In the Swiss system of multi-party proportional representation, one will therefore tend to negotiate and settle all sorts of conflicts peacefully, rather than resort to competition and open conflict. The four biggest parties, the official languages, major religions, and regions are all represented within the Federal Council and the Federal Assembly. A systematic, periodic exchange between government and opposition does not take place. Instead, the opposition groups may take advantage of the initiative and referendum and can through them advocate their ideas in a somewhat piecemeal, but all the more efficient, fashion. All groups which may start a referendum are integrated in the preparatory stages of the decision-making process and cooperate there with a view to reaching a compromise that is acceptable to everybody concerned. This includes not only parties or linguistic groups, but all sorts of major pressure groups. The optional referendum and the mandatory vote on constitutional amendments have today not only the direct effect of possibly vetoing a bill or amendment proposed by the legislature, but also an indirect effect in the pre-legislative procedure, since they enforce the trend towards consensual bargaining even before a decision reaches the Federal Assembly. In addition to the political rights of the citizens, the system of proportional representation, the peculiar shape and composition of the Federal Council, and the Swiss form of federalism likewise support the tendency to a "consensual democracy."

II. Constitutional Structure and Allocation of the Treaty Power

A. *Introductory Remark*

The Federal Constitution of 1874 was, like most constitutions, "introverted." It dealt very briefly with aspects of international law and international relations, and showed no awareness of the fundamental sociological fact of present-day international interdependence.[6]

This changed fundamentally with the new, totally revised Federal Constitution adopted by the people and the cantons on April 18, 1999 and entered into force on January 1, 2000. The new Constitution prominently takes up the basic values of the international order and relates national law and policy-making to the increasingly interdependent nature of today's necessities.[7] It contains explicit regulations on foreign relations (Article 57); the participation of the cantons in decisions of foreign policy (Article 55) as well as their relations with foreign countries (Article 56); the treaty conclusion procedure (Articles 140, paragraph 1, letter b; Article 141, paragraph 1, letter d; Article 166, paragraph 2; Article 184, paragraph 2); and the partition of competencies between the Federal Assembly and the Federal Council in the field of foreign policy (Article 166, paragraph 1, and Article 184, paragraph 1). The Confederation and the cantons are bound to respect international law (Article 5, paragraph 4). The Federal Tribunal and all other authorities must follow international law (Article 191). Furthermore, the whole policy of the Swiss Confederation is put in the context of the global system, with Article 2, paragraph 4 providing as a purpose of the Confederation "to strive to secure the long-term preservation of natural resources, and to promote a just and peaceful international order," and Article 54, paragraph 2, mentioning as a goal of Swiss foreign policy to "contribute to alleviate need and poverty in the world, and to promote respect for human rights, democracy, the peaceful coexistence of nations, and the reservation of natural resources."

Total or partial revisions of the Constitution must comply with the mandatory rules of international law, *i.e. ius cogens* (Articles 193, para-

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[6] The only foreign policy purpose of the Swiss Confederation mentioned in Article 2 of the former Constitution was state-oriented and purely defensive (preservation of the independence of the country). *See* Daniel Thürer, *Verfassungsrecht und Völkerrecht, in* Thürer, Daniel, Aubert, Jean-François and Müller, Jörg Paul (eds.), *Droit constitutionnel Suisse* § 11, N 10 (Schulthess Polygraphischer Verlag: Zürich, 2001).

[7] *Id.*, § 11, N 8–11.

graph 4, and 194, paragraph 2). Popular initiatives shall be declared invalid by the Federal Assembly if they do not respect the peremptory norms of international law (Article 139, paragraph 3).

The Federal Council has repeatedly stressed the importance of treaties for Switzerland, since they affect all fields of state activities and are increasingly of a law-making character. Currently, Switzerland is internationally bound by about 3,300 treaties.[8]

B. *Federal Government and Cantons*

Article 54, paragraph 1 of the Constitution lays down the competence of the Confederation to shape foreign relations: "Foreign relations are a federal matter." This has come to mean that the federal government has power to enter into any treaty, whatever its object, even if it falls within the domain of cantonal legislative or administrative powers.[9] The consistent practice of the Federal Council and the Federal Assembly, approved by the Federal Tribunal, has always supported an expansive view of the federal treaty-making power.[10] The cantons may, and still do, enter into agreements, but these agreements may be said, at present, to be mainly local and to a certain extent apolitical (Article 55 of the Constitution, and *infra* Section III.I).

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[8] According to the International Law Division of the Foreign Affairs Department, 2,546 bilateral and 787 multilateral international agreements were in force for Switzerland on January 12, 2005.

[9] 53 VPB No. 55, 480–502, at 486 (1989); Thomas Pfisterer, *Auslandsbeziehungen der Kantone, in* Thürer/Aubert/Müller, *supra* note 6, § 33, N 27; Müller, Jörg Paul and Wildhaber, Luzius, *Praxis des Völkerrechts* 107 (Bern: Stämpfli, 3d ed., 2001); Häfelin, Ulrich and Haller, Walter, *Schweizerisches Bundesstaatsrecht* 556, N 1896 (Schulthess Polygraphischer Verlag, Zürich, 5th ed., 2001); Georg Müller, *Rechtsetzung und Staatsverträge, in* Thürer/Aubert/Müller, *supra* note 6, § 70, N 40; Thürer, *supra* note 6, § 11, N 40.

Some authors postulate that this federal prerogative can no longer be held to be valid under Article 54, paragraph 3 of the Constitution. *See* Auer, Andreas, Malinverni Giorgio and Hottelier Michel, *Droit constitutionnel suisse*, vol. I, N 1239 (2 vol., Bern: Stämpfli, 2000). The wording of the provision, which requires the Confederation to "take into consideration the powers of the cantons," thus avoiding more stringent terms like "respect" or "compliance" nevertheless suggests that the comprehensive federal competence to enter into treaties even in the domain of the cantons still exists. According to Pfisterer, Article 54, paragraph 3 of the Constitution does not oblige the Confederation to respect strictly the powers of the cantons, but requires a thorough ponderation of both national and cantonal matters of concern. Pfisterer, *supra* § 33, N 36–37.

[10] Jean Monnier, *Les principes et les règles constitutionnels de la politique étrangère suisse*, 105 ZSR N.F. 144–50 (1986 II); Luzius Wildhaber, "Switzerland," *in Federalism and International Relations: The Role of Subnational Units* 249–52 (Oxford: Clarendon Press; Hans J. Michelmann and Panayotis Soldatos, eds., 1990).

When Switzerland became a federal state in 1848, the aim of the new Constitution was described as being "external unity and internal pluralism." Responsibility for the conduct of external affairs and therefore also for the conclusion and termination of treaties was vested in the federal government. The presumption of competency in favor of the cantons laid down in the Constitution was thus reversed in the field of foreign relations.

Nevertheless, the new Constitution of April 18, 1999 makes it very clear that the competencies of the cantons shall not be circumvented by the powers of the Confederation in the field of foreign policy. Article 55 of the Constitution grants the right of the cantons to "participate in the preparation of decisions of foreign policy which concern their powers or their essential interests" (paragraph 1). The Confederation "shall inform the cantons timely and fully, and consult them" (paragraph 2). Their position "shall have particular weight when their powers are concerned. In these cases, the cantons shall participate in international negotiations as appropriate" (paragraph 3). The actual treaty policy of Switzerland has always been characterized by a cautious attitude aimed at avoiding conflicts between the demands of internationalism and the reserved powers of the cantons. By and large, Switzerland, like all other genuine federal states, demonstrates a clear "federal reluctance" that drives it occasionally to plead constitutional incompetence where it is a matter of political dislike.[11] Accordingly, the full sway of the federal treaty power is not brought to bear. Rather, a consensus with the cantons and all interested groups is sought before a treaty is submitted with a view to its approval and ratification.[12] This federal reluctance mitigates the full, but somewhat theoretical, centralist impact of a federal treaty power that might otherwise provoke considerable resentment in the cantons.

A "Contact Committee" composed of the Federal Minister of Justice and Police and members of all cantonal governments was set up in 1978, following an initiative of the Federal Council. While at the beginning, its main purpose consisted of information and coordination, by the end of 1988, the "Contact Committee" decided to focus its attention primarily on problems relating to the European integration and its repercussions on Swiss federalism. Within the framework of the "Contact Committee," the cantons were therefore called upon to consider issues

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[11] Luzius Wildhaber, "Conclusion and Implementation of Treaties in Switzerland," *in Swiss Reports: Presented at the Thirteenth International Congress of Comparative Law (Montréal, August 19–24, 1990)* 176 (Zürich: Schulthess Polygraphischer Verlag, 12 Publications of the Swiss Institute of Comparative Law, 1990).

[12] BBl 1994 II 620–95, at 633.

of European integration regularly and intensively. They were accordingly informed about the state and progress of the negotiations and about the strategy and the federal legislative measures intended to implement the Treaty on the European Economic Area (EEA Treaty).[13] The EEA Treaty would have brought about considerable encroachments on traditionally cantonal powers; nonetheless most cantonal governments supported it. Although Switzerland rejected the EEA Treaty on December 6, 1992,[14] it is interesting to see how the federal authorities intended to deal with this mainly political problem. To lessen the impact on the competencies of the cantons, the approval decree of the Federal Assembly provided for a subtle process of information and cooperation among the federal government and the cantons; as far as the implementation and the further development of the EEA Treaty were concerned, the decision-making power remained vested in the federal authorities.[15] In addition, the federal authorities decided not to adapt cantonal law by way of federal legislation, but to leave the enactment of the necessary amendments up to the competent cantonal authorities.[16]

In autumn 1993, the "Conference of the Governments of the Cantons" was founded (*See infra* Section III.I.2). In the view of almost all cantons, this conference should serve as an instrument of coordination in the field of cross-border cooperation. According to the Federal Council, the said conference could contribute to the improvement of mutual information and coordination among the federation and the cantons. As an organ of political dialogue, the Conference of the Governments of the Cantons plays an important role in the preservation of the cohesion among the different Swiss regions and shall especially forestall possible tensions between border and interior cantons.

C. *Federal Assembly and Federal Council*

The Federal Constitution knows of no strict separation of powers in the field of external affairs. Both the Federal Assembly (the Swiss legislature, which consists of two chambers with equal standing) and the Federal

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[13] BBl 1992 IV 1–972, at 101–02; BBl 1992 III 1189–1381, at 1336–38; *see also* 53 VPB No. 55, 480–502 (1989).

[14] The majority of the citizens and of the cantons rejected the EEA Treaty (or rather, the approval decree) in a mandatory vote held on December 6, 1992. Despite the Swiss rejection, the EEA Treaty entered into force on January 1, 1994. In addition to the European Union and its then-twelve member states, all EFTA members except Switzerland and Iceland intend to become parties.

[15] BBl 1994 II 620–95, at 631–33.

[16] *See* BBl 1992 IV 1–972, at 101–04; 55 VPB No. 42, 384–410, at 396–97 (1991).

Council (the chief executive, which consists of a collegiate seven-member body) are assigned interdependent and overlapping powers within a very loose constitutional framework. Both are urged to cooperate with one another. There is no "presumption of competency" either in favor of the Federal Council or in favor of the Federal Assembly, because treaty making is neither an exclusively executive nor a purely legislative function in the sense of the doctrine of separation of powers. This concept, according to which all foreign relations had to be channeled through the external affairs department, is outdated. In a modern, pluralistic state, the other departments of the Executive as well as the Parliament and the cantons participate in shaping external relations.

According to Article 184, paragraph 1 of the Constitution, the Federal Council conducts foreign relations. Article 166, paragraph 1, however, stipulates the right of the Federal Assembly to "participate in shaping foreign policy" and to "supervise foreign relations." The negotiation, signature and ratification of treaties lies within the powers of the Federal Council (Article 184, paragraph 2), whereas the power to approve international treaties rests with the Federal Assembly, except for treaties which by statute or international treaty are within the competency of the Federal Council (Article 166, paragraph 2 of the Constitution). Both the Federal Assembly and the Federal Council share the responsibility to "take measures to secure the external security, the independence, and the neutrality of Switzerland" (Articles 173, paragraph 1, letter a, and Article 185, paragraph 1 respectively). The revised Constitution of 1999, more even than that of 1874, designs the external-affairs power as common ground for the government and the legislator. Nevertheless, the main responsibility for the development of foreign policy strategies and the day-to-day business of managing the external relations still lies with the government, *i.e.* the Federal Council.[17]

Obviously, most practices and adaptations in the treaty-making process have evolved outside the text of the Federal Constitution, which, before the adoption of the Constitution of 1999, contained only sparse and rather unsystematic references to this subject. Longstanding practice, rather than the explicit clauses of the Constitution or court decisions, has settled most conflicts of competency. The result has probably been, above all, a confirmation of consensual democracy, in the sense that

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[17] Thürer, *supra* note 6, §11, N 52; Müller/Wildhaber, *supra* note 9, at 110–11 (excerpting from the message of the Federal Council on the new Federal Constitution of November 20, 1996, BBl 1997 I, at 392); Cottier, Thomas and Germann, Christophe, *Die Partizipation bei der Aushandlung neuer völkerrechtlicher Bindungen: verfassungsrechtliche Grundlagen und Perspektiven, in* Thürer/Aubert/Müller, *supra* note 6, § 5, N 15.

both the legislature and the executive were encouraged to cooperate, to make common cause and to avoid all but the inevitable fights.

For the purposes of international law, the Federal Council (as a whole) represents the state, negotiates, signs and ratifies treaties. Within its external policy power fall the decision to enter into negotiations with a foreign state, the nomination and instruction of the negotiating delegation, the formal conduct of the negotiations, unilateral declarations, such as the recognition of states, and the denunciation of treaties.[18] Moreover, it fixes and coordinates the objectives and orientations of Swiss foreign policy and takes care of their implementation. The same holds true for the growing number of memoranda of understanding that are merely politically binding.

The Federal Assembly approves treaties and thereby authorizes the Federal Council to ratify them. It may reject them or send the text back to the Federal Council with instructions, which are not legally binding, to try to negotiate specific revisions. Moreover, it has the possibility of influencing foreign policy through its power to supervise the activities of the government and by way of legislation and budget decisions. The Federal Council bears a collective responsibility for the day-to-day conduct of external affairs, but the Federal Assembly, by approving a treaty, shares this responsibility. In the case of politically or economically important treaties, the government usually informs the parliamentary committees about their procedures and content. Since Switzerland has no parliamentary system, the Federal Assembly is free to approve or reject treaties submitted by the government. Indeed, in 1987, the chambers refused to give their approval to the European Social Charter, and in March 2003, the Federal Assembly also refused to approve a bilateral treaty with Germany concerning the exercise of air traffic control over German Territory and the repercussions of the operation of the Zurich

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[18] Valentin Zellweger, *Die demokratische Legitimation staatsvertraglichen Rechts, in* Cottier, Thomas, Achermann, Alberto, Wüger, Daniel and Zellweger, Valentin (eds.), *Der Staatsvertrag im schweizerischen Verfassungsrecht* 269–70, note 67 (Bern: Stämpfli, 2001); Monnier, *supra* note 10, at 194–201; Wildhaber, "Conclusion and Implementation," *supra* note 11, at 182–83. Ehrenzeller by contrast, postulates that every important unilateral declaration (including the denunciation of treaties) needs parliamentary consent. Bernhard Ehrenzeller, *Legislative Gewalt and Aussenpolitik. Eine rechtsvergleichende Studie zu den parlamentarischen Entscheidungskompetenzen des Bundestages, des amerikanischen Kongresses und der schweizerischen Bundesversammlung im auswärtigen Bereich* 551–52, 555–61 (Basel and Frankfurt a.M.: Helbing und Lichtenhahn, 57 Schriftenreihe des Instituts für Internationales Recht und Internationale Beziehungen der Universität Basel, 1993). He also sees no strict difference between regular treaties and "non-binding agreements" from the constitutional standpoint and claims that both forms need the "advice and consent" of the Federal Assembly as long as they are of fundamental significance. *Id.* at 502–17.

airport on German territory.[19] But, there is almost no possibility for the Federal Assembly to influence the content of a draft treaty or to modify it. Only on seldom occasions has the Federal Assembly attempted to oblige the Federal Council to negotiate certain treaties. The government, to be sure, can only be obliged to establish diplomatic contacts and to suggest negotiations, whereas, of course, the other contracting parties must remain free as to their reactions.

In 1991, the Federal Statute on the Federal Assembly (until November 2003, the Federal Statute Governing the Activities of the Federal Assembly and the Form, the Publication and the Entry into Force of its Acts) was amended in order to broaden the base of foreign politics, to enhance parliamentary participation in treaty making at an early stage, and to stress regular information and consultation.[20] Faced with fears that the increasing significance of international lawmaking and treaties might diminish its internal legislative function, the Federal Assembly reacted by endeavoring to achieve a more active involvement in the international lawmaking procedure.[21] At first, it wanted to enable the Committees on Foreign Policy of both chambers to send their own observers to international negotiations and conferences in order to be fully informed at any time and to be able to comment on the negotiations. In view of the opposition of the Federal Council,[22] only the following innovations were adopted: Section 2 of Article 152 obliges the Federal Council to inform the president of each chamber of the Federal Assembly as well as the Committees on Foreign Policy regularly, thoroughly, and in good time about all developments, about its intentions and pending negotia-

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[19] *See also* Monnier, *supra* note 10, at 215–16 (citing two further examples).

[20] *See* Art. 152 of the statute mentioned above, SR 171.10. *Cf.* BBl 1994 I 153–242, at 195. For a detailed overview of the provision and its implication on the cooperation between the Federal Council and the Federal Assembly in the field of foreign policy *see* Zellweger, *supra* note 18, at 258–65.

[21] BBl 1991 III 617–811, at 649–50.

[22] BBl 1991 III 812–27, at 818–20; Zellweger, *supra* note 18, at 266, note 50. An inclusion of members of the Parliament in the negotiation teams could be counter-productive. First, parliamentary activities are essentially based on transparency, whereas international negotiations require a particular degree of confidentiality, especially at an early stage of the talks. Additionally, from a democratic point of view, functions and responsibilities should be clearly assignable to either the government or the Parliament. It is the government's duty to negotiate and elaborate international treaties and to take the responsibility for the result, and it is the Parliament's obligation to control the government's work and to decide on the approval or disapproval of a specific project. Direct participation of members of the Parliament in the negotiation process could make it more difficult for them to perform their democratic duty of control and take an independent, even critical stand on certain projects. *See* Cottier/Germann, *supra* note 17, § 5, N 33–34.

tions. Twice a year, the Federal Council presents a comprehensive inventory listing the essential foreign-policy activities of the seven Departments (Ministries) to the Committees on Foreign Policy.[23] The government must also consult the Committees on Foreign Policy on the guidelines with respect to negotiations within international organizations that lead to decisions either creating norms directly applicable in Switzerland or obliging Switzerland to enact such norms. The Committees may inform the Federal Council of their respective views. However, they do not have any authority to issue directives; consultation does not mean co-decision or legal co-responsibility. The Federal Council takes note of the view of the Committees, but then decides on its own.[24] Furthermore, the executive must inform the Committees of the progress of negotiations. This article was applied for the first time in the negotiation process leading to the sectoral agreements between Switzerland, the European Community and its member states. The consultation procedure laid down in Article 152 has proven to be a necessary and reasonable means of cooperation for both the executive and the legislative branch of the Federal authorities.[25]

D. *Federal Council and Federal Administration*

The Federal Council is the chief executive, a collegiate body of seven members. Each of the Federal Councilors is the sole head of an administrative department and simultaneously a member of the government. He shares a collective responsibility for all joint actions of the government, but his tenure does not depend on parliamentary confidence, nor does he sit in either house of the legislature. Decisions are taken by the Federal Council as a whole, under Article 177, paragraph 1 of the Federal Constitution. Legislation may delegate certain matters to an administrative department, and thereby to a single Federal Councilor (Article 177, paragraph 3 of the Constitution).

This situation applies to both external and internal affairs. The line between collective responsibility of the Federal Council as a whole and individual responsibility of a single Federal Councilor is not easy to draw. The Minister of External Affairs, as well as any other member of the government, is likely to be held responsible for the timing and style and to some extent even the substance of a trip abroad, even though the Federal Council must approve such a trip. The influence of the mass

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[23] BBl 1998 I, at 1168; Zellweger, *supra* note 18, at 259.
[24] Zellweger, *supra* note 18, at 263.
[25] *Id.*, at 262.

media has led to a certain personalization of responsibilities. On the other hand, issues such as the ratification or eventual denunciation of the European Convention on Human Rights or whether to submit the European Social Charter for approval, or the decision to propose an adhesion to the European Union, undoubtedly belong to the Federal Council as a whole.

E. *Treaty Referendum*

The Swiss treaty referendum is a unique feature and can only be understood in the context of Swiss semi-direct democracy (*supra* Section I.F). In this context, it would seem normal enough to subject the central foreign policy questions to some form of semi-direct democracy. Elsewhere if one speaks of a "democratization" of the external affairs and means more involvement of the legislature in a field mainly dominated by the Executive, in Switzerland one tends to associate the issue with the political rights of the citizens rather than with parliamentary checks and balances.

III. Details of Swiss Treaty Law and Practice

A. *Definition of International Agreement*

The Swiss Constitution does not provide for any legal definition of international treaties. In public international law, any treaty between subjects of public international law, which deals with issues of public law and which is intended to be ruled by public international law and to have binding legal effects, is considered as an international agreement. What is decisive is the *will of the parties as expressed in the treaty text or accompanying understandings*. Therefore, many instruments of international cooperation, such as "codes of conduct, joint declarations of intent, gentlemen's agreements, and memoranda of understanding" which are merely politically binding do not qualify as treaties.[26]

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[26] These instruments, often referred to as "*soft law*," may nevertheless develop some normative significance. *See* Müller/Wildhaber, *supra* note 9, at 99–103 (with references); 47 SJIR 114–15 (1990); 47 SJIR 116–18, at 117 (1990); 51 VPB No. 58, 369–85, at 376 (1987); *see also* Monnier, *supra* note 10, at 213–14; Wildhaber, "Conclusion and Implementation," *supra* note 11, at 182–83. Ehrenzeller contends that such instruments of international cooperation should be considered to be as "treaties" in the sense of Article 166, paragraph 2 of the Constitution (Article 85, paragraph 5 of the former Constitution). Ehrenzeller, *supra* note 18, at 502–17, esp. 509.

There must be a mutual obligation. Unilateral acts are, by definition, not international agreements, and they are in general not regarded as such under Swiss practice.[27] In 1986, the Federal Tribunal held in the *Schorno* case concerning a convention between the canton of Tessin and the Italian municipality of Campione that the exchange of identical unilateral declarations could constitute an international agreement.[28] The Federal Tribunal based its decision mainly on the constant Swiss practice according to which treaties may be concluded orally or implicitly.

For the purposes of international law, form is irrelevant. Whether an agreement is termed a treaty, a pact, an arrangement, a convention, or a declaration; whether it is ratified, accepted, or merely signed; and whether it is approved by the legislature or concluded by an administrative agency may be of importance in considering whether domestic law requires a qualified approval. But, basically, Swiss practice accepts all these forms of agreements as internationally binding obligations. Agency-to-agency and implementing agreements are regarded as international agreements, although most of them are concluded by the Federal Council alone without formal approval by the Federal Assembly (*infra* Section III.C), and most are not published. Oral agreements would probably be considered as international agreements, too. It has never happened, however, that the Federal Council has asked for legislative approval of an oral agreement. Certain limits to informal treaty making may also result, in effect, from the rules concerning the publication of agreements (*infra* Section III.H).

In the field of foreign aid or sales contracts and agreements which are governed by domestic law, everything depends on the specific contract at issue. If both contracting parties are subjects of public international law and if the contract deals with a public law issue, it is likely that the existence of an international agreement will be assumed. If the contract deals with private law issues and is made subject to a domestic law clause, a domestic, private law agreement is assumed to be concluded. If one of the parties is a state and the other a private person, firm, or corporation, there is a certain presumption in favor of a domestic law contract. If the private party fulfilled actual state functions, if a choice-of-law

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[27] For instance, if a treaty provides for a simplified amendment procedure (*e.g.*, by a two-thirds majority) and therefore gives a state party power to object to amendments in simplified form or to "opt out," the Federal Council considers such declarations as unilateral acts. *See* 51 VPB No. 37, 222–24 (1987).

[28] Judgment of May 27, 1986 (*Schorno* Case), *reprinted in* 44 SJIR 170–75, at 172–73 (1988). It is noteworthy that the Federal Council had refused to qualify the said convention as an international agreement.

clause declared public international law to be applicable, if disputes are to be decided by an international tribunal, if the private party faces the state party on an equal standing, or if other weighty factors plead against the presumption, it would seem possible to affirm the existence of an international agreement. This kind of "internationalized" treaty with foreign enterprises is not, however, very likely to be concluded by Switzerland, such treaties being typical of countries exporting raw materials.

Legally binding decisions of international organizations are, on the whole, not subject to the same or similar procedures by the executive and legislature as are treaty commitments. The allocation of competences as to the acceptance or rejection of legally binding resolutions is nowhere addressed explicitly by the Constitution. It is helpful to distinguish between legally binding decisions of international organizations and amendments to the foundation treaty. If Switzerland as a member state of an international organization has to reject a resolution within a certain period of time to avoid an international obligation (opting-out-procedure), the Federal Council alone is competent.[29] On the whole, this kind of resolution deals with legal norms of a highly technical and subsidiary character, so that the parliamentary consent to the original foundation treaty can be interpreted as an authorization to the Federal Council to accept or reject a resolution. Article 152 of the Federal Statute on the Federal Assembly now guarantees a certain measure of participation to the Committees on Foreign Policy. The Federal Council has to consult the Committees on Foreign Policy of both chambers on the guidelines for negotiations within international organizations before determining or amending them. Amendments to the foundation treaties, however, are international treaties according to Article 166, paragraph 2 of the Constitution. As a result, the Federal Assembly is competent, unless a delegation to the Federal Council can be assumed.

B. *Treaties Approved by the Legislature*

Article 166, paragraph 2 of the Constitution states that the Federal Assembly "shall approve international treaties, with the exception of those which by statute or international treaty are within the powers of the Federal Government." The Federal Council concludes various categories of international agreements alone without submitting them to the Federal Assembly for approval or to an optional or mandatory referendum. This was a longstanding practice already under the former Constitution that

[29] *See, e.g.*, 37 SJIR 190–92 (1981).

did not explicitly mention the possibility of a delegation of the treaty-making power to the federal government.[30] Article 7a of the Federal Statute on the Organisation of the Government and the Administration[31] lists four categories of treaties "of minor importance" and empowers the Federal Council to conclude them without the involvement of the Federal Assembly. (*See infra* Section III.C.) Actually, about 45% of all international agreements concluded by Switzerland are specifically approved by the legislature.[32]

Based on constitutional and statutory provisions as well as practice, one may generally say that an international agreement requires specific legislative approval only (a) if the Federal Assembly has not authorized the Federal Council in advance to conclude such agreements and (b) if the agreement is not a treaty of clearly minor importance in the sense of Article 7a paragraph 2 of the above-mentioned statute.[33] Except for urgent cases, which require a particularly speedy procedure to take effect provisionally but have to be submitted to the Federal Assembly for subsequent approval, it is therefore the intention of the legislator to establish a distinction based on the *importance criterion*, requiring a formal authorization or approval of the Parliament only for treaties of some significance.

The Federal Constitution does not state at what stage and under what circumstances the Federal Assembly must approve treaties. There are, theoretically, five possibilities:

- authorization in advance of negotiations;
- advance authorization, subsequent specific approval after ratification, subject to treaty denunciation in case of refusal of approval;
- tacit approval in case the legislature does not expressly object between signature and ratification;
- specific approval between signature and ratification;
- subsequent approval after ratification.

In Swiss practice, all these variants have occurred, with the exception of the third one. The normal procedure is the fourth one, i.e., specific approval between signature and ratification. It is not advisable to ratify a treaty before the legislature has approved it, since this would create

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[30] *See also* Zellweger, *supra* note 18, at 351.

[31] SR 172.010. *See also* BBl 1999, at 4827–29; *infra* Section III.C.

[32] Of the 2,546 bilateral and 787 multilateral international agreements that were in force on January 12, 2005, 785 and 624 respectively (i.e., 31% and 79% respectively) have been approved by the Federal Assembly. *See* BBl 1997 I 1–648, at 393; 51 VPB No. 58, 369–85, at 371–72 (1987).

[33] The treaties of Article 7a, paragraph 2, letter d, are also referred to as "petty" agreements (*Bagatellverträge*). *See infra* Section III.C.

the risk that the treaty becomes internationally binding while lacking validity in domestic law.

Reservations on behalf of Switzerland are formulated by the Federal Council upon signature of a treaty. The government submits them to the Federal Assembly for approval, along with the treaty. The Federal Assembly may change the formulation of reservations; it may ask the Federal Council to examine whether a reservation cannot be dropped in a specific case; it may even introduce new ones, but it obviously cannot amend the treaty itself. Reservations by other states are not submitted to the Federal Assembly for approval. They are officially published if a given treaty provides for them. The formulation of objections to reservations introduced by other parties to a treaty falls within the exclusive competence of the Federal Council.[34]

In substance, the withdrawal of reservations can be considered as tantamount to a revision of a treaty, insofar as it affects the rights and obligations of the parties under public international law. Consequently, the procedure which domestically applies is the same as in the case of the revision of an existing treaty (*See infra* Section III.F) or the conclusion of a new treaty.[35] The approval decree may also empower the Federal Council to withdraw the reservations to a given treaty without prior consultation of the Federal Assembly.[36]

We do not know of any bilateral treaty concluded by Switzerland containing a Swiss reservation. According to Swiss practice, a reservation to a bilateral treaty seems to amount to a new proposal reopening the negotiations.

There is an established practice of consulting the public, and particularly the cantons, political parties, and main pressure groups and associations, on the desirability of treaties that are subject to legislative approval and perhaps referendum. The consultation is arranged by the federal administration, acting under directions by the Federal Council

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[34] Luzius Wildhaber, "Parliamentary Participation in Treaty-making, Report on Swiss Law," *in Parliamentary Participation in the Making and Operation of Treaties. A Comparative Study* 131–51, 137; 495–512 (Dordrecht/Boston/London: Martinus Nijhoff Publishers; Stefan A. Riesenfeld and Frederick M. Abbott eds., 1994) (citing various examples); Jacqueline Béatrice Moeri, *Die Kompetenzen der schweizerischen Bundesversammlung in den auswärtigen Angelegenheiten* 132–34 (Wil, thesis St. Gallen, 1990).

[35] BBl (1999) 3658–69, at 3667–68 (withdrawal of two reservations and two interpretative declarations to Article 6 of the ECHR); BBl (1992) II 1182–201, at 1198 (withdrawal of four Swiss reservations to four multilateral conventions in the fields of private international law and international civil procedure law).

[36] *See, e.g.*, AS (1993) 747–49 (approval decree concerning the International Covenant on Civil and Political Rights); AS (1998) 2053–54 (approval decree concerning the Convention on the Rights of the Child).

(the two together make up the federal executive). Consultations are usually written, but may include oral communications and conference discussions. They take place after the signature, but before the treaty is submitted for legislative approval. This practice has been regulated by the Federal Council's ordinance concerning the so-called "consultation procedure" (*Vernehmlassungsverfahren*), of June 17, 1991.[37] According to this ordinance, the cantons and the political parties represented in the Federal Assembly are to be consulted (a) whenever the federal law so provides; or (b) where bills or draft treaties have significant political, economic, financial, or cultural implications; or (c) where treaties will be implemented by other bodies than the federal administration. The same applies to the biggest pressure groups: the central organization of employers (including the *Economiesuisse*) and of employees, the Farmers' Association, or the Swiss Banking Association. Since these pressure groups exercise a certain clout in the legislature and are powerful enough to organize and finance a referendum campaign, their influence is substantial. In the negotiation of commercial or double taxation treaties, their own representatives may be included in the official Swiss delegation. Off the record, they are sometimes even invited to give their views to draft treaties (e.g., the EEA Treaty).

No consultation with the entire legislature as such is likely to take place. Article 152 of the Federal Statute on the Federal Assembly obliges the Federal Council to inform the Committees on Foreign Policy of both chambers as well as other standing parliamentary committees about negotiations with foreign States. The Committees may on their own initiative demand additional information from the Federal Council. Moreover, the government must consult them on the guidelines for negotiations, and the Committees may inform the Federal Council of their respective views.

Since the refusal of Parliament to approve a treaty is hardly a check upon the executive which can be used regularly and efficiently (*supra* Section II.C), the Federal Assembly insists upon constant and timely information for its preparatory committees and will be inclined to submit important treaties to a searching scrutiny. This has been the case for instance with the Free Trade Convention with the Common Market, with the European Convention on Human Rights (ECHR) and its Additional Protocols, and the United Nations Human Rights Pacts as well as a few selected bilateral agreements.

In the case of treaties subject to the mandatory or optional referendum, information and consultation has been regular and careful. The

[37] SR 172.062.

EEA Treaty (*See supra* Section II.B), for example, was made the subject of a special information campaign. During the negotiations, the Federal Council took part in the sessions of the Committees on Foreign Policy of both legislative chambers and gave them detailed information as to the state and progress of the negotiations.[38] Since the approval of the EEA Treaty was subject to a mandatory referendum and the requirement of a double majority of the people and the cantons, it was not at all surprising that the negotiations concerning this treaty led to a wide-ranging discussion about the future place of Switzerland in Europe. Undoubtedly, such public discussions are necessary, particularly with regard to treaties subject to a referendum. Thus, it seems indispensable to elaborate a concept under which the government attempts to inform systematically not only the parliamentary committees, but the public in general.[39] Round-table discussions bringing together members of the government and the Parliament with opinion leaders of important political parties, commercial associations and particularly concerned interest groups are not uncommon in the negotiation process of complex (often multilateral) economic treaties.[40] "Negotiations in public" ought, nevertheless, to be avoided, in the view of the government.

By and large, the Federal Council hardly consults with the Federal Assembly on the desirability of a proposed international agreement that does not require formal legislative approval. Nor does the Federal Assembly seem to be interested in, or insist on, such consultation.

C. *Executive Agreements*

Roughly 55% of all international agreements concluded by Switzerland are not specifically approved by Parliament but are concluded by the Federal Council alone (*supra* Section III.B). According to a decades-old practice, there were six categories of such agreements in simplified form:

1. agreements the conclusion of which the Federal Assembly had authorized in advance;
2. agreements executing prior treaties;

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[38] The same procedure was applied for the negotiations with the European Union and its member states concerning, *inter alia*, the adherence of Switzerland to the so-called Schengen and Dublin treaties.

[39] BBl 1994 I 153–242, at 194–97.

[40] Such *ad hoc*-structures for the purpose of information and consultation have been established in the negotiation process leading to the sectorial agreements between Switzerland, and the European Community and its member states of June 21, 1999. *See* Zellweger, *supra* note 18, at 264.

3. agreements which conferred only rights and imposed no new obligations upon Switzerland;
4. provisional and urgent agreements subject to subsequent parliamentary approval;
5. agreements concerning objects which, in domestic law, the Federal Council had power to regulate alone; and
6. agreements extending existing treaties in cases of state succession.

On the whole, this relatively constant practice of concluding executive agreements remains unchallenged. In particular, categories 1 and 4 could be claimed to be anchored in customary constitutional law. On the other hand, category 5 – agreement concerning objects which, in domestic law, the Federal Council had power to regulate alone – gave rise to internal conflicts.

After protracted discussions, the International Law Division of the Federal External Affairs Department and the Federal Office of Justice, reframed and systematized the different categories of executive agreements in a version agreed by the Federal Council, in 1987.[41] Certainly the most important innovation was the definition of so-called "petty" agreements (*Bagatellverträge*), a category essentially based on the material significance of the agreement.[42] This category was remarkable insofar as at that time, it could not be based on a specific statutory provision delegating the competence to conclude such agreements to the Federal Council, but was derived directly from the Constitution, as an inherent power of the government to enter into treaties, which, because their content *per se* is of minor importance, need not be submitted to the Federal Assembly.[43] Art. 7a of the Federal Statute on the Organisation of the Government and the Administration is now a general legal foundation for the competencies of the Federal Council to conclude international treaties. The Federal Council thus has power to conclude agreements alone in the following cases:

a. where the Federal Assembly, by statute or by an international treaty approved in the parliamentary procedure, has authorized the conclusion beforehand, explicitly or implicitly. More than 80% of executive agreements fall under this category.[44]

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[41] 51 VPB No. 58, 369–85 (1987); *see also* Müller/Wildhaber, *supra* note 9, at 112–13.
[42] *See* Zellweger, *supra* note 18, at 356–57.
[43] Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1252; Zellweger, *supra* note 18, at 371 (referring to Article 85, paragraph 5 of the former Constitution of 1874).
[44] 51 VPB No. 58, at 377–78 (1987); Zellweger, *supra* note 18, at 387–95.

b. where the urgency of a treaty asks for a provisional entry into force without delay. Such treaties are rare, and an ulterior approval by Parliament is reserved. Most examples concern treaties of commerce.[45]
c. Where agreements are of minor importance:
   - because they neither impose new obligations upon Switzerland nor abandon existing rights;[46]
   - because they execute international treaties approved by the Federal Assembly;[47]
   - because they concern matters which the Federal Council has power to regulate under domestic law and which should be regulated by an international agreement;[48]
   - because they are primarily aimed at the authorities, settle questions of an administrative-technical character or do not imply significant financial consequences.

These are so-called "petty" agreements, (*Bagatellverträge*).[49] Until the end of 1998, 30 petty agreements had been concluded.[50]

All in all, the executive enjoys considerable discretion in deciding whether an agreement should receive the approval of the legislature before its entry into force.

The bulk of agreements not expressly approved by the legislature are not transmitted to the entire legislature for its information (*supra* Section III.B). Commercial agreements are transmitted, however, according to the Federal Statute concerning External Trade Measures, of June 25, 1982.[51] Under this statute, the Federal Council is empowered to conclude inter-

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[45] 51 VPB No. 58, 369–85, at 381 (1987); Zellweger, *supra* note 18, at 395–401. *See, e.g.*, Article 2 of *the arrêté fédéral* Concerning the Conclusion of Treaties on the Protection and the Encouragement of Capital Investment, of September 27, 1963 (SR 975); Article 10 of the Federal Statute on International Cooperation in Development and Humanitarian Assistance, of March 19, 1976 (SR 974); and Article 2 of the Federal Statute Concerning External Trade Measures, of June 25, 1982 (SR 946.201). This category has recently given rise to a heavy controversy between the Federal Assembly and the Federal Council. *See* BBl (2004) 761–776 and 1017–1022.

[46] *See* Zellweger, *supra* note 18, at 375–78.

[47] *Id.* 380–82.

[48] *Id.* 382–87.

[49] For a detailed definition, *see* 51 VPB No. 58, 369–85, at 381–84 (1987); *see also* 3 SZIER 673–74 (1993), 2 SZIER 554–58, at 557–58 (1992); Zellweger, *supra* note 18, at 356–75. Some commentaries still mention the possibility of a short-term termination as a prerequisite for a "petty" agreement. The Federal Council, however, no longer sticks to this requirement, because in its view some treaties may be of minor importance even if they cannot be terminated easily (or at all). *See id.*, at 372–75 (with critical remarks). Agreements on minimal frontier corrections or territorial exchanges might be examples.

[50] *See* Zellweger, *supra* note 18, at 357.

[51] SR 946.201.

national agreements concerning external commerce, services, and payment transactions and to put such agreements provisionally into force. The Federal Council must submit them for approval within six months from their provisional application. "Petty" agreements (*Bagatellverträge*) are made known to the Parliament as well. The Federal Assembly is annually informed of the conclusion of such petty agreements and it can raise objections. In the opinion of the government, information about the conclusion of such petty agreements should enable the Federal Assembly to decide whether or not it wants such agreements to be submitted to the procedure of parliamentary approval, or whether it wants to invite the Federal Council to denounce a specific agreement. The Federal Assembly would be free to reject any such agreements, but practical problems have not arisen thus far, which may be put down to the fact that the government's and the Federal Assembly's definitions of this treaty category are largely congruent.

D. *Executive Branch Authorization*

The implementation of multilateral conventions and of bilateral treaties is decentralized in a double sense. Within the federal administration, it is decentralized in that implementation is not centrally entrusted to the External Affairs Department, but is the task of the office which is domestically in charge of the matter which the agreement concerns. Within the entire federal state of Switzerland, implementation is decentralized in that matters which are, domestically, in the power of the cantons are left to the cantons to administer, even if a federal treaty deals with them. When submitting the EEA Treaty to the Federal Assembly for approval, the Federal Council stressed to the consensus of the federation and the cantons that the EEA Treaty should be performed without affecting the constitutional allocation of competencies.[52]

There are no special supervisory procedures to ensure implementation of international agreements. Rather, the procedures observed are the usual ones which are followed to ensure implementation of federal law in the cantons, or to achieve coordination within the seven federal administrative departments.

Decisions by the government are taken by the Federal Council as a whole (*supra* Section II.D), unless statutory grants delegate matters to the specific administrative departments.

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[52] BBl 1992 IV 1–972, at 102; *see also* 55 VPB No. 42, 384–410, at 394–95 (1991).

The preparation and implementation of treaties, as well as the representation of Switzerland in international organizations, are, in general, left to the federal offices in charge of the respective subject matters. External relations should be channeled through the Federal External Affairs Department. Communications by federal authorities with Swiss embassies abroad or foreign officials should be sent through the Federal External Affairs Department.[53] Only the following federal offices have been singled out as being empowered to deal directly with foreign authorities:

- the State Secretariat for Economic Affairs;
- the Office of Justice, with respect to guardianship, testaments, judicial assistance and procedural treaties; furthermore, it represents the Federal Council in the European Court of Human Rights as well as in the U.N. Committee against Torture;
- the Registry Office (through the agency of the Office of Justice), for the exchange and procurement of civilian status documents;
- the Police Office;
- the Office for Migration;
- the Office for Civil Aviation, regarding bilateral civil aviation agreements and the representation of Switzerland in the International Civil Aviation Organization (ICAO);
- the Tax Administration, with respect to double taxation treaties;
- the Office for Environmental Protection; and
- the Swiss Federal Institute of Intellectual Property.

In reality, these qualifying regulations are no longer applied with any rigidity. Almost all federal offices maintain direct contacts with foreign authorities. On the whole, this power to deal directly with foreign authorities does not automatically imply authority for the negotiation, let alone the conclusion, of international agreements. Such authority must be based on a specific statutory grant. Statutory grants exist, above all, for the State Secretariat for Economic Affairs (*See supra* Section III.C), and, to a lesser degree, also for the Office of Justice.

Essentially, the Federal Council as a whole has the power to conclude executive agreements. It may delegate its power to one of the seven Federal Departments.[54] Such a delegation is permitted within several limits, developed by the Federal Tribunal for domestic legislation and valid

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[53] As to the necessity for coherence and coordination in the field of external affairs, *see* BBl 1994 I 153–242, at 197–98.

[54] Article 48a of the Federal Statute on the Organisation of the Government and the Administration.

in the field of foreign affairs by analogy. Accordingly, the delegation of the power to conclude an international agreement presupposes a regulation in an ordinance or a decision of the Federal Council. Furthermore, such a delegation has to be limited to agreements settling matters of a purely administrative or technical nature.[55] Whenever a department intends to negotiate an agreement, the Federal External Affairs Department should be consulted from the very outset. In special cases in which the conclusion of a given agreement is exceptionally urgent, a federal department or a federal office may conclude and provisionally apply this treaty even without prior authorization by the Federal Council. Such agreements must at once be submitted to the Federal Council for approval.[56] However, there are no detailed regulations on these matters.

E. *Treaty Referendum*

1. *Situation from 1921 to 1977*

While proposals for the introduction of a treaty referendum were rejected in 1874, the people and the cantons adopted a constitutional initiative in 1921 that submitted to the optional referendum treaties concluded for an indefinite period or for a duration of more than 15 years. In 1920, the Federal Assembly had subjected the adherence to the League of Nations to a mandatory referendum, in analogy to the procedure of constitutional amendment.

Between 1921 and 1977, only about 4% of all international agreements were subject to the optional treaty referendum, which was made use of in three cases: in 1923, the Franco-Swiss Convention on the Free Zones was rejected; in 1958, the treaty with Italy concerning the utilization of the boundary of the river Spöl was accepted; and in 1976, a grant of 200 million francs to the International Development Association (IDA) was rejected. In 1972, the Free Trade Convention with the Common Market was made the subject of a mandatory referendum by the people and the cantons (without any express constitutional basis), and was

[55] 52 VPB No. 20, 123–25, at 124 (1988). A delegation to a Federal Office is admissible only if there is an express statutory grant; as is the case, for example, of Article 48a, paragraph 2, of the Federal Statute on the Organisation of the Government and the Administration for treaties of minor importance. *See also* 51 VPB No. 58, 369–85, at 385 (1987); Zellweger, *supra* note 18, at 401–08; Christophe Wilhelm, *Introduction et force obligatoire des traités internationaux dans l'ordre juridique suisse* 39–40 (Lausanne: Presses Centrales, thesis Lausanne, 1992).

[56] *See* 51 VPB No. 58, 369–85, at 384–85 (1987).

accepted. Some important treaties, however, escaped the referendum, such as the EFTA Treaty, the Nuclear Test Ban Treaty, and the European Convention on Human Rights.

Dissatisfaction with the working of the treaty referendum led to several proposals for a new system. A constitutional initiative by a political minority party asked that all international agreements be submitted to the referendum, and that even existing agreements be so submitted retroactively. Although the compatibility of this initiative with both constitutional and international law could be doubted, it was brought to the vote. On March 13, 1977, the initiative was clearly defeated; however, the majority of the people and the cantons accepted a counter-proposal of the Federal Assembly.

2. *Regime from 1977–2003*

From 1977 to mid-2003 Switzerland had a threefold treaty referendum:

- a *mandatory* referendum (required referendum for approval by a double majority of people and cantons) for the adherence to organizations for collective security (e.g., the U.N.) and supranational communities (e.g., the adherence to the European Union) (Article 140, paragraph 1, letter b of the Constitution).
- a *"mandatory" optional* referendum (referendum required where 50,000 citizens or 8 cantons request it, in which case approval by a simple majority of the people is required) (1) for treaties of unlimited duration that may not be terminated, (2) for treaties providing for the adherence to an international organization, and (3) for treaties involving a multilateral unification of law (Article 141, paragraph 1, letter d, clauses 1–3 of the Constitution);
- an *"optional" optional* referendum (discretion of the Federal Assembly whether 50,000 citizens or 8 cantons can trigger the referendum, in which case a simple majority of the people is required) for treaties which the legislature decides to expose to the optional referendum (Article 141, paragraph 2 of the Constitution);

On the domestic level, constitutional amendments must be adopted by a mandatory referendum, and federal statutes are subject to optional referendum. Article 164, paragraph 1 of the new Constitution, requires that "all important provisions establishing rules of law must be enacted in the form of Federal Statutes." The treaty referendum regime of 1977 took a far more restrictive approach. Under a democratic point of view, however, in order to achieve the goal of preventing the political rights of the people and the cantons from being undermined by way of international treaty law, the treaty referendum should cover more or less the

same broad area of application as the constitutional and the statutory referenda together.[57]

3. *The New Regime*

Consequently, on February 9, 2003, the majority of the people and the cantons accepted a modification of the popular rights of the citizens, including, *inter alia*, simplification and an extension of the treaty referendum.[58] The new constitutional norms entered into force on August 1, 2003. The criterion of the multilateral unification of law is now replaced by a criterion based on the importance of the treaty in question. Article 141, paragraph 1, letter d, clause 3, of the Federal Constitution now subjects to the *"mandatory" optional* referendum "treaties which contain important provisions establishing rules of law or requiring the enactment of federal statutes for their implementation." On the other hand, the *"optional" optional* referendum has been abolished.

Between 1977 and May 2004, 95 international treaties, that is, roughly 15% of all international agreements approved by the Federal Assembly, were exposed to the *"mandatory" optional* treaty referendum (i.e., efforts were made to achieve the approval of a referendum by 50,000 Swiss citizens or 8 cantons). A referendum was successfully demanded twice.[59] First, in 1992, the Swiss citizens accepted the adherence of Switzerland to the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the International Monetary Fund (IMF). Second, in 2000, the Swiss citizens accepted seven sectoral agreements with the European Community and its member states. The specific effects of the 2003 reform itself, however, obviously cannot be assessed yet.

The transformation of two loans to the IDA into donations was submitted to the *"optional" optional* referendum in 1980. A decisive factor in the submission was probably that the people had refused to grant such a loan to the IDA in 1976. However, no referendum was launched against the transformation.

In 1986, the adherence of Switzerland to the United Nations Organization was the object of a *mandatory* referendum.[60] And, in 1992, the

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[57] This is particularly true given the circumstance that today about 100 treaties are concluded each year, whereas until 1960, the rate was only 6.6 per year. Häfelin/Haller, *supra* note 9, at 560, N 1911.

[58] *See* BBl (1997 I), at 436–86 and 635–39 (draft submitted by the Federal Council).

[59] These two demands for a referendum concerned 11 treaties, which is 11.6% of all treaties exposed to the *mandatory optional* referendum since 1977; *see also supra* note 4.

[60] Dieter Pfirter, *Verhältnis Schweiz-UNO: Wie weiter nach dem 16. März 1986?, in* 28 *Schweizerisches Jahrbuch für Politische Wissenschaft* 73–90 (1988); Luzius Wildhaber, *Das*

EEA Treaty was put to a *mandatory* referendum vote, although this treaty did not match exactly the explicit criteria of the Federal Constitution for an *optional* or *mandatory* referendum. Both the adherence to the U.N. as well as the EEA Treaty were rejected. However, on March 3, 2002, the majority of the people and the cantons accepted a popular initiative concerning the adherence to the United Nations. Switzerland has thus become the 190th UN member state as of September 2002.

With respect to the EEA Treaty, the Federal Council acknowledged that this treaty and the agreements closely connected with it, while implying a multilateral unification of law as well as the adhesion to two international organizations (*i.e.*, the EFTA Surveillance Agency and the EFTA Court), did not constitute an adherence to a supranational community. In the view of the government, Article 89(5) of the former Constitution (*i.e.* Article 140, paragraph 1, letter a of the actual Constitution) was thus not applicable to the EEA Treaty. In the view of the Federal Council, however, it was neither feasible nor desirable to design an explicit constitutional basis for each and every case in which a *mandatory* referendum would be adequate. The *mandatory* referendum clause of the Federal Constitution can thus not be regarded as conclusive.[61] As the EEA Treaty was of paramount political and economic importance, only the *mandatory* referendum was deemed politically acceptable.[62] One can appreciate this political decision only when taking into account the outcome of the referendum in which the popular vote was negative by a very thin, almost incidental margin, while a strong majority of the cantons rejected the EEA Treaty. Had the people accepted the treaty, delicate constitutional questions might have arisen. The Federal Constitution indeed does not recognize an optional mandatory referendum, so that citizens in favor of the treaty might have held that the Federal Assembly had violated their political rights at its discretion by organizing such a mandatory referendum not contemplated by the Constitution. Since the Federal

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Schweizer Nein zu einer Vollmitgliedschaft in den Vereinten Nationen, *in* 41 *Europa-Archiv* 461–68 (1986).

[61] *See* BBl 1974 II, at 1159 and 1992 IV, at 541–42 (with further references); *see also* Zellweger, *supra* note 18, at 284–85.

[62] *See* BBl 1992 IV 1–972, at 538–42. The approval decree (*reprinted in* BBl 1992 VI, at 56–57) would not only have empowered the Federal Council to ratify the EEA Treaty but also contained two constitutional amendments. (Such amendments must at any rate be adopted in a *mandatory* referendum.) One of these concerned cooperation among the federation and the cantons regarding questions of European integration. According to the other amendment, all adaptations of federal statutes deemed necessary to implement the EEA Treaty upon its entry into force would have been exposed to the referendum, which could have been asked for only after that time.

Tribunal lacks the power of judicial review in such cases, the citizens would moreover have been without a forum to raise their claim of alleged unconstitutionality.[63]

F. *Treaty Revision*

The internal treaty-making procedure is also applicable to the revision of existing treaties.[64] An amendment to an existing treaty requires parliamentary approval, except, of course, where only an executive agreement is concerned. On the other hand, not every revision of an existing treaty, which was subject to the referendum, must also be exposed to the referendum. The revision of a treaty providing for the adhesion to an international organization is made the subject of the referendum if the repercussions on the structure of the organization are so far-reaching as to render the revision equivalent to a new adhesion.[65]

G. *Treaty Termination*

The power to terminate international agreements rests solely with the Executive.[66] There is no requirement of parliamentary consent or approval. Thus far, no dispute has arisen over this issue. However, such a dispute might one day arise, based on the argument that Parliament ought to give its approval to the termination or suspension of treaties. In the case of treaties conceding rights to individuals directly, or where the termination amounts to a creative, political act, the unmaking of a treaty is

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[63] Most recently, the question arose whether to subject the adherence of Switzerland to the Schengen and Dublin treaties to a *mandatory* referendum. The Federal Council as well as the Federal Assembly, bearing in mind the applicable constitutional framework, finally decided to subject the said adherence to the *optional* referendum. *See* BBl 2004 5965–6564, at 6286–6253; the approval decree is reprinted in BBl 2004 7149–187 (*see* article 4 at 7181).

[64] *See* BBl 1992 IV 1–972, at 83–87; BBl 1990 I 463–78, at 469–70 (Additional Protocol of July 12, 1989, to the Free Trade Convention with the Common Market of 1972); BBl 1989 III 1509–22, at 1515 (Protocol of October 17, 1989, to amend the German-Swiss Convention on Double Taxation of August 11, 1971); BBl 1988 II 373–92, at 382 (revision of the EFTA Treaty).

[65] Therefore, the amendment of May 28, 1987, to the Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, of February 2, 1971, was subject to the referendum (BBl 1988 II 1–12, at 8). On the other hand, the amendment of September 27, 1984, to the Statute of the International Atomic Energy Agency was not exposed to the referendum (BBl 1985 II 157–65, at 162); *see also* BBl 1994 I 681–1114, at 1049–102, esp. 1055 (concerning the International Cocoa Organization).

[66] 2 SZIER 565–66 (1992); Wildhaber, "Parliamentary Participation," *supra* note 34, at 139; Müller/Wildhaber, *supra* note 9, at 109; Wilhelm, *supra* note 55, at 38–39.

similar to its making.[67] On the other hand, where the termination registers the obvious in an almost routine fashion, one tends to seek an analogy to the conclusion of executive agreements. Parliamentary participation could, for instance, be reserved in the approval decree. Another possibility would consist in a decision to be taken by the Federal Assembly when the question arises whether or not to denounce a treaty.[68]

While it has been controversial for a long time whether the legislature, by way of the so-called motion (a binding mandate), could oblige the government to denounce or terminate a treaty,[69] Article 120, paragraph 2 of the recently adopted Federal Statute on the Federal Assembly makes now clear that there is such a parliamentary power.

H. *Incorporation into National Law*

Switzerland has a long-standing monistic tradition. Indeed, according to unanimous doctrine and a consistent practice, treaties upon ratification – as well as customary international law and the general principles of international law – become an integral part of the Swiss legal order.[70] There

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[67] The denunciation of the ECHR, for instance, would have major repercussions on the Swiss position in Europe. It seems hardly conceivable to leave the respective decision to the Executive alone.

[68] Ehrenzeller, *supra* note 18, at 544–45; Moeri, *supra* note 34, at 141.

[69] While Parliamentarians repeatedly attempted to do so, the Federal Council consistently refused to consider such a motion as binding. 2 SZIER 565–66, at 565 [1992]; 40 VPB No. 68, 11–14 [1976]. However, there was no doubt that Parliament could suggest that the government denounce a specific treaty. When, in the *Belilos* case (Judgment of April 29, 1988, in Publications of the European Court of Human Rights A/132), the European Court of Human Rights declared a Swiss interpretative declaration to Article 6 of the ECHR (which in fact was a reservation) null and void because it did not comply with the requirements of Article 64 (now Article 57) of the ECHR, this decision was rapidly exposed to severe criticism, especially in the Council of States. Councilor Danioth asked that the Council of States invite the Federal Council to denounce the ECHR provisionally and to reformulate the invalid declaration as a valid reservation. The government opposed this so-called postulate, which the Council of States thereupon rejected by 16 to 15 votes. In the aftermath of these events, the executive reformulated the part of the interpretative declaration that was not directly affected by the *Belilos* judgment. This reformulated declaration soon became the object of a legal dispute, and, in 1992, the Federal Tribunal struck down this "subsequent declaration" on the ground that reservations formulated *ex post* are inadmissible. ATF 118 I a 473–88 [1992], *reprinted in part in* 3 SZIER 584–87 [1993]; *see also infra* Section III.H.2. In an *obiter dictum*, the Federal Tribunal held that the proposal of Councilor Danioth (i.e., a provisional denunciation combined with an immediate re-adherence to the ECHR) would have constituted an abuse of rights. For a summary of the events, *see* Luzius Wildhaber, *Rund um Belilos, Die schweizerischen Vorbehalte und auslegenden Erklärungen zur Europäischen Menschenrechtskonvention im Verlaufe der Zeit and im Lichte der Rechtsprechung, in Kleinstaat und Menschenrechte, Festgabe für Gerard Batliner* 328–35 (Basel und Frankfurt: Helbing und Lichtenhahn; Alois Riklin, Luzius Wildhaber, and Herbert Wille, eds., 1993); Wildhaber, "Parliamentary Participation," *supra* note 34, at 142–45.

[70] BBl 1992 IV 1–972, at 90; 53 VPB No. 54, 394–436, at 403 (1989); ATF 122 II

is no need for formal transformation. Legislative approval is neither an example of legislation or transformation as in the orthodox dualist view, nor is it a declaration of the will of the state and in that sense a ratification. Legislative approval is simply an authorization to ratify and, as such, one necessary step in the whole treaty-making process. (*See supra* Sections III.B and III.C.) Usually, the Federal Assembly gives its specific approval between signature and ratification (*See supra* Section III.B).

Whereas the prevailing thesis rightly rejects the legislative character of parliamentary approval, Ehrenzeller deduces from the doctrine of the separation of powers that each of the three powers, on the basis of its own structure and the procedure connected with it, can only exercise one basic function. Accordingly, the legislature would act legislatively as far as it reaches its decisions within the parliamentary procedures. In his view, the approval decree constitutes first of all a binding political decision and guidance for the executive, and therefore a legislative act.[71] We are of the opinion, however, that the notion of "legislation" includes the power to determine not only whether a norm should be enacted, but also the content of a norm. Since the Federal Assembly lacks power to influence the content of a treaty submitted for approval (*supra* Section II.C), the power to approve is not the same as the power to legislate.

Treaties become domestically applicable upon their international entry into force, and any individual may invoke a given treaty before the administration or in court, provided the treaty is self-executing. According to the Federal Tribunal, a treaty is self-executing if it is sufficiently precise and clear to constitute the basis of decision in a concrete case. Besides justiciability, the interpretation of a specific disposition, its systematic context and the general aim of the treaty determine whether or not it is self-executing.[72]

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237 (1999); *see also* ATF 94 I 672 (1968); Thürer, *supra* note 6, §11, N 23; Nicolas Michel, *L'imprégnation du droit étatique par l'ordre juridique international, in* Thürer/Aubert/Müller, *supra* note 6, §4, N 15–16; Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1266; Daniel Wüger, *Die direkte Anwendbarkeit staatlicher Normen, in* Cottier/Achermann/Wüger/Zellweger, *supra* note 18, at 102–03. Though monism is not expressly anchored in the Constitution, it can be derived implicitly from Article 189, paragraph 1, letter c, establishing the jurisdiction of the Federal Tribunal over complaints about violations of international treaties, and from Article 191, which declares international law to be binding on the Federal Tribunal and the other authorities applying law. Wüger, *supra* at 103.

[71] Ehrenzeller, *supra* note 18, at 462–63; *contra* Luzius Wildhaber, *Treaty-Making Power and Constitution. An International and Comparative Study* 52–58, 68–85 (Basel and Stuttgart: Helbing and Lichtenhahn, 16 Schriftenreihe des Instituts für Internationales Recht und Internationale Beziehungen der Universität Basel, 1971).

[72] 53 VPB No. 54, 394–436, at 404 (1989); Wüger, *supra* note 70, at 93–250; Müller/Wildhaber, *supra* note 9, at 182–91; Thürer, *supra* note 6, § 11, N 24–25; Michel, *supra* note 70, § 4, N 48–52; Häfelin/Haller, *supra* note 9, at 555–56, N 1894; Olivier Jacot-Guillarmod *L'applicabilité directe des traités internationaux en Suisse: histoire d'un détour inutile,*

Internationally, a state cannot plead the supremacy of domestic law over public international law. It must respect international treaty law. This follows from the *pacta sunt servanda* principle laid down in Article 26 of the Vienna Convention on the Law of Treaties (VCLT),[73] as well as from the rule in Article 27 of the VCLT, that "[a] party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[74] This is reflected in Article 5, paragraph 4 of the revised Constitution, which lays down that "[t]he Confederation and the cantons shall respect international law." Nonetheless, there has always been a controversy about the ranking of treaty law in the Swiss judicial order.[75] Generally, the doctrine does recognize the precedence of international law (treaty or customary law) over domestic law.[76] Nevertheless, in the recent doctrine, some qualifications are made because of the "democratic deficit" of international law. Some authors suggest that the essence of fundamental rights granted by the Constitution prevail over obligations stipulated in international treaties,[77] others favor an even broader reservation including the fundamental rights and all basic principles of the Constitution. The risk of such conflicts, however, is not too significant, because, particularly in the field of human rights, international law has evolved a subtle system of individual protection and remedies.[78]

The Constitution of 1874 did not contain norms dealing with conflicts of international and domestic law. Partly, this can be attributed to the fact that the Swiss legal system, due to a "democratic reflex," knows no comprehensive constitutional jurisdiction. Neither the Federal Tribunal nor any other authority can repeal federal statutes contradicting constitutional law. Even if unconstitutional, such statutes must be followed, because in the Swiss tradition – at least on the federal level – a judiciary

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in 45 SJIR 129–51 (Jubiläumsband 1989); Wildhaber, "Conclusion and Implementation," *supra* note 11, at 187–90; Wilhelm, *supra* note 55, at 125–62; *see generally* Thomas Buergenthal, "Self-executing and Non-self-executing Treaties in National and International law," *Recueil des Cours de l'Académie de la Haye* 303–400, at 235 (1992 IV).

[73] SR 0.111. Switzerland acceeded to the Vienna Convention on the Law of Treaties on June 6, 1990. Nevertheless, since many of the essential rules of the VCLT are a mere codification of pre-existing customary law, Switzerland was bound by them even before its accession to the convention.

[74] Alberto Achermann, *Der Vorrang des Völkerrechts, in* Cottier/Achermann/Wüger/Zellweger, *supra* note 18, at 40.

[75] For the varied positions in the doctrine *cf.* the references in Achermann, *supra* note 74, at 45–46 and "The relationship between Public International Law and Domestic Law in the Swiss Legal System," International Law Division of the Federal External Affairs Department and the Federal Office of Justice, 53 *VPB* No. 54, 410–14 (1989).

[76] *See* the references in Thürer, *supra* note 6, § 11, N 27, note 28.

[77] Thomas Cottier, *Einleitung und Synthesen, in* Cottier/Achermann/Wüger/Zellweger, *supra* note 16, at 20; Michel, *supra* note 70, § 4, N 42.

[78] Michel, *supra* note 70, § 4, N 42.

ruling on the applicability of statutory norms, elaborated by the democratically elected legislator and sometimes confirmed by the people in a referendum vote, is considered to be rather problematic.[79] For the same reason, Articles 113(3) and 114bis(3) of the former Constitution prescribed the applicability of international treaties approved by the Federal Assembly, even if they contradicted the Constitution.[80] In Article 191, the revised Constitution of 1999 extends this applicability to all international law. The Federal Tribunal thus lacks power to review a treaty deviating from the Constitution.[81]

The wording of Article 191, however, does not determine whether treaties prevail over federal statutes in the case of a real conflict, i.e. if it is not possible to reconcile the two norms by means of interpretation.[82] The Constitution of 1999 contains explicit conflict rules only with regard to mandatory provisions of international law (*ius cogens*). Total or partial revisions of the Constitution must not violate such provisions (Article 193, paragraph 4 and Article 194, paragraph 2, respectively). Article 139, paragraph 3 of the Constitution obliges the Federal Assembly to declare invalid popular initiatives which violate *ius cogens* provisions. This was already practiced under the former Constitution, even without a written rule. In 1996, the Federal Assembly, on proposal of the Federal Council, declared invalid a popular initiative of the Swiss Democrats, a relatively small right wing party. The initiative demanded that asylum seekers shall immediately be expelled if they entered the country illegally or if their application was definitively rejected by the Swiss authorities. The Parliament and the Government held that the mandatory expulsion requirement of the initiative, leaving not the slightest room for maneuver, violated *inter alia* the non-refoulement principle of Article 33 of the UN Refugee Convention,[83] according to which no contracting state "shall

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[79] In the Federal Council's own words, statutory norms have to be applied in such cases, because "the judiciary power should not elevate itself above the legislative power." Message on the new Federal Constitution, BBl 1997 I, at 428.

[80] ATF 117 Ib 372 (1991).

[81] This does not mean that the treaty-making authorities have power to conclude treaties derogating from fundamental value judgments of the constitution. *See* Wilhelm, *supra* note 55, at 251–53, 259–64; Müller/Wildhaber, *supra* note 9, at 198–202.

[82] It is the prevailing doctrine and practice that domestic law has to be interpreted in conformity with international law in order to minimize conflicts, *see* ATF 123 III 447 (1997); 122 II 239 (1996); 117 Ib 373 (1991); 99 Ib 43–44 (1973); 94 I 678 (1968); Achermann, *supra* note 74, at 41; *see also* BBl 1992 IV 91 (message of the Federal Council on the approval of the EEA Treaty); "The Relationship between Public International Law and Domestic Law in the Swiss Legal System," International Law Division of the Federal External Affairs Department and the Federal Office of Justice, 53 *VPB* No. 54, 419 (1989). Excerpts of both texts reprinted in Müller/Wildhaber, *supra* note 9, at 164–66.

[83] *See* BBl 1994 III, at 1495–1500 and 1996 I, at 1355–56.

expel or return ['refouler'] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[84] It is therefore recognized by the Constitution that even directly manifested democratic expressions of will on a domestic level cannot transgress the limits set by the most fundamental norms on which the whole international order rests.

The actual Swiss practice in cases of conflict between international treaties and domestic law can be summarized as follows:

- Treaties concluded by the Confederation prevail over cantonal and municipal law of all levels, because they belong to the federal law.[85]
- Treaties prevail over federal ordinances (issued by the Federal Council or the Federal Assembly) or federal law of a lower level (e.g. directives).[86]
- Treaties in conflict with federal constitutional law have to be applied irrespective of their unconstitutionality (Article 191 of the Constitution).[87]
- Treaties contradicting older federal statutes (i.e. statutes, which entered into force before the treaty became binding upon Switzerland) always prevail.[88] The practice is less clear, however, with regard to younger federal statutes. In two decisions rendered three decades ago,[89] the Federal Tribunal took the position that the *younger federal statute* takes precedence over an older treaty, when the Federal Assembly deliberately intended to deviate from the treaty or at least consciously accepts such a deviation.[90] Some recent decisions suggest, however, that the Federal Tribunal might be inclined to limit the exception of a conscious deviation by the legislator, giving unrestricted priority to treaties at least in the field of human rights.[91] Unfortunately, the jurisprudence

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[84] Convention of July 28, 1951, UNTS vol. 189, p. 137.

[85] According to Article 49, paragraph 1 of the Constitution, federal law takes precedence over contrary cantonal law. *See also* Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1271; Häfelin/Haller, *supra* note 9, at 565, N 1928; Achermann, *supra* note 74, at 42; Michel, *supra* note 70, §4, N 26.

[86] Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1271; Häfelin/Haller, *supra* note 9, at 565, N 1927; Achermann, *supra* note 74, at 42; Michel, *supra* note 69, §4, N 26.

[87] Achermann, *supra* note 74, at 76 (indications on different opinions in the doctrine).

[88] Häfelin/Haller, *supra* note 9, at 564, N 1924; Achermann, *supra* note 74, at 42; Michel, *supra* note 70, §4, N 26.

[89] ATF 94 I 669 (1968; *Frigerio*) and ATF 99 Ib 39 (1973; *Schubert*). Excerpts of the texts are reprinted in Müller/Wildhaber, *supra* note 9, at 167–68 (*Frigerio*) and 171–72 (*Schubert*, German translation from the Italian).

[90] On this practice *see* Achermann, *supra* note 74, at 44; Häfelin/Haller, *supra* note 9, at 564, N 1925; Thürer, *supra* note 6, § 11, N 31; Müller/Wildhaber, *supra* note 9, at 167–75; Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1279.

[91] In ATF 125 II 417 [1999], a decision rendered in 1999, the Federal Tribunal granted a right to judicial review against an injunction of the Federal Council ordering the requisition and destruction of propaganda material from the PKK (Kurdistan Worker's

of the Federal Tribunal is far from being consistent on this point.[92] Prevailing doctrine and practice favor the precedence of the treaty.[93]

- In cases of treaties contradicting other treaties or norms of international law, the conflict has to be resolved on the basis of the generally applicable conflict rules of international law (*lex posterior, lex specialis*).[94] *Ius cogens*-provisions always prevail.

Along the same lines, the Federal Tribunal has examined in various cases whether a reservation or declaration to a treaty was internationally lawful, either under the regime of a specific treaty or under general public international law.[95] In particular, it examined Swiss reservations

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Party), although the Federal Statute on the Organization of the Federal Judiciary (SR 173.110) clearly excludes such a right (Articles 98, letter a, and 100, paragraph 1, letter a, of the statute). The Federal Tribunal, however, took the stand that, despite the opposite regulation of the mentioned federal statute, a right to review has to be granted based on Article 6, paragraph 1 of the ECHR, which prescribes that in the determination of civil rights and obligations or criminal charges, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The Federal Tribunal reasoned that in the Swiss legal system, international law generally precedes domestic law in a case of conflict. Therefore, in the view of the Federal Tribunal, a norm contrary to international law cannot be applied, a solution which, as to the Federal Judges, imposes itself particularly if the preceding international norm belongs to the realm of human rights. The Tribunal, however, left it explicitly open whether in other constellations different conflict rules might apply. *See also* ATF 129 I 193 [2003]; Achermann, *supra* note 74, at 57–59; Häfelin/Haller, *supra* note 9, at 565, N 1926 and Michel, *supra* note 70, § 4, N 32–33. Other recent decisions are not very conclusive, anyhow, since in no case is there the slightest indication that the legislator intended to deviate deliberately from earlier international law. *See* ATF 122 II 485 (1996), 122 II 234 (1996) and 117 Ib 367 (1991).

[92] Achermann, *supra* note 74, at 61–63; *id.* at 46–65 (an extensive survey of recent decisions on conflicts between treaties and younger statutory norms). Auer, Malinverni and Hottelier, however, hold that the Schubert practice has become obsolete with the entering into force for Switzerland of the Vienna Convention on the Law of Treaties, since the Federal Assembly, by accepting VCLT Article 27, according to which internal provisions cannot be a justification for a failure to implement a treaty, committed itself to stopping adoption of statutes contradicting international law. Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1280.

[93] *See* Olivier Jacot-Guillarmod, *Le juge suisse face au droit européen*, 112 *ZSR* N.F. 367–78, 542–43 (1993 II); Wilhelm, *supra* note 55, at 173–249; Häfelin/Haller, *supra*, note 9, at 565, N 1926. For the view of the administration *see* 53 VPB No. 54, 394–436, at 405–14 (1989). Thürer takes a different view, holding that the precedence of international or domestic law has to be determined on a case-by-case basis. Thürer, *supra* note 6, §11, N 31.

[94] Article 191 of the Constitution offers no solution, since it simply prescribes the applicability of international law without establishing specific domestic conflict rules. In an extradition case between Germany and Switzerland, the Federal Tribunal stated in an *obiter dictum* that a denial of the extradition by Switzerland contrary to its treaty obligations could possibly be justified on grounds of another international provision binding Switzerland as well as Germany, if very important matters are at stake, ATF 122 II 488 (1996).

[95] ATF 127 I 141–44 [2001]; 2 SZIER 486–88 (1992); 47 SJIR 193–94 (1990); 46 SJIR 263–65 (1989); 40 SJIR 205–06 (1984); 38 SJIR 159–60 (1980).

to Article 6 of the ECHR as to their compatibility with Article 64 (now Article 57) of the ECHR and struck down, in 1992, a "subsequent reservation" of the Federal Council as invalid under Article 64 (now Article 57) of the ECHR (*supra* Section III.G).[96] Treaties become obligatory for Switzerland when they come into effect in international law. There is thus no requirement of promulgation. The treaty, as such, is valid and binding before publication. Official publication is, however, necessary to extend the binding effects of treaties to individuals.[97]

All treaties that were subject to the treaty referendum must be published. The publication of other agreements or of decisions of international organizations is necessary only if they contain provisions of a law-making character or oblige Switzerland to enact new norms. As far as there is a particular interest, further treaties and international decisions may be (and usually are) published.[98] The so-called "petty agreements" (*Bagatellverträge, see supra* Section III.C) are generally not published unless there is a special public interest, which may be the case if individuals are affected.

Classified agreements are usually not made known to the legislature. At any rate, no constitutional, statutory or other text asks for such transmittal.

Switzerland in principle registers all treaties at the United Nations. Excepted are temporary agreements of a technical character, especially the numerous agreements which the Office of Cooperation in Development and Humanitarian Assistance concludes.

Upon their entry into force, treaties are published in the official collection, in which also constitutional amendments, statutes, and ordinances are published (*Amtliche Sammlung des Bundesrechts* [*AS*]). Moreover, there is a systematic loose-leaf edition (*Systematische Sammlung des Bundesrechts*). Its first part covers domestic law and the second part, international law. This edition is updated four times a year. The inclusion or exclusion of international agreements in the *AS* is not, however, conclusive evidence that an agreement is, or is no longer, in force. (*See supra* Section III.H).

Treaties subject to a referendum (*see supra* Section III.E) are first published in the so-called *Bundesblatt* (*BBl*). In the case of an optional referendum, at least 50,000 Swiss citizens or eight cantons may ask for a referendum vote within 100 days after the publication in the *Bundesblatt*. The treaty will be published in the *AS* upon its entry into force only after the referendum has taken place and if the outcome was positive.

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[96] ATF 118 I a 473–88 (1992), *reprinted in part in* 3 SZIER 584–87 (1993); *see also* ATF 127 I 141–44 (2001).

[97] 53 VPB No. 54, 394–426, at 402–03 (1989).

[98] *See* Arts. 3, 6, 8 and 9 of the Statute Concerning the Law Gazettes and the *Bundesblatt* of June 18, 2004 (SR 170.512).

I. *International Agreements Concluded by Sub-national Entities*

1. *Scope of Authority*

With the revised Constitution of April 18, 1999, the regulations on the participation of the cantons in the shaping of Swiss Foreign Policy have been completely redrawn. The constitutional text was brought in line with long-standing practice, thus reflecting new developments in an increasingly interdependent international society, where, particularly in Europe, traditional notions of sovereignty and territorial fixation no longer play the overly dominant role of the past.[99]

The Constitution grants the Confederation an unrestricted power to conclude international treaties, even if the objects of the treaties fall within the domestic competence of the cantons. (*See supra* Section II.B). The cantonal participation rights (Article 55 of the Constitution) and the cantonal treaty-making power (Article 56 of the Constitution) form a counterweight to the comprehensive competency of the Confederation in the field of foreign relations.

The federal government has power to enter into treaties concerning subject matters otherwise within cantonal competence. Article 54, paragraph 3 of the Constitution requires, however, that the Confederation, in conducting foreign policy "shall take into consideration the power of the cantons, and shall protect their interests." Some authors derive from this provision that the comprehensive federal treaty-making power can no longer be held to be valid.[100] The term "take into consideration," instead of more stringent terms like "respect" or "compliance," suggests nevertheless that the federal competence to enter into treaties even in the domain of the cantons still exists.[101] The exercise of the federal treaty-making power thus supersedes the cantonal treaty-making power (Article 56 of the Constitution) in the same matter.[102] Practically, the federal power to encroach on cantonal competencies was far more important in the nineteenth century, when the federal powers were much narrower than they are today. Nonetheless, the comprehensive federal treaty-making power is still essential with respect to procedural law, the execution of foreign judgments, and double taxation. For the cantons, this means

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[99] *See* Pfisterer, *supra* note 9, § 33, N 2.

[100] Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1239.

[100] According to Pfisterer, Article 54, paragraph 3 of the Constitution does not oblige the Confederation to respect the competencies of the cantons rigorously, but demands a thorough consideration of both national and cantonal matters. Pfisterer, *supra* note 9, § 33, N 36–37.

[102] Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1236; Pfisterer, *supra* note 9, § 33, N 63.

that there is room for the conclusion of cantonal agreements only insofar as they are compatible with federal treaties.

2. *Participation of the Cantons in Decisions of Foreign Policy*

Modern foreign policy is no longer exclusively state-oriented, but also extends to social groups and individuals. It has, therefore, a growing impact on the competencies and interests of the cantons. Article 55 of the revised Constitution takes this into account by guaranteeing the cantonal right to participate in the decision-making process of foreign policy. The cantons "shall participate in the preparation of decisions of foreign policy" if "their powers or their essential interests" are concerned (Article 55, paragraph 1 of the Constitution). The Confederation shall inform them "timely and fully" and shall "consult" them on these matters (Article 55, paragraph 2 of the Constitution). Special weight is given to the cantonal participation "when their powers are concerned". In this case, the cantons shall even "participate in international negotiations as appropriate" (Article 55, paragraph 3 of the Constitution).

The means and methods of cantonal participation are various. In the case of treaty negotiations, an extensive information exchange between the Confederation and the cantons is particularly important. In order to grant the necessary information flux, to coordinate their efforts and to elaborate, introduce and defend common positions on the federal level, the cantons established common institutions. Since 1990, the cantons have an information representative in Brussels, who follows the developments within the EU. Another cantonal information representative in Bern should preserve cantonal interests in the national decision-making process on the European integration.[103] When the cantons founded the so-called "Conference of the Cantonal Governments" in 1993 (*see also supra* Section I.B), they discovered some deficits in the representation of their interests on the federal level, especially with regard to the European integration issue. The "Conference of the Cantonal Governments" consists of a Plenary Forum meeting several times a year, in which every canton is represented by a member of the government, an Executive Committee of seven to nine members elected by the Plenary Forum for two years, and a permanent Secretary Office.

The Conference[104] has actively accompanied the bilateral negotiations of Switzerland with the EC and its member states. It was also involved

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[103] *See* Thiemo Sturny, *Mitwirkungsrechte der Kantone an der Aussenpolitik des Bundes*, doctoral thesis, Freiburg (Switzerland) 1998, at 165–66.

[104] On the Conference of Cantonal Governments and its tasks *see* Sturny, *supra* note 103, at 162–64.

in the elaboration of the Federal Statute on the Participation of the cantons in the foreign policy of the Confederation of December 22, 1999.[105] Taking up the basic requirements of the Constitution, this statute obliges the Confederation to inform the cantons timely and fully about projects of foreign policy, which concern their powers or essential interests (Article 3, paragraph 2 of the statute). When preparing decisions of foreign policy having an impact on the powers of the cantons, the Confederation must consult them if they so wish (Article 4, paragraph 1). Consultations must also take place before negotiations will start (Article 4, paragraph 2). Moreover, the Confederation commits itself to involve representatives of the cantons in the preparation of negotiation mandates and negotiations, if cantonal powers are concerned (Article 5, paragraph 1 of the statute).

3. *Cantonal Agreements and Contacts with Foreign States*

Article 56, paragraph 1 of the revised Constitution of 1999 enables the cantons to "conclude treaties with foreign countries within the scope of their powers." The former Constitution of 1874 – marked by a rather centralist spirit in the time after the foundation of the Confederation – restricted this power to matters of public economy, neighborship and police relations. In more than 100 years, however, the practice has left behind those textual limits,[106] so that Article 56, paragraph 1 of the revised Constitution is in fact a mere adaptation to the actual situation. The cantons, therefore, can conclude treaties on the whole range of matters falling within their domestic competence. Limits are set by the law and the general interest of the Confederation, which may not be infringed upon. The cantons should focus mainly on neighborhood questions, whereas the "big" foreign policy should be left to the Confederation, though with cantonal participation.[107]

While the cantons were quite active agreement makers until the First World War, their agreement making power has today become precarious, except in local and apolitical affairs. All in all, about 140 cantonal agreements with foreign states are still in force, and almost all are bilateral. A significant part of all cantonal agreements deals with tax law

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[105] SR 138.1. For an unofficial English translation of the text *see infra* Annex E.

[106] The prevailing doctrine has always supported this practice by arguing that the cantons can make agreements so far as they are competent to legislate, *see* 2 SZIER 553–54, at 553 (1992); 53 VPB No. 55, 480–502, at 485–86 (1989); 51 VPB No. 20, 137–39, at 138 (1987); Monnier, *supra* note 10, at 164–65; Luzius Wildhaber, *Autonomie locali e diritto internazionale in Svizzera, in I rapporti di vicinato tra Italia e Svizzera* 116 (Milano: Giuffrè; Andrea de Guttry and Ronzitti Natalino eds., 1989); Wilhelm, *supra* note 55, at 26.

[107] Pfisterer, *supra* note 9, § 33, N 64.

(double taxation and direct taxation). Other cantonal agreements, dating back to the eighteenth or nineteenth centuries, concern the tracing of borders. Further examples are railroad agreements, agreements concerned with schooling, public health issues, cultural and technical cooperation, cooperation in development, or environmental problems. Many cantonal agreements have been concluded with the Principality of Liechtenstein, France and Germany.[108] It is difficult to get hold of all cantonal agreements. Many of them have not been officially published.

Despite the relatively great number of cantonal agreements in force, their significance should not be overestimated. Some categories of the cantonal agreements enumerated above would today have to be concluded by the federal government (for example, agreements concerning borders or double taxation). The high number of agreements on direct taxation is explained by the fact that many identical reciprocity declarations on minor matters were exchanged. There still seems to be both vigor and interest in a cantonal agreement making power on local matters. In Europe, there is an increasing interest in transnational and transborder agreements on a regional or local level, manifested *inter alia* by the European Outline Convention on Transfrontier Co-operation between Territorial Communities and Authorities of May 21, 1980,[109] and the Additional Protocol No. 2 to the Convention of May 5, 1998.[110] These multilateral agreements should stimulate further cooperation of Swiss cantons with subnational entities of neighboring states. In the so-called "Agreement of Karlsruhe," a multilateral agreement between several frontier cantons of northwestern Switzerland, Germany, France and Luxemburg of January 23rd, 1996, the parties explicitly recognize the right of subnational entities, *inter alia* municipalities, to conclude cooperation agreements in accordance with the respective national competencies, but without specific authorization or approval requirements.[111]

Cantonal agreements with foreign entities have to be in line with the federal order. They "may not be contrary to the law nor the interests of the Confederation nor to the laws of other cantons" (Article 56, paragraph 2 of the Constitution). Before concluding such an agreement, the

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[108] *See* Yves Lejeune, *Recueil des accords internationaux conclus par les cantons suisses* (Bern/Frankfurt: P. Lang, 1982); Wildhaber, "Switzerland," *supra* note 10, at 263–64.

[109] ETS 159; SR 0.131.1 (entered into force for Switzerland on June 4, 1982).

[110] Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities Concerning Interterritorial Co-Operation, ETS 169, signed but not yet ratified by Switzerland on November 19, 2001.

[111] *See* Pfisterer, *supra* note 9, § 33, N 59; Sturny, *supra* note 103, at 92–93; Ursula Abderhalden, *Möglichkeiten und Grenzen der interkantonalen Zusammenarbeit*, doctoral thesis, Freiburg 1999, at 137–38.

cantons must "inform the Confederation" (Article 56, paragraph 2 of the Constitution). A systematic federal approval is not required. Nevertheless, since the international responsibility of the Confederation extends also to cantonal treaties,[112] Article 62 of the Federal Statute on the Organization of the Government and the Administration[113] provides that the federal department in charge examines the compliance of the agreement with the federal law and the interests of the Confederation and of other cantons. In case of a negative result, the department proposes to the Federal Council to make an objection at the canton. Only if the conflict cannot be settled does the Federal Council refer it to the Federal Assembly, which then takes a binding decision on the agreement.

The cantons are not empowered to negotiate their own agreements with foreign states. They have to leave the negotiations to the Federal Council acting as an agent. Direct negotiations by the cantons are possible with non-political actors, i.e. administrative or judicial authorities, but not with foreign ministers or secretaries of state.[114] The cantons may only deal directly with all "lower ranking foreign authorities" (Article 56, paragraph 3 of the Constitution).[115]

The same rules apply to the termination of existing cantonal agreements. Based on its comprehensive competency to conduct the foreign policy and to conclude international treaties even within the domestic competence of the cantons (Article 54, paragraph 1 of the Constitution, *see supra* Section II.B), it seems that the federal government would even have the right to denounce a treaty against the express will of a canton.[116]

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[112] Pfisterer, *supra* note 9, §33, N 66; Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1246.

[113] SR 172.010. For an unofficial English translation of the text *see infra* Annex C.

[114] In 1986, the Federal Council approved an agreement on cultural and technical cooperation between itself, "acting for the canton of Jura," and the Republic of the Seychelles, and authorized the Swiss ambassador to sign the agreement. In doing so, it rebuked the canton of Jura for having negotiated the agreement on its own, and insisted on its exclusive power to negotiate such international agreements. *See* Wildhaber, *Autonomie locali*, *supra* note 106, at 123. On the former practice in general *see* 51 VPB No. 20, at 137–39 (1987); BBl 1994 II 620–95, at 625; 2 SZIER 553–54 (1992).

[115] BBl 1997 I 1–437, at 233; Auer/Malinverni/Hottelier, *supra* note 9, vol. I, N 1244; Aldo Lombardi, *Mitwirkungsrechte der Kantone an der Europapolitik des Bundes: Perspektiven im Gesamtzusammenhang des politischen Systems*, *in* Dieter Freiburghaus (ed.), *Die Kantone und Europa* 224–25 (Berne/Stuttgart/Vienna: Paul Haupt Verlag, 1994); Dietrich Schindler, commentary on article 10, no. 11, *in Kommentar zur Bundesverfassung der Schweizerschen Eidgenossenschaft, vom 29 Mai 1874* (Basel: Helbing und Lichtenhahn; Bern: Stämpfli; Zürich: Schulthess Polygraphischer Verlag; Jean-François Aubert, et al., eds., 1987 ff.).

[116] 42 SJIR 53 (1986); Monnier, *supra* note 10, at 173–77; Wildhaber, "Switzerland," *supra* note 10, at 256–57; Wilhelm, *supra* note 55, at 29–30.

There are many direct cantonal contacts with "lower ranking foreign authorities" in the sense of Article 56, paragraph 3 of the Constitution, which in their essence are probably more important than the cantonal agreements. Several border cantons maintain contacts on the level of cantonal governments, ministries, administrative offices, officials or municipalities. Swiss cantons are represented in various transborder consultative commissions which mainly deal with regional cross-border problems such as protection of the environment, town and country planning, financing and schools as well as economy and communications.[117] These commissions may even adopt recommendations directed at the competent authorities.[118]

4. *Agreements between and with Municipalities*

The Federal Constitution and the 26 cantonal constitutions do not allude to the possibility of an agreement-making power of borderline municipalities. Municipalities are not subject to international law and, as such, enjoy no agreement-making capacity.[119] Nevertheless, Article 50, paragraph 2 of the Federal Constitution requires that "[i]n its activity, the Confederation shall take into account the possible consequences for the Municipalities." The Federal Council acknowledges the importance of low-level contacts among border municipalities, treating them as a reasonable application of the subsidiarity principle.[120] The European Outline Convention on Transfrontier Cooperation between Territorial Communities and Authorities of May 21, 1980, the Additional Protocol No. 2 to this Convention and the "Agreement of Karlsruhe" (all mentioned *supra* III.I.3) intend to further such contacts.

The canton of Basel-Stadt has concluded four agreements with the German municipalities of Inzlingen, Weil am Rhein, and an inter-communal association, the Wieseverband (agreements with the municipality of Inzlingen concerning drainage, of December 18, 1961/April 12, 1962/

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[117] For various examples, particularly in the border areas of Basel, Lake Constance and Geneva, *see* Sturny, *supra* note 103, at 92–96; Abderhalden, *supra* note 111, at 138–41.

[118] Wildhaber, "Switzerland," *supra* note 10, at 266–69; *see also* BBl 1994 II 620–95, at 636–46; 52 VPB No. 18, 117–18, at 118 (1988); 44 SJIR 176–77 (1988).

[119] For the unanimous practice and doctrine *see* Report of the Federal Council on the Transfrontier Cooperation and the Participation of the Cantons in the Foreign Policy, of March 7, 1994, BBl 1994 II 641; Ulrich Beyerlin, *Rechtsprobleme der lokalen grenzüberschreitenden Zusammenarbeit*, 53–58, 280–99, 375–76 (Berlin: Springer, 1988); Béatrice Speiser, *Europa am Oberrhein. Der grenzüberschreitende Regionalismus am Beispiel der oberrheinischen Kooperation* 130–31 (Basel and Frankfurt: Helbing and Lichtenhahn, 13 Schriften der Regio, thesis St. Gallen, 1993).

[120] Report on the Transfrontier Cooperation and the Participation of the Cantons in the Foreign Policy, of March 7, 1994, BBl 1994 II 641, 644 and 659.

June 18, 1962; with the Wieseverband concerning the passage of sewage, of December 5, 1963/March 16, 1964; with the town of Weil am Rhein concerning drainage, of June 24, 1970/July 21, 1970, and concerning rubbish disposal, of June 10, 1970/July 14, 1970). The agreements do not determine what law shall be applicable. However, each contains an arbitration clause, providing for an arbitral tribunal composed of one representative of each party and an umpire who would be nominated, if the parties cannot agree, by the president of either the Swiss Federal Tribunal or the Court of Appeal of the canton of Basel-Stadt. The arbitration clauses underscore the transnational character of the agreements.

IV. Basic Documentation

A. *National Legislation*

Annex A: Constitution of the Swiss Federation, of April 18, 1999 (excerpts)

Annex B: The Federal Constitutions of 1874 and of 1999 in a Chart Form

Annex C: Federal Statute on the Federal Assembly, of December 13, 2002 (excerpts)

Annex D: Federal Statute on the Organization of the Government and the Administration, of March 21, 1997 (excerpts)

Annex E: Federal Statute on the Participation of the Cantons in the Foreign Policy of the Confederation, of December 22, 1999

Annex F: Ordinance of the Federal Council Concerning the Consultation Procedure, of June 17, 1991

ANNEX A

EXCERPTS FROM THE CONSTITUTION OF THE SWISS CONFEDERATION, OF APRIL 18, 1999, ENTERED INTO FORCE JANUARY 1, 2000

(Unofficial Translation)

Article 5 Rule of law

4. The Confederation and the cantons shall respect international law.

Article 54 Foreign Relations

1. Foreign Relations are a federal matter.
2. The Confederation shall strive to preserve the independence of Switzerland and its welfare; it shall, in particular, contribute to alleviate need and poverty in the world, and to promote respect for human rights, democracy, the peaceful co-existence of nations, and the preservation of natural resources.
3. It shall take into consideration the powers of the cantons, and shall protect their interests.

Article 55 Participation of the Cantons in Decisions of Foreign Policy

1. The cantons shall participate in the preparation of decisions of foreign policy which concern their powers or their essential interests.
2. The Confederation shall inform the cantons timely and fully, and consult them.
3. The position of the cantons shall have particular weight when their powers are concerned. In these cases, the cantons shall participate in international negotiations as appropriate.

Article 56 Relations between the Cantons and Foreign Countries

1. The cantons may conclude treaties with foreign countries within the scope of their powers.
2. These treaties may not be contrary to the law, nor to the interests of the Confederation nor to the laws of other cantons. Before concluding a treaty, the cantons must inform the Confederation.
3. The cantons may deal directly with inferior foreign authorities; in other cases, the relations of the cantons with foreign countries shall be conducted by the Confederation acting on their behalf.

Article 140 Mandatory Referendum

1. There shall be submitted to the vote of the people and the cantons:
   b. The adherence to organizations of collective security or to supranational organizations.

Article 141 Optional Referendum

1. If 50,000 citizens entitled to vote or eight cantons so require, there shall be submitted to the vote of the People:
   d. International treaties which
      1. are of unlimited duration and may not be terminated;
      2. provide for the adherence to an international organization; or
      3. contain important provisions establishing rules of law or requiring the enactment of federal statutes for their implementation.
2. . . . (abolished)

Article 166 Foreign Relations and International Treaties

1. The Federal Assembly shall participate in shaping foreign policy, and shall supervise foreign relations.
2. It shall approve international treaties, except where by statute or international treaty the Federal Council alone is competent.

Article 172 Relations between the Confederation and the Cantons

3. [The Federal Assembly] shall approve treaties among the cantons and treaties between cantons and foreign countries in case of an objection raised by the Federal Council or a canton.

Article 173 Further Tasks and Powers

1. The Federal Assembly shall in addition have the following competencies:
   a. It shall take measures to assert the external security, the independence and the neutrality of Switzerland.

Article 184 Foreign Relations

1. The Federal Council shall conduct foreign relations respecting the rights of the Federal Assembly to participate; it shall represent Switzerland on the international level.
2. It shall sign as well as ratify international treaties. It shall submit them to the Federal Assembly for approval.
3. If the assertion of the interests of the county so requires, the Federal Council may issue ordinances or orders. The validity of such ordinances must be limited.

Article 185 External and Internal Security

1. The Federal Council shall take measures to assert the external security, the independence and the neutrality of Switzerland.

Article 186 Relations between the Confederation and the Cantons

3. [The Federal Council] may raise objections against treaties among the cantons or between the cantons and foreign countries.

ANNEX B

THE FEDERAL CONSTITUTIONS OF 1874 AND OF 1999 IN A CHART FORM

Constitution of 1874		Constitution of 1999		Title
art.	para.	art.	para.	
n/a		5	4	rule of law
8		54	1,2,3	foreign relations
n/a		55	1,2,3	participation of the cantons in decisions of foreign policy
9		56	1,2	relations between the cantons and foreign countries
10		56	3	relations between the cantons and foreign countries
85	5	166	1,2	foreign relations and international treaties
85	5	172	3	relations between the Confederation and the cantons
85	6	173	1a	further tasks and powers
89	3	141	1d	optional referendum
89	4	141	2	optional referendum
89	5	140	1b	mandatory referendum
102	7	184	1,2,3	foreign relations
102	7	186	3	relations between the Confederation and the cantons
102	8	186	3	relations between the Confederation and the cantons
102	8	184	1,2,3	foreign relations
102	9	185	1	external and internal security

ANNEX C

FEDERAL STATUTE ON THE FEDERAL ASSEMBLY, OF DECEMBER 13, 2002

VI[bis]. Information and Consultation in the field of foreign politics

Article 152

1. The committees competent in the field of foreign politics and the Federal Council shall regularly exchange views.
2. The Federal Council shall regularly, thoroughly, and in good time inform the president of each chamber as well as the committees competent in the field of foreign politics on important developments in foreign politics. The committees competent in the field of foreign politics shall transfer these informations to other interested committees.
3. The Federal Council shall consult the committees competent in the field of foreign politics on the relevant issues and guidelines for important international negotiations before determining or amending them. It shall inform these committees of the development of the negotiations and the progress made in the realization of the relevant issues.

3[bis]. The Federal Council shall consult the competent committees before provisionally applying an international treaty which requires approval by the Federal Assembly.

4. In urgent cases, the Federal Council shall consult the presidents of committees competent in the field of foreign politics, who shall without delay inform their respective committees.
5. The committees competent in the field of foreign politics or other interested committees may ask the Federal Council to inform or consult them.

ANNEX D

FEDERAL STATUTE ON THE ORGANIZATION OF THE GOVERNMENT AND THE ADMINISTRATION, OF MARCH 21, 1997

Article 7a Conclusion of International Agreements by the Federal Council alone

1. The Federal Council may conclude international treaties if by statute or an international treaty approved by the Federal Assembly it is empowered to do so.
2. It furthermore has power to conclude international treaties of minor importance, namely:
   a. agreements which neither impose new obligations upon Switzerland nor abandon existing rights;
   b. agreements executing international treaties approved by the Federal Assembly;
   c. agreements concerning matters which the Federal Council has power to regulate under domestic law and which should be regulated by an international agreement;
   d. agreements which are primarily aimed at the authorities, settle questions of an administrative-technical character or do not imply significant financial consequences.

Article 7b Provisional application of international treaties by the Federal Council

1. The Federal Council may decide to provisionally apply an international treaty subject to the approval by the Federal Assembly, where the assertion of essential interests of the country and a specific urgency so require.
2. The provisional application of a treaty ends if the Federal Council does not submit the draft concerning the approval of this treaty to the Federal Assembly within six months from the beginning of the provisional application.
3. The Federal Council shall notify the end of the provisional application to the other contracting parties.

Article 48a Conclusion of International Agreements

1. The Federal Council may delegate its power to conclude international agreements to one of the seven Federal Departments. If international agreements of minor importance are concerned, it may further delegate its power to an administrative group or to a federal office.

2. It shall annually inform the Federal Assembly of the agreements it has concluded and those respectively concluded by a Federal Department, an administrative group, or a federal office.

Second Chapter: *Approval of Cantonal and Intercantonal Law, Information on Agreements of the Cantons with Foreign Countrie*s

Article 62 Agreements of the Cantons with Foreign Countries

1. The cantons inform the Confederation in advance of agreements they conclude with foreign countries.
2. The department in charge examines whether the agreements contradict federal law or the interests of the Confederation and of other cantons, and, in the case of a contradiction, proposes to the Federal Council to make an objection to the canton. If the contradiction cannot be solved, the Federal Council shall submit its objection to the Federal Assembly.
3. The Federal Assembly decides on the approval of cantonal agreements with foreign countries, if the Federal Council or a canton raises an objection.

ANNEX E

FEDERAL STATUTE ON THE PARTICIPATION OF THE CANTONS IN THE FOREIGN POLICY OF THE CONFEDERATION, OF DECEMBER 22, 1999

Article 1 Principle

1. The cantons shall participate in the preparation of decisions of foreign policy which concern their powers or their essential interests.
2. Essential interests of the cantons are concerned particularly in cases in which the foreign policy of the Confederation affects important cantonal tasks of implementation.
3. The participation of the cantons may not encroach on the capacity of the Confederation to conduct the foreign policy.

Article 2 Purpose of the Participation

The participation of the cantons in the foreign policy of the Confederation shall:

a. ensure that the interests of the cantons will be considered by the Confederation in the preparation and implementation of decisions of foreign policy;
b. contribute to preserve, if ever possible, the powers of the cantons when concluding international treaties;
c. to anchor the foreign policy of the Confederation in the domestic policy.

Article 3 Information of the Cantons

1. The basis of participation is mutual information.
2. The Confederation shall inform the cantons timely and fully about projects of foreign policy, which concern the powers of the cantons or their essential interests.
3. The information about the foreign policy of the Confederation shall be handled in such a way as to help the cantons to make their contribution to a better integration of the federal foreign policy into the domestic policy.

Article 4 Consultation of the Cantons

1. When preparing decisions of foreign policy which concern the powers of the cantons or their essential interests, the Confederation shall consult the cantons on their demand. It can consult them on its own initiative, too.

2. Before starting negotiations, the Confederation generally shall consult the cantons. This consultation complements the consultation procedure on international treaties.
3. The Federal Council shall consider the position of the cantons. Their position shall have particular weight when their powers are concerned. When the Federal Council deviates from the position of the cantons, it shall notify the relevant reasons to them.

Article 5 Participation in the Preparation of Negotiation Mandates and in Negotiations

1. When projects of foreign policy concern the powers of the cantons, the Confederation shall involve representatives of the cantons in the preparation of the negotiation mandates and generally also in the negotiations.
2. The Confederation can act correspondingly when the powers of the cantons are not concerned.
3. The representatives shall be nominated by the cantons and appointed by the Confederation.

Article 6 Confidentiality of Information

The confidential handling of information shall be guaranteed.

Article 7 Participation in the Implementation of International Law

As far as the implementation of international law lies with the cantons, they have to take the necessary timely modifications.

ANNEX F

ORDINANCE OF THE FEDERAL COUNCIL CONCERNING THE CONSULTATION PROCEDURE, OF JUNE 17, 1991

Article 1 Scope of Application and Object of the Consultation Procedure

1. This ordinance applies to consultation procedures led by the federal administration.
2. A consultation procedure shall be carried out:
   a. whenever the federal law so provides;
   b. with regard to bills for legislative provisions and international treaties which have significant political, economic, financial, or cultural implications or which will to a high degree be implemented by those outside the federal administration.

Article 4 Participants in the Procedure

1. In general, the cantons, the political parties represented in the Federal Assembly, and the organizations of national importance competent for the subject matters concerned shall be heard.

V. Bibliography

Abbreviations

AS	*Amtliche Sammlung des Bundesrechts* (official collection of the federal law).
ATF	*Arrêts du Tribunal Fédéral Suisse (recueil officiel)* (Judgments of the Federal Tribunal Reports)
BBl	*Bundesblatt der schweizerischen Eidgenossenschaft*
Const.	Constitution of the Swiss Confederation, of April 18, 1999
ECHR	European Convention on Human Rights, of November 4, 1950
EEA Treaty	Treaty on the European Economic Area, of May 2, 1992
EFTA	European Free Trade Association
ETS	European Treaty Series
SZIER	*Schweizerische Zeitschrift für Internationales und Europäisches Recht* (Swiss Review of International and European Law)
SJIR	*Schweizerisches Jahrbuch für Internationales Recht* (Swiss Yearbook of International Law)
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties, of May 23, 1969
VPB	*Verwaltungspraxis der Bundesbehörden* (Jurisprudence of the Federal Administrative Authorities)
ZSR N.F.	*Zeitschrift für Schweizerisches Recht (Neue Folge)*

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CHAPTER EIGHTEEN

NATIONAL TREATY LAW AND PRACTICE: THAILAND

Sompong Sucharitkul

I. Introduction

A. *Preliminary Observations*

To be able to follow with relative ease the treaty law and practice of the Kingdom of Thailand or Siam – as the country is even today interchangeably known[1] – it is indispensable to acquaint readers with some of the salient historical facts and features of that southeast Asian kingdom.

Thailand is the oldest living kingdom, with the richest practice and longest experience in treaty-making, not only among its Asian neighbors but, more significantly for the purpose of the present inquiry, among Thailand's Western, non-Asian partners in the bilateral treaty-making process. Thailand's experience dates back to an era well preceding the Treaty of Westphalia, which marked the end of the Thirty Years' War in Europe in 1648.[2]

Indeed, prior to the advent of the current notion of the modern law of nations, a rudimentary form of international law was in existence, regulating the relations among nations in the various regions of the world and even in their inter-regional treaty and diplomatic relations and practices. The study of Thailand's treaty law and practice will inevitably reveal the consistent pattern of continuing growth and progressive development in the treaty practice of states with which Thailand has concluded and maintained treaty relations throughout her national history.

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[1] Both expressions – *Muang Thai* or Thailand and *Sayam* or Siam – are used concurrently and interchangeably to identify the same Thai or Siamese kingdom or kingdoms. Both names continue to be used officially even today although the word "Thailand" has gained general acceptance in the usage of the modern international community. However, the expressions "Siam" or "Sayam" and "Siamese" never lost any of their past splendor. Historically, Thai predates Siam.

[2] This date is believed to be the start of contemporary international law as European nation-states began to emerge as independent sovereign nations.

B. *Historical Development of the Thai Treaty-Making Process*

The recent discoveries at Baan Chieng, dating back 6,000 years, have placed northeast Thailand among the earliest of the world's civilizations. However, little evidence is found to elaborate on the treaty practice of the Thai kingdoms between Baan Chieng (circa 4000 B.C.) and Nan Chao (circa 650). Recorded Thai history – for purposes of treaty law and practice – consists of three periods:[3]

1. *Sukhothai Period (1257–1350)*
During the Sukhothai Period, treaty relations existed with China, as evidenced by frequent exchanges of visitors in various ad hoc missions and trade delegations.

2. *Ayudhya Period (1350–1767)*
The earliest series of treaties, as we understand them today, were concluded by Siam with Portugal, the Netherlands, and France, and were preceded by an exchange of diplomatic and consular missions. Diplomatic relations were established with the Pope prior to the close of the seventeenth century. King Narai gave plots of land for followers of the Catholic and other Christian faiths to establish their churches in Lopburi and Ayudhya during the last two decades of the seventeenth century.

3. *Ratanakosin Era (1782–Present): The Bangkok Period*

a. 1782–1898
The Bangkok (*Ratanakosin*) Era started 15 years after the fall of Ayudhya in 1767. For the brief interlude of 15 years, the interim capital of Siam was founded at Thonburi by King Taksin, who succeeded in defeating the Burmese invaders and reunifying the Thai people. King Rama I, founder of the present Chakri Dynasty, decided to move the Siamese metropolis from Thonburi across the *Menam Chao Phraya* (Chao Phraya River) to Bangkok in 1782.

It was in the Bangkok period that the treaty practice of Siam expanded its scope of activities with renewed vigor. Bangkok, being closer to the sea than Ayudhya, was even better poised to explore and exploit the external and global trade of Siam.

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[3] For a more detailed historical account of constitutional developments, *see* Sompong Sucharitkul, *Constitutions of the Countries of the World, THAILAND* (Dobbs Ferry, New York: Oceana Publications Inc., Albert P. Blaustein & Gilbert H. Flanz eds., Nov 1993) (especially xii–xiii).

The Bangkok Era witnessed the offshoot of a new series of active treaty relations with a group of Western powers, beginning with the Treaty with Great Britain in 1826,[4] followed by the Treaty of Amity and Commerce with the United States in 1833.[5] It was not until 1855, however, that a series of Friendship, Commerce and Navigation (FCN) Treaties were concluded with the Western world, the first – known as the John Bowring Treaties – being executed between Siam and Great Britain in 1855,[6] with a Supplement in 1856.[7] The United States followed suit in 1856.[8] France,[9] Denmark,[10] and the Hanseatic (German) Republics[11] concluded similar treaties with Thailand in 1858. Portugal[12] and the Netherlands[13] in 1859 and 1860, respectively, entered into similar FCN treaty relations with Siam. Other European nations wasted no time in concluding this series of FCN treaties with Siam. Sweden, Norway,[14] Belgium,[15] and Italy[16] all concluded agreements with Siam in 1868, while Austria-Hungary and Spain followed in 1869 and 1870, respectively. The Western world then consisted of a dozen or so European nations and the United States of America. At this stage, Japan was still primarily concerned with Asian affairs and, thus, did not conclude an FCN treaty with Siam until 1898.[17]

In the meantime, another set of commercial agreements was concluded between the Western world and Siam, beginning with France in 1867,[18] and relating to the importation of wines and spirits into Siam. Other European producers of wines and spirits followed.[19]

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[4] *See 1* [1617–1869] *Bilateral Treaties and Agreements between Thailand and Foreign Countries and International Organizations* 23–81 (Ministry of Foreign Affairs, Bangkok, Thailand 1968) (hereinafter "*Treaty Series of Thailand*").

[5] *Id.*, at 33–36.

[6] *Id.*, at 37–45.

[7] *Id.*, at 45–57.

[8] *Id.*, at 59–67.

[9] 1 *Treaty Series of Thailand*, *supra* note 4, at 69–92.

[10] *Id.*, at 93–104.

[11] *Id.*, at 105–17; *see also id.*, at 147–58 (Treaty with the German Customs and Commercial Union in 1862).

[12] *Id.*, at 119–31.

[13] *Id.*, at 133–46; *see also id.*, at 169–73 (bilateral Convention concerning access to the ports of the Netherlands colonies).

[14] 1 *Treaty Series of Thailand*, *supra* note 4, at 191–203.

[15] *Id.*, at 205–16.

[16] *Id.*, at 236–48.

[17] 2 *Treaty Series of Thailand*, *supra* note 4, at 155–61 (FCN Treaty with Japan and Protocol, *signed in* Bangkok, February 25, 1898).

[18] 1 *Treaty Series of Thailand*, *supra* note 4, at 183–84. (*Convention relative à l'Importation des Vins et Spiritueux dans le Royaume de Siam, conclude à Paris, le 7 août, 1867*).

[19] *See, e.g.*, 2 *Treaty Series of Thailand*, *supra* note 4, at 49–52 (Agreement with Great Britain, *signed in* London, April 6, 1883); *id.*, at 53–55 (Agreement with Portugal (1883));

b. 1898–1918

During the period from the closing years of the nineteenth century to the dawn of the twentieth century another type of "unequal treaty" was imposed upon Siam. Not only was a regime of extraterritoriality incorporated in the treaty practice of Siam against its will, but the judicial independence of the Kingdom was seriously impaired by subjects of the Western world, including Asian colonial subjects who were placed outside Siamese law and beyond Siam's territorial jurisdiction, despite their presence in the Kingdom. Fiscal independence was restricted to the levy of *ad valorem* import duties of two to three percent. Furthermore, under one pretext or another, since the Declaration of London by Great Britain and France, the two colonial powers expanded their territorial ambitions at the expense of Siam's territorial integrity. Through a series of treaties, euphemistically designated as boundary rectifications, Siam gradually ceded big chunks of its precious land to France, to add to French Indochina and to Great Britain, as well as to British India and the Strait Settlements.[20]

Extradition treaties and treaties for the return of fugitive criminals were also concluded by Thailand with several Western nations with interests in the territories adjacent to Siam.[21]

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id., at 69–72 (Treaty with Sweden and Norway (1883)); *id.*, at 75–76 (Treaty with Denmark (1883)); *id.*, at 77–80 (Treaty with Belgium); 2 *Treaty Series of Thailand, supra* note 4, at 93–96 (Treaty with the Netherlands (1883)); *id.*, at 101–06 (Treaty with German Empire (1884)); *id.*, at 107–110 (Treaty with the United States (1884)); *id.*, at 111–114 (Treaty with Spain (1884)); *id.*, at 119–22 (treaty with Italy (1884)); 2 *Treaty Series of Thailand, supra* note 4, at 129–32 (Treaty with Austria-Hungary (1885)); *id.*, at 163–64 (Treaty with Japan (1898)).

[20] *See, e.g.*, The Treaty of October 3, 1893 between France and Siam, 2 *Treaty Series of Thailand, supra* note 4, 143–48 (where Siam renounced her rights over the territory on the left bank of the Mekhong River and its islands and agreed not to construct any fortress or military post in the provinces of Battambang and Siem Riep within the distance of 25 kilometers from the right bank of the Mekhong); *see also id.*, at 185–90 (the Franco-Thai Treaty of February 13, 1899); *id.*, at 201–13 (Treaty of March 23, 1907 and Protocol). For the transfer of the State of Kelantan, Tranganu, Kedah, Perlis and adjacent islands to Great Britain, *see* the Anglo-Thai Treaty of March 10, 1909 and the Boundary and Jurisdiction Protocols of the same date. 2 *Treaty Series of Thailand, supra* note 4, at 211–28.

[21] *See, e.g.*, 2 *Treaty Series of Thailand, supra* note 4, at 85–92 and 133–34 (the Anglo-Thai Treaty of September 3, 1883, and Supplementary Article relative to Extradition, November 30, 1885); *id.*, at 233–40 (the Extradition Treaty with Great Britain of March 4, 1911 and the Rendition of Fugitive Criminals of November 20, 1912); *see also* The Treaty between Siam and Cambodia, relative to Commerce, Extradition, Succession and Tribute, December 1, 1863, 1 *Treaty Series of Thailand, supra* note 4, at 159–68; The Extradition Treaty between Siam and the United States, December 30, 1922, 3 *Treaty Series of Thailand, supra* note 4, at 29–34.

The Declaration of 1899 between Russia and Siam relative to commerce and navigation[22] was perhaps the first treaty that was not unequal, as was the case with most other European and Western nations, including that concluded with Japan in the previous year.[23]

The Alliance with Russia not only served to counterbalance the Franco-British Declaration of their respective zones of influence on each bank of the Chao Phraya River, but also entitled Thailand to an invitation to the Hague Peace Conferences of 1899 and 1907. The multilateral conferences were beneficial to Siam as one of the very few privileged Asian nations invited to the world conferences. Thailand had a hand in codifying conventions which have never ceased to attract its attention and interest.

During World War I, Siam sent two expeditionary forces to Europe on the side of the Allied forces. This afforded Siam the opportunity to become party to the Peace Treaty of 1919, which in turn helped reaffirm its position in the family of modern nations. It also heralded Siam's participation in a new era of diplomacy by conference and a new practice and experience for Siam in multilateral treaty-making processes.

c. 1919–1931

The Treaty of Versailles, 1919,[24] marked a turning point in Thailand's struggle to regain its judicial independence and fiscal autonomy from the Western world. Assuredly, as signatory to the peace settlement on the victorious side, Thailand could not have been worse off than the enemy of the Allied powers. Germany could not very well insist upon extraterritorial rights for its subjects within Siam.[25] But the real upturn was prompted by the sympathetic support of President Woodrow Wilson of the United States. Heading the list of the Western world to conclude a new series of FCN Treaties with Siam was the United States of America on December 16, 1920.[26] The country next in line to abolish extraterritoriality in Thailand was Japan. This was done in the FCN Treaty

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[22] *See* The Declaration of June 11/23, 1899, 2 *Treaty Series of Thailand*, *supra* note 4, at 165, following the Anglo-French London Declaration.

[23] *See* 2 *Treaty Series of Thailand*, *supra* note 4, at 155–64 (the FCN and Liquors Treaties with Japan of February 25, 1898).

[24] See in particular, Section III of Part X of the Treaty of Versailles of June 28, 1919 *in* 13 *Am. J. Int'l L. Supp.* 151 and 16 *Am. J. Int'l L. Supp.* 207, and the Convention between the United Kingdom and Siam Respecting the Settlement of Enemy Debts, London, December 20, 1921, 3 *Treaty Series of Thailand*, *supra* note 4, at 13–14.

[25] *See e.g.*, Provisional Economic Agreement (with Protocol and Annex) between Siam and Germany, Berlin, February 28, 1924, 3 *Treaty Series of Thailand*, *supra* note 4, at 35–40.

[26] *See* 3 *Treaty Series of Thailand*, *supra* note 4, at 1–12.

with Japan of March 10, 1924.[27] France was no exception, although France still insisted on the extension of an extraterritorial regime until the final adoption of Thailand's Civil Code, Commercial Code, Penal Code, Code of Civil Procedure, Code of Penal Procedure and Law of the Organization of the Courts of Justice.[28] Other European nations followed the lead of the United States by removing outright the odious provisions restricting the fiscal autonomy and constraining the judicial independence of Siam (subject to the right of evocation pending the passage of Siamese codes of law). These included the Netherlands,[29] the United Kingdom,[30] Spain,[31] Portugal,[32] Denmark,[33] Sweden,[34] Italy,[35] Belgium,[36] Norway,[37] and Germany.[38] Thus, one by one, the elimination of extraterritoriality in Thailand was completed, with help from the understanding of Siam's trading partners, the adoption of Thailand's codification of civil and penal law and procedure, and the technical assistance of expatriate expertise from countries friendly to Thailand, namely, Belgium, Switzerland, and the United States of America.[39] This could not have been achieved without the greatest sacrifices endured by the Government and people of Thailand.[40]

d. 1932–Present

June 24, 1932 marked a fundamental change in the constitutional history of Siam. The Kingdom became a constitutional monarchy, and the provisional constitution was promulgated on June 27, 1932.[41] Since then,

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[27] *See id.*, at 41–50 (FCN Treaty and Protocol (Annex), Bangkok, March 10, 1924). Japan had freed itself from Western exterritoriality by the end of the nineteenth century.

[28] *See id.*, at 53–88 (*Traité d'Amitié, de Commerce et de Navigation entre le Siam et la France, Paris, le 14 février, 1925 et Protocole*).

[29] *See id.*, at 89–112 (FCN Treaty with the Netherlands, The Hague (June 8, 1925) and Protocol).

[30] *See id.*, at 113–30 (Treaty of Friendship with Great Britain, London (July 14, 1925), and the Treaty of Commerce and Navigation).

[31] *See* 3 *Treaty Series of Thailand, supra* note 4, at 131–40 (The FCN Treaty with Spain, Madrid (Aug. 3, 1925)).

[32] *See id.*, at 141–50 (The FCN Treaty with Portugal, Lisbon (Aug. 14, 1925)).

[33] *See id.*, at 151–64 (The FCN Treaty with Denmark, Copenhagen (Sept. 1, 1925)).

[34] *See id.*, at 171–80 (The FCN Treaty with Sweden, Stockholm (Dec. 19, 1925)).

[35] *See id.*, at 181–92 (The FCN Treaty with Italy, Rome (May 9, 1925)).

[36] *See* The Treaty with Belgium-Luxembourg Economic Union and Protocol, Bangkok (July 13, 1926), 4 *Treaty Series of Thailand, supra* note 4, at 1–34.

[37] *See id.*, at 35–50 (The FCN Treaty with Norway, Oslo, (July 16, 1926)).

[38] *See id.*, at 87–96 (The FCN Treaty with German Reich, Bangkok (Apr. 7, 1928)).

[39] *See* Francis B. Sayre (Phraya Kalya Maitri), "The Passing of Extraterritoriality in Siam," 22 *Am. J. Int'l L.* 70–88 (1928). Other neutral experts were Gustave Rolin-Jaquemyns (Belgian) Chao Phraya Abhai Raja and Strobel (Swiss). Westerngard was the first American adviser to have been ennobled Phraya Kalya Maitri.

[40] *See id.*, at 77–88 (Sayre's description of the battle to regain jurisdictional autonomy).

[41] *See* The Provisional Constitution of the Kingdom of Thailand, 49 Govt. Gaz., June 27, b.e. 2475 (1932).

16 constitutions altogether have been in force. The current one was adopted on October 11, 1997.[42] While the 16 constitutions may have varied in their contents regarding a number of significant constitutional matters, the practice of treaty-making has changed back and forth with regard to the requirement of parliamentary ratification in the intermittent absence of an elected House of Representatives. In the main, whenever there is a national assembly of elected deputies, international agreements concluded by the Executive under a traditional democratic government will require approval by the legislature in cases of territorial changes, and in cases requiring budgetary appropriation or other types of legislative enactment to implement treaty provisions.[43] The treaty power of the Kingdom or His Majesty's Government is shared by the three branches of the government. Under most constitutions, "[t]he King has the prerogative of concluding a peace treaty, armistice and other treaties with other countries or international organizations."[44] The prerogative of declaring war is exclusively exercised by the King,[45] with the advice and consent of a two-thirds majority of the total active members of the National Assembly[46] – a body comprised of the Senate and the House of Representatives. The treaty-making power is, in practice, exercised by the Executive, subject to the constitutional requirement of legislative supervision and ratification in certain cases.[47] The judiciary shares with the Constitutional Tribunal the power to interpret, apply, and determine the constitutionality of an act or activity carried out by the Legislature or the Executive.

Thus, the law of treaties governing Thailand has remained unaltered by successive constitutional reforms: the Monarch still retains certain prerogatives of the Crown in the making of war and peace and in the conclusion of treaties which in certain prescribed subject areas is subject to approval by the combined sessions of the National Assembly. In actual practice, the treaty-making process, from initiation and negotiation to adoption of the text, is conducted by the Executive or council of ministers responsible for the affairs of state.

The decade that followed the coup d'état of 1932 saw further endeavors on the part of Thailand to rid itself of the remaining vestiges of unequal

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[42] *See* The Constitution of the Kingdom of Thailand, Govt. Gaz. No. 114, pt. 55a, Oct. 1, b.e. 2540 (1997).

[43] *See, e.g.*, 1997 Const. § 224(2) (a treaty which provides for a change in the Thai territories or the State jurisdiction area or requiring the enactment of an Act for its implementation must be approved by the National Assembly).

[44] *See, e.g.*, 1997 Const. § 223(1).

[45] *See, e.g.*, id. (qualifies this royal prerogative which can only be exercised exclusively by the King with the approval of the National Assembly).

[46] *See, e.g.*, 1997 Const. § 223(2).

[47] *See, e.g.*, § 224(2) for treaties requiring approval by the National Assembly.

treaties – a heritage of Western expansionism of the past. The second series of FCN treaties, which were considered progressive when concluded in the late 1920s, had a ten-year term. They were renegotiated, amended, and replaced by a new set of FCN treaties in 1937 and 1938.[48]

Several treaties were negotiated and concluded with the United Kingdom concerning Burmese boundaries with Thailand.[49] Further extradition treaties were concluded with more distant Western nations,[50] so as World War II broke out in Europe, the United Kingdom[51] and Japan[52] rushed to conclude a non-aggression pact with Siam in 1940. Hostilities erupted between Siam and France on the Indochinese front. With Japanese mediation, a peace agreement was signed in Tokyo on May 9, 1941, in French, Japanese and Thai. The agreement readjusted the boundary between Thailand and French Indochina, making the median line of the main thalweg of the Mekhong River the frontier. This redrawing of the boundary returned to Thailand the following territories on the right bank of the river: Kong Island and the provinces of Siemriep and Battambong.[53]

As a prelude to Pearl Harbor and as a result of Japan's Franco-Thai mediation, a protocol was concluded between Japan and Thailand concerning a political guarantee on May 9, 1941.[54] On December 21, less

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[48] On the eve of the new era, Siam concluded a Treaty of Friendship and Commerce with neutral Switzerland, signed in Tokyo on May 28, 1931. 4 *Treaty Series of Thailand*, *supra* note 4, at 101–08. The new wave of FCN treaties were concluded with the United States, November 13, 1937, 5 *Treaty Series of Thailand*, *supra* note 4, at 1–13; with Switzerland, November 4, 1937, 4 *Treaty Series of Thailand*, *supra* note 4, at 147–54; with Belgium and Belgo-Luxembourg, November 5, 1937, *id.*, at 155–70; with Denmark, November 5, 1937, *id.*, at 171–82; with Sweden, November 5, 1937, *id.*, at 183–91; with Norway, November 15, 1937, 5 *Treaty Series of Thailand*, *supra* note 4, at 14–27; with the United Kingdom, November 23, 1937, *id.*, at 28–68; with Italy, December 3, 1937, *id.*, at 69–82; with France, December 7, 1937, *id.*, at 83–103; with Japan, December 8, 1937, 5 *Treaty Series of Thailand*, *supra* note 4, at 104–23; with the German Reich, December 13, 1937, *id.*, at 128–42; with the Netherlands, February 1 1938, *id.*, at 143–57; and with Portugal, July 2, 1938, *id.*, at 158–67.

[49] *See, e.g.*, Exchange of Notes between the United Kingdom and the Government of India and Siam constituting agreement regarding the Boundary between Burma (*Kentung*) and Siam, Bangkok, August 27, 1931 and March 14, 1932, 4 *Treaty Series of Thailand*, *supra* note 4, at 109–14; *id.*, at 115–18 (Bangkok, June 1, 1934 (*Tenasserim*)); and Bangkok March 31, 1937.

[50] For instance, *see Convention d'Extradition entre la Belgique et Le Siam, Bangkok, January 14, 1937*, 4 *Treaty Series of Thailand*, *supra* note 4, at 119–26.

[51] *See* Non-Aggression Pact between Thailand and the United Kingdom, June 12, 1940, Bangkok, 5 *Treaty Series of Thailand*, *supra* note 4, at 170–72.

[52] *Id.*, at 168–69 (Treaty between Thailand and Japan concerning the continuance of Friendly Relations and Mutual Respect of Each Other's Territorial Integrity, June 12, 1940, Tokyo).

[53] *Id.*, at 173–89 (*Convention de Paix entre La France et La Tháilande*, May 9, 1941, Tokyo, Annex I, Annex II and Annex III).

[54] *Id.*, at 190–91 (*Protocole entre La Tháilande et Le Japan*, May 9, 1941, signed by Matsuoka Yosuke and Varnvaithayakara (Wan Waithayakorn)).

than two weeks after the invasion of Songkhla in southern Thailand by Japanese troops following the predawn engagement of December 8, 1941, Thailand concluded a Pact of Alliance with Japan.[55]

While Thailand's military leader, Marshal Phibul Songgram, flirted with Japanese visiting forces during the harsh years of the Pacific war, the Democrats' leader Kuang Abbhaiwong turned a blind eye to the underground movements of Thai students in the United States and the United Kingdom, with the blessings of Pridi Bhanomyong. The Free Thai movement (*Seree Thai*), consisting of Thai youths formed at Thammasart and Chulalongkorn universities, was transformed into an underground resistance force aimed against the self-invited Japanese forces. After V-J Day, following the dropping of the second atomic bomb in Nagasaki, the free Thai movement joined forces with the Allied visiting forces to accept the surrender of the Japanese militia in Thailand.

The ambivalent position of Thailand during World War II following Pearl Harbor prevented the Kingdom from being signatory to the San Francisco Charter, and hence, from becoming an original member of the United Nations. As a neutral and truly peace-loving nation, Thailand was yet to make further sacrifices in exchange for its admission to the United Nations in December 1946.[56] As a direct consequence, embassies were exchanged with China and the Soviet Union and a fresh era of international relations and organizations dawned for Siam.

During the half century that has elapsed since the advent of the United Nations, the treaty practice of Thailand has not ceased to grow from year to year. A host of treaties were negotiated and successively concluded with international organizations such as the United Nations and its Specialized Agencies in respect of their Asian-Pacific regional headquarters.[57] Thailand itself has been a founding member of a number of regional and sub-regional organizations, and Bangkok has also served as a site for their headquarters.[58] Several new series of bilateral treaties in the field of economic cooperation, including trade and investment, air and maritime transport, and telecommunications, have entered into force

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[55] *Id.* at 192–93.

[56] With the good offices of the United States, France agreed to the Washington Accord of November 17, 1946, (344 *U.N.T.S.* 59), submitting territorial disputes with Thailand to a conciliation commission. Thailand did not succeed in its attempt to reclaim possessions of Siamese territories ceded to France in 1904 and 1907.

[57] *See generally* The Collection of Treaties and International Agreements, compiled by the Protocol Department, Ministry of Foreign Affairs (1968); *see also* the exchange of letters with the IAEA (International Atomic Energy Agency), February 4, 1959, 339 *U.N.T.S.* 308–133, 7 *Treaty Series of Thailand, supra* note 4, at 169–70.

[58] *See, e.g.*, Bangkok Declarations creating ASA (1961), ASEAN (1967) and the Manila Pact of 1955.

between Thailand and its traditional Western partners[59] as well as with its newfound Asian and Pacific neighbors[60] and other more distant nations in the Middle East and the Americas.[61] Thailand's multilateral treaty engagements continue to expand in all fields of human endeavors. In the last 50 years, her treaty practice has grown by leaps and bounds in diversity and intensity, and Thailand has acquired even greater maturity and experience. Unequal treaties are no longer retained, and outmoded vestiges of Western colonial inequities of earlier FCN treaties are, without exception, denounced and abrogated. Equality among nations and cooperation with close friends and neighbors have become the order of the day for the treaty law and practice of Thailand, and hopefully will continue to prevail in the foreseeable future.

II. Treaties and the Treaty-Making Power and Process

A. *Use of Terms*

In the current context of the Law of Treaties as interpreted, observed and applied by Siam or Thailand in actual practice, several terms require some explanation concerning their usage.

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[59] *See generally* 6–9 *Treaty Series of Thailand*, *supra* note 4 (1975, 1984, 1985 & 1986 respectively), and in particular the Exchange of Notes between Thailand and the United States concerning the Privileges of the Peace Corps Volunteers Programs in Thailand (1961), *7 Treaty Series of Thailand*, *supra* note 4, at 307–10; *id.*, at 315–41 (Treaty and Exchange of Notes between Thailand and Germany concerning the Promotion and Reciprocal Protection of Investments (1961), and Protocol); *id.*, at 347–52 (Exchange of Notes between Thailand and Italy on Air Services and Route Schedules (1961)); Air Transport Agreement with Germany, 1962, 8 *Treaty Series of Thailand*, *supra* note 4, at 29–46.

[60] *See generally* 6–9 *Treaty Series of Thailand*, *supra* note 4; the Treaty of Friendship between Thailand and Pakistan, 1958, 7 *Treaty Series of Thailand*, *supra* note 4, at 159–66; *id.*, at 226–31 (Exchange of Notes between Thailand and Burma on Border Traffic, 1959 and 1960); *id.*, at 167–214 (Agreement on Transit of Goods between Thailand and Laos, 1959); Exchange of Notes between Thailand and the Republic of Korea concerning a Trade Centre in Bangkok, 1963, 8 *Treaty Series of Thailand*, *supra* note 4, at 176–77; Trade Agreement between Thailand and the Republic of China, 1966, 9 *Treaty Series of Thailand*, *supra* note 4, at 75–79; *id.*, at 96–103 (Air Service Agreement between Thailand and Malaysia, 1966); *id.*, at 312–16 (Trade Agreement with India, 1968).

[61] *See generally* 6–9 *Treaty Series of Thailand*, *supra* note 4, at 311–14; Exchange of Notes with Israel regarding Exemption of Visas for Holders of Diplomatic and Service Passports, 1960, 7 *Treaty Series of Thailand*, *supra* note 4, at 248–49; Treaty of Friendship with Iran, 1967, 9 *Treaty Series of Thailand*, *supra* note 4, at 104–11; Air Transport Agreement with Iraq, 1975, 1977 I.C.A.O. at 2697; and Air Services Agreement with Lebanon, 1969, 9 *Treaty Series of Thailand*, *supra* note 4, at 356–73.

1. *"Treaty" or "Treaties"*

"Treaty" or "treaties," or *Sonthi Sanya* as treaties are called in Thai, means all types of written international agreements between states and/or international organizations. "Treaty" is a generic term, embracing all categories of international agreements, regulated by international law, regardless of its designation, whether it is named "treaty," "convention," "exchange of notes," "arrangement," "modus vivendi," "protocol," "compact," "pact," "covenant," or "memorandum of understanding." The use of the term "treaty" in Thai practice coincides with international usage and international law. This is to be contrasted with the use of the term in some countries, including the United States of America. Under U.S. constitutional practice, "treaty" refers exclusively to a specific category of more formal international agreements, i.e., those which require approval by a two-thirds majority of the Senate. An understanding of the term "treaty" may thus vary from country to country, and may derogate from its use under international law. In Thai, other terms are also used, such as *Anu Sanya*, *Katika Sanya*, and *Kwam Toklong*, but they fall under the heading of "treaties" and are governed by the law of treaties.

It follows that in the treaty practice of Thailand, because the use of the term is coterminous with its usage under international law, very little confusion has arisen in its actual application. The criteria may be listed as follows:

A treaty is:
- an international agreement;
- in writing;
- between states and/or international organizations;
- binding on states and/or international organizations;
- under international law.

As will be seen, an accurate use of the term "treaty" has the advantage of clearly delineating a treaty from other types of agreements which may bear the semblance of a treaty, but are not treaties, either because the agreement:

- is a purely unilateral or national enactment, such as the United States Constitution; or
- is not reduced to writing, such as an oral communication or statement; or
- is not between states and/or international organizations, such as administrative contracts or concession agreements; or
- is a nonbinding accord, such as the Helsinki Accord of 1975 (14 *ILM* 1292) or the Universal Declaration of Human Rights of 1948 (GA Res. 217 (III-1948)); or

- is regulated by municipal, as distinguished from international law, such as a sale or purchase or procurement contract by a state or an international organization.

Thus, it is apparent that private law or commercial contracts are not governed by international law, but are subject to the applicable law, which, in the absence of a clear expression of choice of law in the agreement, will be subject to the Thai Conflict Rules (Code of Conflict of Laws 1938). Questions of choice of law are to be decided by a competent forum.

2. *"Treaty-making capacity"*

"Treaty-making capacity" means the capacity of every sovereign state and every international organization – i.e., inter-governmental organization – to initiate, negotiate, and conclude a treaty. Sometimes, non-sovereign states, non-self-governing territories, or political sub-divisions of a federal union may be endowed with the capacity to conclude treaties either in their own names or as delegated by the central government in the name of that state. For Thailand, a problem has arisen in the past with regard to bilateral treaties concluded with a contracting party, say France, on behalf of one of its protected states, such as Laos and Cambodia.

3. *"Treaty-making power"*

"Treaty-making power" means the power that is conferred upon one organ or several organs of a state or an international organization, allowing those organs to negotiate, conduct, and complete the treaty-making process. The distribution or division of treaty-making power among the different branches of the government, such as the legislative, the executive and, on rare occasions, the judiciary, varies from one legal system to another, depending on the prevailing constitutional process and requirements.

Various processes have been in use in Siam. Before 1932, it was the sovereign Monarch as head of state who alone was vested with the treaty-making power. Even today, after 15 constitutions, the King still retains considerable power to make war and peace, although the power is now shared by the Council of Ministers, representing the executive, and the joint sessions of the National Assembly.

B. *Negotiating Agencies and Delegation of Full Powers*

In light of Siam's experience before 1932, it was either the King or the King in Council, i.e., with Royal Advisers, who undertook the task of initiating, negotiating, approving, initialing, signing and ratifying treaties

with foreign states. After 1932 the power to negotiate could be conferred on any agent, ambassador, delegate or consul in the employ of the King, or His Majesty's Government, as evidenced by a written authorization, known as the Full Powers (*Pleins Pouvoirs*) to enter into negotiations. An authorization to sign may require a separate instrument, as evidence that the negotiating agent also had the authority to sign the treaty with the authorization of the King, or, since 1932, the Head of the Government or Ministers of Foreign Affairs. Negotiations could still be conducted *ad referendum*, i.e., subject to confirmation by the sovereign or, since 1932, after referral to higher authority in the central government.

A glimpse of the seventeenth century treaty practice of Siam reveals an interestingly unique feature. It was not unusual to appoint a foreign national in His Majesty's service to represent Siam, and to negotiate, conclude and sign an agreement on behalf of the Kingdom, with the necessary authorization or full powers delegated for that purpose. The first recorded treaty with the Netherlands in 1617[62] was signed by an Opra in the service of the King of Siam. *Opra* is a title of nobility sometimes known as PHRA, formerly *Ok Phra* – equivalent to a Knight or Sir – in this case, a Japanese chief Ollon Soupattrou, one of the King's buying agents. The first treaty between France and Siam, concluded in 1685,[63] was signed at Lopburi, Siam, by the French Ambassador to Ayudhya, Chevalier de Chaumont, and Monsieur Constance Faulkon, Commissioner with full powers of His Majesty the King of Siam. Faulkon was a Greek ex-patriot in the employ of King Narai, elevated to the position of Chief Adviser, and knighted as *Chao Phraya Bhijayen.*

Pre-1932, Ratanakosin Treaties also confirmed the Ayudhya practice of delegation of full powers to a foreign national to negotiate and sign FCN Treaties with Western nations on behalf of Siam. Thus, in 1868, Sir John Bowring, former British Ambassador to Bangkok, signed Siam's Treaties with Sweden-Norway,[64] Belgium,[65] and Italy.[66] King Mongkut

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[62] *See* Agreement concluded at Ayudhya on June 12, 1617, 1 *Treaty Series of Thailand, supra* note 4, at 1–2 (modern Dutch Transcription (Netherlands Colonial Archive Inv. No. 4464 L., 122, verse-125)); *see also Magazine for East-Indian Philology, Geography and Ethnology*, 13 Batavia 1864, at 412.

[63] Taken from the State Papers of the Kingdom of Siam, 1664–1886, London, William Ridgway 169, Piccadilly, 1886, at 23; 1 *Treaty Series of Thailand, supra* note 4, at 11–13.

[64] *See* The Treaty of Friendship, Commerce and Navigation between Siam and Sweden and Norway, signed in London, May 18, 1868, 1 *Treaty Series of Thailand, supra* note 4, at 191–204.

[65] *See id.*, at 215–16 (Treaty of Friendship and Commerce between Siam and Belgium, signed in London, Aug. 29, 1868).

[66] *See id.*, at 217–28 (Treaty of Friendship, Commerce and Navigation between Siam and Italy, signed in London, October 3, 1868).

(Rama IV) was so impressed by Bowring's diplomatic skills in the process of negotiations of the treaty between Siam and Great Britain, while Bowring was serving the British Queen, that the Siamese King decided to engage the services of Bowring to negotiate similar treaties on behalf of Siam with other European nations on the model of the Anglo-Siamese Treaty of 1855 (the Bowring Treaty).[67] Bowring was in the service of the King of Siam and was ennobled with the title *Phraya Sayamanukunkij* (literally, the nobleman who performed beneficial deeds for Siam).[68]

A survey of the nineteenth century bilateral treaties with the Western powers also reveals a few other significant features in the history of the Siamese treaty-making process. In the FCN "Bowring" treaties with Western powers (1855–1870), reference was invariably made to the duality of Siamese monarchical hierarchy: the First King (*Wang Luang*) and the Second King (*Wang Nah*). In several treaties, both King Mongkut and King Pin Klao were mentioned as First and Second Kings of Siam.[69] The practice of examining the Full Powers has been prevalent since the Anglo-Siamese Treaty of 1855.[70] The practice of exchange of ratifications to bring into force bilateral treaties signed by duly authorized agents of the Kingdom had been adopted earlier. The United States-Siamese Treaty of Amity and Commerce of 1833 (the Edmund Roberts Treaty)[71] expressly required ratifications, which were subsequently exchanged.[72] An earlier 1826 Anglo-Siamese Treaty (the Henry Burney Treaty)[73] was also signed subject to ratifications that were exchanged in 1827.[74]

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[67] The Bowring Treaty was the Treaty of Friendship and Commerce between Siam and Great Britain, signed in Bangkok, Apri1 18, 1855, 1 *Treaty Series of Thailand*, *supra* note X, at 37–46.

[68] *See* "Modernization of the Kingdom" *in* Rong Syamananda, *A History of Thailand* 118–45 (Chulalongkorn University, 1958) (Chapter XI). Bowring published two volumes entitled: The Kingdom and People of Siam (London, 1857).

[69] *See, e.g.*, The Anglo-Siamese Treaty of 1855, 1 *Treaty Series of Thailand*, *supra* note 4, at 37–57; *see also* State Papers of the Kingdom of Siam, 81–93. The son of the Second King Pin Klao was the last *Maha Uparaj* (the Crown Prince), and on his death in 1885 the position was abolished.

[70] *See* 1 *Treaty Series of Thailand*, *supra* note 4, at 37 ("Their Majesties the First and Second Kings of Siam and Her Majesty the Queen of Great Britain, who after having communicated to each other their respective full powers and found them to be in good and due form, have agreed upon the following Articles. . . .").

[71] The Treaty was signed on March 20, 1833. This was the first Treaty ever concluded between the United States and an Asian country. It predates by 11 years the Treaty of Wanghia and by 21 years the Treaty of Kanagawa. *See* 1 *Treaty Series of Thailand* 33; British and Foreign State Papers, 2 *Treaty Series of Thailand*, *supra* note 4, at 590 (1833–34).

[72] *See* 1 *Treaty Series of Thailand*, at 37. Ratifications were exchanged in Bangkok on April 14, 1836.

[73] *See id.*, at 23 (June 20, 1826).

[74] *See id.*, at 29 (January 17, 1827).

C. *Ratification of Treaties*

The process of ratification, which enables a treaty to enter into force, is not required for every treaty. Important formal international agreements generally contain provisions, today called the "final clauses," which prescribe the procedures for, among other things, the entry into force of the treaty. Entry into force can occur upon signature, or after signature, upon exchange or deposit of the instruments of ratification, or upon accession without signature. This process is conveniently designated as ratification under international law.

However, in several modern legal systems, there is a requirement in the internal constitutional process for approval or ratification of an international agreement or treaty, which may be negotiated and signed by an accredited agent with the authorization of the executive branch of the government, and which will require subsequent and, in some instances, even prior approval or authorization or ratification by the legislature, or in the case of Constitutional Thailand, by the National Assembly. For want of a better term, the expression "parliamentary ratification" has often been used with a possibility of confusion with the international act of ratification itself. The constitutional process of parliamentary ratification or approval refers to the validity, legitimacy and applicability in the implementation of obligations arising out of the treaty under the national law of the contracting party, which for current purposes is Thailand.[75]

Under Section 224 of the present Constitution promulgated on October 11, 1997, the King has the prerogative power to conclude a peace treaty, armistice and other treaties with other countries or international organizations.

The second paragraph of Section 224 lists the categories of treaties which require the approval of the National Assembly as follows: "A treaty which provides for a change in the Thai territories or the jurisdiction of the State or requires the enactment of an Act for its implementation must be approved by the National Assembly."

In addition, Section 223 of the Constitution provides: "The King has the prerogative power to declare war with the approval of the National Assembly. The approval of the National Assembly must be passed by votes not less than two-thirds of the total number of the existing members of both Houses." These provisions appear to reconfirm the practice of Thailand under its constitutional monarchy.

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[75] *See* Sompong Sucharitkul, *Ratification and Effect of Treaties*, III Bot Pandit 20 (1962) (Journal published by the Bar Association of Thailand and published in Thai).

Thus, due to the absence of a proclamation by the King, the declarations of war made by Marshal Phibul Songgram against the United States and the United Kingdom under the shadow of Japanese visiting forces were repudiated by Pridi Bhanomyong as Regent of Thailand, after V.J. Day on August 16, 1945. This proclamation by the Regent was approved by the National Assembly on the same day.[76] By the same token, the treaty with France under Japan's mediation in 1941[77] and the Washington Accord of 1946 also had to be approved by Parliament, as they affected the territories of Thailand.[78] In fact, territorial changes entailing changes of nationality of the local inhabitants, who were normally given a choice to retain their original nationality and/or to be repatriated, had to be promulgated as legislative enactments to give legal effect to the treaty provisions.[79] The treaties, as such, were enacted as laws by being promulgated in the Government Gazette.[80] It is therefore generally advisable for the Executive, where an impending draft treaty contemplates future changes in Thai law, to seek the views and guidance of the National Assembly. Similarly, the Council of Ministers – representing the government in power with a single party or in coalition with other parties commanding majority votes in the National Assembly – would do well to have the draft treaty approved by the legislative, and better still to have the new law enacted in anticipation of the treaty under negotiation, so as to enable the executive to implement the treaty provisions if and when the treaty itself enters into force, and thereby avoid the embarrassment associated with failure to fulfill treaty obligations. Thus, all treaties relating to taxes or import duties, or requir-

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[76] In the Proclamation, it was stated that Thailand had no desire for the territories in Burma and Malaya which Japan entrusted to her and was ready to arrange for their transfer to Great Britain. *See* Syamananda, *supra* note 68, at 175. On the other hand, Marshal Phibul Songgram and his collaborators were acquitted in 1946 on charges as war criminals for their parts in bringing Thailand into war on the side of Japan, and the Special Court held that the new law on war crimes passed after the war was not retroactive. *Id.*, at 178.

[77] *See* The Tokyo Convention of May 9, 1941, De Martens, 41 N.R.G. 3d 868; 144 *British State and Foreign Papers (BSFP)* at 805; 6 *Treaty Series of Thailand*, *supra* note 4, at 173–89.

[78] *See* The Settlement Agreement of November 17, 1946, 6 *Treaty Series of Thailand*, *supra* note 4, at 59–71, 344 *U.N.T.S.* 59 (annulling the 1941 Convention).

[79] *See* Sompong Sucharitkul, "Thai Nationality in International Perspective," *in Nationality and International Law in Asian Perspective* 452–91, 480–83 (Nijhoff, TMM Asser Institute, 1990).

[80] *See, e.g.*, the Diplomatic Immunities and Privileges Act, b.e. 2527 (1984), enacting the 1961 Vienna Convention on Diplomatic Relations with Thai translation. The process of transformation has been adopted since the publication of the Royal Gazette in 1858, *Rajkichanubeksa*.

ing budgetary appropriation need to have the approval of the National Assembly.

Such approval could be given in the form of a General Enabling Act, which is designed to assign or delegate to an agency in the executive branch of the government the specific task of concluding an international agreement with prior authorization by the National Assembly (e.g., conferring upon the Executive the power to designate international organizations for purposes of immunities and privileges). Such approval could also be given in the form of an executive decree or order to exempt certain items from import duties if the agency in question concludes an agreement with a foreign entity or an international agency to that effect.[81]

D. *Coordination and Centralization of the Treaty-Making Process*

The treaty-making process of Siam has undergone considerable evolution since the simplistic days of Sukhothai, through the more sophisticated Ayudhya period, and during the contemporary Ratanakosin era.

Activities of states have rapidly expanded in the last 50 years, with international relations progressively assuming new multilateral forms and facets in the perfection of treaty-making processes and in the formulation of codification conventions.

Certain institutions have been established in the governmental practice. The traditional functions of *Phra Klang* (Fiscus or Treasury) are now shared among the Ministry of Finance (primarily responsible for fiscal policies), the Ministry of Trade (responsible for external commercial relations), and the Ministry of Foreign Affairs (broadly responsible for international dealings covering political, diplomatic, governmental, economic, social, juridical and treaty relations between Thailand and other nations and international organizations).

To embrace all the activities of the central government in various fields, it has become necessary for Thailand to structure a national institution, which is today designated as the Special Committee, to review treaties and conventions. This is a national body composed of legal experts, eminent jurists and the most highly qualified publicists, including members of the Supreme Court, Attorneys-General, and the Secretary-General of the Juridical Council. *Ex officio* members are high legal officials

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[81] *See, e.g.*, Royal Decree (No. 9) relating to the Revenue Code providing for exemption from income taxes, b.e. 2499 (1956). Section 3 provides: "Exempted from income taxes under the Revenue Code are persons for whom the Government is under an obligation to grant such exemption in accordance with an economic and technical cooperation agreement concluded by Thailand with a foreign State."

of the Ministry of Foreign Affairs; principally the Legal Adviser (Director-General of the Treaty and Legal Department), with the Directors of the Treaty Division and the Legal Division. The Directorate-General of the Treaty and Legal Department provides necessary secretariat services for the Committee. Expert witnesses are invited from other relevant ministries to examine each of the aspects of a particular provision of the treaty or draft convention under review. This Committee is, in principle, presided over by the Minister of Foreign Affairs, and in his absence, invariably by the President or Ex-President of the Supreme Court.

The Committee meets every week and has an extensive agenda with a series of treaties and draft conventions awaiting consideration, which it takes up in the order of their relative significance and urgency. Priority is given to questions that require immediate national attention. The Committee thus operates as the central coordinating organ of the state, giving advice and counsel to all departments of government in various ministries on any question of international law or interpretation and application of the treaties to which Thailand is a party or is contemplating signing, ratifying or acceding.

In principle, every treaty is submitted to this Treaty Review Committee, which may be requested to consider pertinent questions regarding the desirability and feasibility of Thailand's participation as party to the treaty, its interpretation and application, and possible legal measures to be taken in the process of its implementation, including preparation of a draft law to give effect to the treaty under review in case the government decides to become a party, and a draft text of the proclamation or promulgation of the treaty as part of the law of Thailand either through the process of incorporation or transformation.

The basic framework treaties such as FCN or Economic Cooperation Treaties are generally negotiated by the Ministry of Foreign Affairs with interdepartmental representatives forming part of the negotiating team. On the other hand, once the principal treaty or basic agreement is concluded, further detailed arrangements or regulations of administrative matters could be the subject of discussion, negotiation, and conclusion by other ministries or departments of government directly involved and fully competent in the subject matter of that particular treaty. Thus, technical cooperation and assistance could be the subject of direct consultation between the Department of Technical and Economic Cooperation (DTEC) in the National Development Ministry and the Economic Counsellor of an accredited diplomatic mission in Bangkok. By the same token, specific commodity agreements or commercial arrangements could be concluded between the Ministry of Commerce or Trade Delegation abroad with a foreign government regarding trade terms or liberalization

of trade or the availability of a Generalized System of Preference (GSP). For more detailed and technical matters, the central government may delegate or assign to a variety of departments of government the duty to negotiate and conclude a particular specific agreement with an agency or an accredited foreign mission.

Even for the general framework treaty, it is not always the Treaty and Legal Department that is assigned the negotiating task. Rather, the Economic Department or the Department of International Organizations, as the case may be, often undertakes the task of conducting negotiations with its counterparts within the foreign government concerned. Thus, a collection of treaties with international organizations such as the United Nations and its specialized agencies has been compiled by the Protocol Department.[82]

To give further illustrations, air services agreements have been negotiated by a national team, headed by a senior official (Under-Secretary) or the Director-General of the Commercial Aviation Department of the Ministry of Communication, the Director-General of the Economic Department of the Ministry of Foreign Affairs, and a representative from the private sectors – i.e., the national carrier, Thai Airways International.[83] Agreements with UNESCO are usually negotiated by the Department of External Relations of the Ministry of Education;[84] agreements with FAO by the Ministry of Agriculture;[85] with WHO by the Ministry of Public Health; and with ILO by the Ministry of Labor.[86] Loan agreements are normally negotiated and concluded by the Ministry of Finance.[87]

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[82] *See supra* note 57.

[83] *See, e.g.*, Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Singapore for Air Service between and beyond their respective territories, signed at Bangkok, September 2, 1968, 9 *Treaty Series of Thailand, supra* note 4, at 244–57; *id.*, at 258–61 (Agreement with Laos, September 10, b.e. 2511 (1968)).

[84] *See, e.g.*, Agreement between the Government of Thailand and UNESCO regarding the Asia Regional Office of the Organization, September 6, 1961, Collection of Treaties between Thailand and International Organizations compiled by the Protocol Department, May 25, b.e. 2511 (1968), at 74–76; *id.*, at 77–88, Annexes I to N (Agreement on Technical Assistance, October 29, 1950).

[85] *See, e.g., id.* at 48–58, also 59A and B (Agreement between the Government of Thailand and FAO regarding the Far East Regional Office of the Organization, April 5, 1956).

[86] *See, e.g., id.*, at 99–103, 104–07 (Agreement between the Government of Thailand and WHO for the Provision of Services by WHO in Thailand, August 23, 1949 and Basic Agreement, March 7, 1962); *see also id.*, at 97–98 (Agreement with ILO concerning the Office for Liaison with ECAFE, November 1, 1961).

[87] *See, e.g.*, Agreement between the Government of the Kingdom of Thailand and the Government of the Federal Republic of Germany concerning Financial Assistance, October 8, 1968, 9 *Treaty Series of Thailand, supra* note 4, at 262–72; *id.*, at 291–300 (The Project

Given the rising volume of international agreements awaiting consideration, the task of negotiating their text is today assigned to the technically competent bodies within the executive branch of the government.

E. *Publication of Treaties*

Publication of treaties to which Thailand is a party takes place in the Government Gazette. This process is tantamount to promulgation of the treaty as the law of the land. It is considered to be the effective incorporation or transformation of treaty provisions into the internal laws of the Kingdom. While the process of incorporation is used primarily for the conversion of customary rules of international law into Thai law, actual legislative enactment into Thai national law is the more usual method of transforming treaty obligations into law through national legislation having the effect of internal law.

A collection of treaties to which Thailand is a party has been undertaken by the Ministry of Foreign Affairs, chiefly the Treaty and Legal Department, since 1968. To date, ten volumes have been compiled and published for official use with limited circulation. Two more volumes are in the process of compilation and printing. Other, more specialized collections of treaties and international agreements, dealing with privileges and immunities of international organizations, have been compiled and published by the Protocol Department.

F. *Treaty Termination*

The decision to terminate treaties rests principally with the Executive. As has been seen, the series of treaties concluded by Siam in the nineteenth century were to continue in force until terminated either by denunciation or by revocation. It was not until after World War I that the FCN treaties were given ten years to run. Upon the expiration of the life span of ten years, a treaty could be denounced or renegotiated, as was the case with the conclusion of the FCN Treaties in 1937–1938. The current practice is in favor of a limited period of ten years with automatic renewal or possible termination. By 1961, the Thai Government decided to do away with existing treaty commitments that reflected the bygone days of unequal treaties, and it entered first into negotiations with the country most sympathetic to Thailand – the United States of

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Financing of Investments of Small and Medium-sized Enterprises, Bangkok, December 4, 1968).

America. After lengthy sessions, in 1966, Thailand adopted the text which formed the Treaty of Amity and Economic Relations with the United States of America.[88] Negotiations with other countries were not accorded top priorities by the Thai Government. The 1937–1938 series of FCN Treaties continued to apply in principle on a bilateral basis in spite of their official termination insofar as friendship, commerce, and navigation were concerned, thereby casting aside all unequal provisions regarding frontier adjustments, extraterritoriality, and constraints on the fiscal autonomy of Thailand.

G. *Deposit and Registration of Treaties*

Thailand has served as depositary of regional treaties and as such, has performed the functions of a depositary state. On the other hand, Thailand has not always taken the initiative to register bilateral agreements of an administrative character. Significant international agreements of a regional association like ASEAN will no doubt be registered with the United Nations. However, not every agreement within the region will be so registered.

It is difficult to determine with assurance the percentage of treaties that Thailand has ratified *and* registered with the United Nations. Even a simple procedure of ratification of a codification convention such as the Vienna Convention on Diplomatic Relations of 1961,[89] which is clearly known to be declaratory of the current practice of states and which reflects the existing rules of customary international law, was not readily endorsed by a diplomatically experienced nation such as Thailand. It is unbelievable that it took that Kingdom more than two decades to ratify a seemingly uncontroversial convention, although a newly emerged country such as Jamaica wasted little or no time in ratifying it. Thailand did not have to amend any of its laws or practices to accede to the provisions of the codification convention.

H. *Public Participation in the Treaty-Making Process*

Treaties are no longer negotiated or concluded in secrecy today, thanks to the exposure of governmental activities to the mass media, television, and radio and the widening distribution of information by the press. In the past, very few senior officials had the chance to participate in bilateral or multipartite treaty negotiations. Only very selected officials of

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[88] The Treaty was signed in Bangkok on May 2, 1966, and ratified at Washington, D.C., on May 8, 1968. *Id.*, at 25–57.

[89] Done at Vienna on April 18, 1961; *see also supra* note 80 (the Act of 1984).

long experience were afforded the opportunity to attend global conferences such as the two Hague Peace Conferences in 1899 and 1907. The privileged few were too few to mention. The practice of using the service of foreign expert advisers on foreign relations might account for the retarded growth of indigenous expertise in international legal affairs. Today, however, a new trend has emerged: while the Executive itself may not pay sufficient heed to sound legal advice, and may tend to act on the spur of the moment, or be prompted by the opinion of the inexperienced and uninitiated, the younger generation has become more active and more sensitive to the intricacy of international legal affairs. Thus, in 1949, when the United Nations Secretary-General informed the Foreign Ministry of Thailand (falsely of course) that the Thai declaration, made in 1939 accepting the compulsory jurisdiction of the World Court[90] was about to expire, experts suggested that Thailand should renew the declaration without consulting even the Council of Ministers, let alone the National Assembly or the public. Democratic principles dictate that the people be consulted on matters of such political importance that not only could affect their rights and interests but also their national boundaries. Yet the acting Minister, upon the unsound advice of a Director-General, was prepared to risk the future of his own country without prior consultation with his peers or his electorates. Although history may repeat itself on this score, there is hope that an ultimately enlightened government will permit the people to have a voice in the conduct of foreign relations, in the preservation of their best national interests and in the safety and security of their livelihood.

[90] As it turned out, the notice was a false alarm. Thailand's declaration of 1939 lapsed in 1945 and was not in existence in 1949.

III. Basic Data and Documentation

A. *National Legislation*

Annex A: Constitutional Provisions (excerpts)
Annex B: Statutory Provisions
Annex C: Regulations, Orders and Other Official Announcements

B. *Selected Examples and Discussions of Treaty Documents*

Annex D: Full Powers
1. Full Powers to Represent
2. Full Powers to Sign
Annex E: Instrument of Ratification
Annex F: Discussion of Registration Certificate and Depositary Circular Notes
Annex G: Discussion of Messages to Legislature on Particular Treaties
Annex H: Official Proclamation of Treaties

C. *Statistical Data*

Annex I: Discussion of Statistical Data Issues in Thai Treaty Practice

ANNEX A

CONSTITUTIONAL PROVISIONS

The Executive branch of the government is guided by constitutional provisions in the treaty-making process. The relevant provisions of the Constitution of b.e. (Buddhist era) 2534 (1991)[91] are reproduced below.

PROVISIONS OF THE CONSTITUTION OF B.E. (BUDDHIST ERA) 2534 (1991)

Section 177:

(1) The King has the prerogative of declaring war with the approval of the National Assembly. The resolution of approval of the National Assembly must be passed by a majority of votes of not less than two-thirds of the total number of existing members of both Houses.

(2) After the expiration of the term or the dissolution of the House of Representatives, the Senate shall perform the function of the National Assembly in making the approval under paragraph one. In this case, a resolution shall be passed by votes of not less than two-thirds of the total number of the incumbent Senators.

Section 178:

(1) The King has the prerogative of concluding a peace treaty, armistice and other treaties with other countries or international organizations.

(2) A treaty which provides for a change in the Thai territories or the State jurisdiction or requires the enactment of an Act for its implementation must be approved by the National Assembly.

Section 156:

The National Assembly shall hold a joint sitting in the following cases:

(11) approval of the declaration of war under Section 177;

(12) approval of a treaty under Section 178.

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[91] *See* Sompong Sucharitkul, *supra* note 3, at 32–33. It follows that treaties outside the purview of Section 178 do not require the approval by the joint session of the National Assembly. The current Thai Constitution dates from b.e. 2540 (1997). *See supra* note 42.

ANNEX B

STATUTORY PROVISIONS

Thailand has enacted many statutes that contain a provision subordinating the application of national legislation to treaties. To give but one illustration, Sections 3 and 4 of the Extradition Act of b.e. 2472 (1929)[92] are reproduced below.

EXTRADITION ACT OF B.E. 2472 (1929), §§ 3–4

(3) This act shall apply to all extradition proceedings in Thailand insofar as it does not conflict with any of the provisions of a treaty, convention or agreement with a foreign State or of a Royal Proclamation relating to such a treaty, convention or agreement.
(4) Even in the absence of an extradition agreement, if the Siamese Government considers it appropriate, it may extradite the person requested, or if it is established that that person has committed an offense within the jurisdiction of the court of any country, the requested person may be surrendered to that country, provided the offence is one punishable by Thai law with a term of no less than one year imprisonment.

[92] *See* The Extradition Act b.e. 2492 (1929), 46 Govt. Gaz. pt. 43 (translation provided by the author).

ANNEX C

REGULATIONS, ORDERS AND OTHER OFFICIAL ANNOUNCEMENTS

Statutory provisions relating to a treaty or treaties may be supplemented by a series of regulations, orders, and other official announcements. For instance, pursuant to an agreement between Siam and Great Britain b.e. 2468 (1925)[93] regulations were adopted by order of the Minister of Interior on August 31, b.e. 2468 (1925) concerning the issuance of permits for Siamese and British policemen to bear arms after crossing the Anglo-Siamese border in pursuit of a criminal suspect on reasonable suspicion of having committed (i) murder or manslaughter; (ii) robbery; (iii) violent armed robbery; and (iv) elephant theft. The regulations also deal with details of Siamese and British permits, their use and the need to return them after use or when no longer in use. According to regulations, after the arrest is affected, the offenders must be handed over to the local or national police authority. Offenders arrested across the border may not be taken back from the other side. Supplementary orders were also adopted on October 3, b.e. 2468 (1925), specifying the position of the responsible British officer on the Burmese side to be that of the Deputy District Commissioner or sub-divisional officer or higher. Requests for assistance in the arrest may be addressed to the superintendent or assistant superintendent, or as was current in Malaya, the British Adviser to the Government, as designated in the announcement of September 1, b.e. 2468 (1925), made pursuant to the Anglo-Siamese Extradition Treaty, b.e. 2453 (1911).[94]

[93] 23 Govt. Gaz. pt. 23, September 6, b.e. 2468 (1925).

[94] The Extradition Treaty between Siam and Great Britain, signed in Bangkok on March 4, b.e. 2453 (1911), was further announced on February 22, b.e. 2470 (1928), by the Thai Ministry of Foreign Affairs to be applicable to Palestine (excluding Transjordan), Cameroons, Togo, Tanganyika Territory, New Guinea, Western Samoa, South-West Africa, and Nauru.

ANNEX D

FULL POWERS

As indicated earlier,[95] an agent or representative of a state may need a Full Powers document at various stages of the treaty-making process. In the first place, an instrument known as credentials serves to accredit the agent to the negotiating body and to allow the agent to examine the draft agreement or text of a proposed treaty.[96] To give an illustration, the composition of a Thai delegation to the Eighth Session of the Third United Nations Conference on the Law of the Sea (UNCLOS) is contained in a letter of credence listing the members of the Thai Delegation with full powers to represent Thailand at the conference. These credentials, which are addressed to the Secretary-General of the United Nations, are reproduced below at (1).

Authorization to sign is needed and normally required to verify the status and authority of the signatory to a treaty. Early Thai treaty practice confirmed this requirement, specifically incorporating it in the preambular paragraphs of the more formal FCN treaties.[97] However, the requirement may be relaxed in contemporary experience, in light of the Vienna Convention on the Law of Treaties, 1969,[98] dispensing with the necessity to provide proof of or to show Full Powers for the Head of State, Head of Government, Foreign Minister, and, to a limited extent, accredited ambassador and permanent representative to an international organization. A typical Full Powers document in the practice of the Thai Ministry of Foreign Affairs is reproduced below at (2).[99]

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[95] *See supra* Part II.B (Negotiating Agencies and Delegation of Full Powers, to negotiate or enter into negotiations or in the case of a multilateral codification conference to attend, participate and negotiate the draft articles of the convention with full powers to amend, approve and adopt the text of the convention).

[96] Credentials, Note No. 0602/9203, dated March 14, b.e. 2522 (1979).

[97] *See, e.g.*, the first Franco-Thai Treaty of 1685, 1 *Treaty Series of Thailand*, *supra* note 4, at 11–13.

[98] Vienna Convention On The Law Of Treaties, UN A/Conf. 39/27 (May 23, 1969) (English text), *reprinted in* 8 ILM 679 (1969), *entry into force* January 27, 1980; *see* Article 7.

[99] The following is taken from an actual document of Full Powers. To complete the contents, the document may refer to the Council of Ministers or the National Assembly as the source of authority for the signature to be appended. It may also indicate being, "Given at the Ministry of Foreign Affairs, Saranrom Palace, Bangkok, this . . . day of October in the year Two Thousand Five Hundred and Thirty-Four of the Buddhist Era corresponding to the year 1991 of the Common Era."

(1) FULL POWERS TO REPRESENT

Excellency,

I have the honour to inform Your Excellency that the Government of Thailand has appointed its Delegation to attend the Eighth Session of the Third United Nations Conference on the Law of the Sea to be held at Geneva, l9 March to 27 April 1979 as follows:

Representatives

1. Dr. Sompong SUCHARITKUL, Chairman Director-General
   Treaty and Legal Department, Ministry of Foreign Affairs
2. Dr. M.L. Birabhongse KASEMSRI, Vice-Chairman Director-General
   International Organizations Department, Ministry of Foreign Affairs
3. Commander Swarng CHARERNPHOL, R.T.N., Member Director-General
   Department of Fisheries, Ministry of Agriculture and Cooperatives
4. Dr. Amore CHANDARA-SOMBOON, Member Deputy Secretary-General
   Juridical Council Office of the Prime Minister
5. Rear-Admiral Rojana HONGPRASITH, R.T.N., Deputy Director
   Hydrographic Department, R.T.N. Ministry of Defense
6. Dr. Prajit ROJANAPHRUK, Member Chief, Legal Division
   Treaty and Legal Department, Ministry of Foreign Affairs
7. Mr. Karn CHIRANOND, Legal Officer
   Treaty and Legal Department, Ministry of Foreign Affairs, Special Adviser
8. H.E. Dr. Manaspas XUTO, Member Ambassador
   Permanent Representative of Thailand to the United Nations Office, Geneva

Accept, Excellency, the assurances of my highest considerations.

_____ (signed)

(Dr. Upadit Pachariyangkun)
Minister of Foreign Affairs of Thailand

(2) FULL POWERS TO SIGN

FULL POWERS

I, the undersigned, Minister of Foreign Affairs of Thailand, do hereby state that Professor Dr. _____ , Minister of Science, Technology and Energy of Thailand, is authorized and empowered to sign the Accord Supplementary to the Memorandum of Understanding between the Governments of the Kingdom of Thailand, Australia and the Lao People's Democratic Republic relating to the Mekping River Bridge Project.

Given at the Ministry of Foreign Affairs, Saranrom Palace, Bangkok, this _____ day of October in the year Two Thousand Five Hundred and Thirty-Four of the Buddhist Era corresponding to the year 1991 of the Common Era.

_____ (signed)
(Name of Minster),
Minister of Foreign Affairs

ANNEX E

INSTRUMENT OF RATIFICATION

Whenever the treaty expressly states that ratification is to be exchanged for the treaty to enter into force, such exchange of instruments of ratification is a suspensive condition for its entry into force.[100] Thus, in many respects, an instrument of ratification is a more formal and more elaborate document than the Full Powers document. An example of a typical instrument of ratification is reproduced below.

INSTRUMENT OF RATIFICATION

WHEREAS the President and the Secretary General of the Extraordinary Session of the Assembly of the International Civil Aviation Organization held at New York, duly authorized by the Assembly, have signed on the twelfth day of March in the Two Thousand five Hundred and Fourteenth year of the Buddhist Era (1971) a Protocol relating to an amendment to the Convention of International Civil Aviation done at Chicago on the seventh day of December in the Nineteen Hundred and Forty-Fourth year of the Common Era, which Protocol is, word for word, as follows:

[Text of the Protocol]

WHEREAS the Protocol aforesaid is open to ratification by any State which has ratified or adhered to the Convention on International Civil Aviation Organization, and

WHEREAS Thailand has ratified the said Convention on International Civil Aviation Organization,

The Government of Thailand, having considered the Protocol, hereby confirms and ratifies the same and undertake faithfully to perform and observe all the stipulations therein contained.

IN WITNESS WHEREOF this Instrument of Ratification is signed and sealed by the Minister of Foreign Affairs of the Government of Thailand.

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[100] *See, e.g.*, the Anglo-Siamese Treaty of 1855 (The Bowring Treaty), signed at Bangkok, April 18,1855, ratifications exchanged at Bangkok, April 5, 1856, *1 Treaty Series of Thailand, supra* note 4, at 37–45; *id., at 59–67* (the US-Thai FCN Treaty, signed at Bangkok, May 29, 1856, ratifications exchanged at Bangkok, June 15, 1857).

Done at Bangkok, this Ninth day of August, Two Thousand Five Hundred and Fourteenth year of the Buddhist Era (1971).

_____ (signed)
(THANAT ICHOMAN)

ANNEX F

DISCUSSION OF REGISTRATION CERTIFICATES AND DEPOSITARY CIRCULAR NOTES

The practice of registration certificates started only after the advent of the United Nations Charter, in particular Article 102, which was designed to preclude secrecy in treaty-making rather than its enforceability or voidability before an organ of the United Nations. Thus, in the practice of regional associations to which Thailand is, or has been, a member, not every international agreement, treaty or convention is registered with the Treaty Division of the United Nations Secretariat. In any event, publication is necessarily delayed. Thus, the result of using Thailand as a depositary state for SEATO or other regional organizations with headquarters in Thailand, is that the Ministry very rarely is required to issue a certificate of registration.[101]

Once an instrument of ratification is deposited, or, in the case of a bilateral treaty, exchanged, it will find its way eventually into the *Government Gazette*. Depositary circular notes, in the case of regional conventions, are not infrequent. But, more often are regulations, administrative orders and instructions issued and circulated by the competent authorities of Thailand to the various administrative units within the Kingdom regarding actual implementation.[102]

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[101] Once a treaty is registered with the U.N., a certificate can be requested. The Thai Foreign Ministry will place on the roster the instrument of ratification deposited by a Party and notify other Parties of such deposit in a normal diplomatic note.

[102] *See, e.g.*, the Orders and Regulations by the Interior Ministry regarding procedures for arresting offenders across the boundary and the necessity to hand over the offenders to British officials.

ANNEX G

DISCUSSION OF MESSAGES TO LEGISLATURE ON PARTICULAR TREATIES

In democratic Thailand, the practice has become more common to submit draft treaties or conventions to joint sessions of the National Assembly, a practice that the competent ministry traditionally adopted in regard to the approval sought from the Council of Ministers. Today, there is thus, a double process of submission: first to the Council of Ministers, and second, upon the latter's recommendation, to the National Assembly. The recommendation by the Executive may vary slightly, or confirm the views of the ministry in charge of the execution of the treaty obligations to be undertaken.

At either stage of the procedures for approbation by the Council of Ministers and by the National Assembly, the messages submitted by the competent ministry or the National Committee for Treaty Review will contain original recommendations of participation by Thailand, subject to the adoption of appropriate revisions, amendments, or reservations as may be necessary to enable Thailand to become a party. The messages should also contain measures, including legislative measures, required to enact new laws, if any, to give effect to the new obligations created by the treaty under consideration.[103]

The new double or even triple procedure is consistent with democratic traditions. However, it entails prolonged debate at different stages and tends to delay Thailand's ratification of important conventions, as has been the case even of the least controversial conventions such as the 1961 Vienna Convention on Diplomatic Relations.[104] Thailand will eventually adhere to all the conventions prepared by the United Nations or under its auspices. But it will take longer under democratic rules than

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[103] Thus in a way not dissimilar from U.S. practice, the Ministry of Foreign Affairs of Thailand submitted its views and commentaries on the International Covenant on Civil and Political Rights (1966) in May 1993 with detailed explanations on the desirability of acceding to the Covenant subject to certain reservations and understanding of the existing practice in Thailand's criminal justice system. In particular, an interpretative declaration was proposed relating to (1) Article 1(1): The right of self-determination in the implementation of political, economic, social and cultural freedoms; (2) Article 6(4): The right to petition for clemency in case of capital punishment; and (3) Article 20(1): The illegality of war propaganda.

[104] *See supra* note 80.

otherwise. One consolation appears to be that a greater share of the people of Thailand now seem to participate in public debate, leading to an articulation and formulation of rational public opinion which should guide the Legislature as it reviews and supervises governmental activities traditionally conducted by the Executive formerly without popular awareness.

ANNEX H

OFFICIAL PROCLAMATION OF TREATIES

When a treaty is promulgated in the *Government Gazette*, it is sometimes attached to a Royal Proclamation or Official Proclamation, declaring parliamentary adoption as law. This is a normal national legislative process. Thus, the 1961 Vienna Convention on Diplomatic Relations, is attached to the Diplomatic Immunities and Privileges Act b.e. 2527 (1984). Actually, it was the official Thai translation text that was promulgated as law.[105]

Pursuant to a treaty provision or in anticipation thereof, such as the 1982 United Nations Convention on the Law of the Sea,[106] signed but not yet ratified by Thailand, the Thai Government, on February 25, 1981, proclaimed Thailand's Exclusive Economic Zone.[107] Portions of the Royal Proclamation are reproduced below.

A further Proclamation was issued on July 18, b.e. 2531 (1988), the 43rd year of our Sovereign Lord, the reigning Monarch,[108] listing in details the geographical coordinates of the limits of Thailand's Exclusive Economic Zone, from point No. 1 Latitude N. 6, degrees 28' 30", longitude E. 99 degrees 39' 12" to point No. 27 Latitude N. 9 degrees 32' 15", longitude E. 97, degrees 56' 20".

There are, thus, several types of proclamations or declarations that the Thai Government may adopt and has adopted during the implementation of impending treaty provisions and commitments, both before and during their entry into force, to give effect to the treaties to which Thailand is a party or is considering becoming a party. The Executive may, and in some cases must, resort to the Legislature for assistance, requesting the passage of an act in the form of a general enabling act of Parliament – i.e., legislative enactment by the National Assembly authorizing the Executive to make regulations or through other legislative

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[105] *See supra* notes 80 and 104 and accompanying text.

[106] The Law of the Sea: Official Text of the U.N. Convention on the Law of the Sea with Annexes and Index; Final Act of the Third U.N. Conference, U.N., New York, 1983. The United States signed the Final Act on December 10, 1982, but not the Convention.

[107] *See* 98 *Govt. Gaz*, pt. 30, February 25, b.e. 2524 (1981) (translation by the author). *Compare* the Reagan Proclamation on March 10, 1983, establishing a 200-nautical-mile Exclusive Economic Zone for the United States, asserting "sovereign rights over natural resources and related jurisdiction."

[108] 105 *Govt. Gaz*. pt. 120, July 26, b.e. 2531 (1988).

process by delegation of legislative authority to the Executive, such as by Royal Decrees, by-laws, decree-laws, Ministerial Regulations, guidelines, guidance and instructions for enforcement measures by administrative officials of the realm.

PROCLAMATION
EXCLUSIVE ECONOMIC ZONE OF THE KINGDOM OF THAILAND

BY Royal Command, it is hereby proclaimed,

FOR purposes of the exercise of sovereign rights by the Kingdom of THAILAND in the exploitation and conservation of the living and non-living resources of the sea,

THE EXCLUSIVE ECONOMIC ZONE of the Kingdom of Thailand as follows:

(1) The EEZ of the Kingdom of Thailand is the maritime area extending seaward from the territorial sea of the Kingdom to the distance of 200 nautical miles measured from the straight baselines used for the determination of the territorial sea.
(2) Within this EEZ, the Kingdom of Thailand shall exercise:
    (a) sovereign rights to explore, exploit, conserve and manage all natural resources of the sea, living and non-living, on the sea-bed and subsoil thereof and in the superjacent water-column; other sovereign rights to explore and exploit economically in the said Zone, such as: energy from the waves; the currents; and the wind.
    (b) jurisdiction
        (i) to construct artificial islands, installations and other structures,
        (ii) to conduct marine scientific research,
        (iii) to preserve the marine environment.
    (c) all other rights under international law.
(3) Within this EEZ, freedoms of navigation, and over-flight and freedom to lay cables and pipelines shall continue in accordance with international law.
(4) In regard to adjacent and opposite States, the Government of Thailand stands ready to negotiate with the coastal States for the mutual determination of respective Exclusive Economic Zones.

Given this 23rd day of February B.E. 2524 being the 36th year of the current Reign.

ANNEX I

DISCUSSION OF STATISTICAL DATA ISSUES IN THAI TREATY PRACTICE

The National Institute for Statistics collects a considerable amount of statistical data, but the collection of treaties is a task to be undertaken by the national body that is responsible for the compilation and publication of treaties to which Thailand is a party. The Treaty and Legal Department of the Ministry of Foreign Affairs is the natural and logical keeper of treaties. Publication has reached nine volumes with three further volumes in the press. That still leaves much room for improvement and updating. Thailand is not a new or young Kingdom, but its national archives have not maintained the standard attained by British and Foreign State Papers or the United States Treaties and other International Agreements Series. Indeed, learned societies such as the American Society of International Law, with limited funds and selection, have been better able to maintain an updated status of multilateral conventions than the United Nations, through the publication of the *U.N. Treaty Series*. Some delay is self-explanatory and relatively easy to understand, provided that all the treaties receive eventual if not always timely publication.

Thailand has concluded a considerable number of treaties, as is evident in the printed volumes of the Treaty Series. Together with the record kept by the League of Nations, The Hague Peace Conferences, the United Nations, and the U.K., U.S. and French collections, an indeterminate number could be listed. No such listing can be complete, let alone exhaustive, due to the reluctance of the Thai Government, intentionally or otherwise, to have all its treaty commitments published. Several agreements, which are in fact treaties, will never be published before they actually fall into desuetude.

Of the several thousand treaties, international agreements, and conventions to which Thailand is, or has been, a party, less than half have been directly ratified or confirmed by the National Assembly. This may be true because no such confirmation is needed under various constitutions; because the Executive has been authorized by the Legislature to conclude such executive agreements, or to enact by-laws or regulations to give effect to it; or because the treaty was promulgated as national law by the process of legislative transformation or an act of Parliament.

The problem facing Thailand in this area of treaty practice lies in the assessment of a proper balance between the need to submit treaties of

essential importance for debate and approval by the National Assembly, and the need to satisfy the practical necessities required for government success in foreign relations. There is a distinct need for every nation to be able to inspire the confidence in other nations that a treaty commitment will be honored. In the ultimate analysis, the people will be given ample opportunity to express their views and to voice their support or opposition. Their views must be echoed in the popularly elected legislative body where treaties requiring eventual statutory enactments must be carefully examined before final acceptance by the government.

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CHAPTER NINETEEN

NATIONAL TREATY LAW AND PRACTICE: UNITED KINGDOM

*Sir Ian Sinclair, KCMG, QC, Susan J. Dickson and Graham Maciver**

I. Introduction

In the United Kingdom, the treaty-making power is vested in the Crown as part of the Royal prerogative. As is well known, the United Kingdom has no written constitution. The United Kingdom constitution is, as McNair puts it, "the net result of the operation of the common law, of a number of important statutes, and of a large and still growing body of constitutional usages or 'conventions' (not in the treaty sense), as they are usually called."[1] McNair continues:

> The organ in which, constitutionally, the treaty-making power resides is the Crown, that is, Her Majesty, acting upon the advice of Her Ministers. It is the Crown which in virtue of the Royal prerogative issues Full Powers for the negotiation and signature of treaties and ultimately ratifies them when ratification is necessary, or grants the necessary authority for the negotiation and conclusion of the less formal types of international agreements. Internationally, the Crown is omni-competent in the matter of treaties, and we are aware of no constitutional or other limitation upon the power of the Crown to conclude on behalf of the United Kingdom an internationally valid treaty.[2]

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* The original draft of this chapter on United Kingdom Treaty Law and Practice was prepared by Sir Ian Sinclair in the early 1980s. When arrangements were made in the early 1990s by the late Monroe Leigh to publish the national reports which he had received, Susan Dickson, one of the Assistant Legal Advisers in the Foreign and Commonwealth Office (FCO), undertook the tasks of updating the original United Kingdom report in consultation with Sir Ian Sinclair, who had by then retired from the post of Legal Adviser to the FCO. The task of further up-dating the United Kingdom chapter as published under the names of Sir Ian Sinclair and Susan Dickson in 1995, in preparation for publication of the present work dedicated to the memory of Monroe Leigh, has been undertaken by Mr. Graham Maciver, another Assistant Legal Adviser in the FCO, again, in consultation with Sir Ian Sinclair.

[1] McNair, A., *The Law of Treaties* 68 (1961).

[2] *Id.* It should be noted that Full Powers and instruments of ratification are issued by Her Majesty only for treaties concluded in Heads of State form. For treaties concluded between states or between governments, Full Powers and instruments of ratification are issued by the Secretary of State for Foreign and Commonwealth Affairs. *See* Satow, E., *Satow's Guide to Diplomatic Practice* 61–62, 240–41, 275–76 (5th ed., 1979).

The exercise of the treaty-making power in relation to treaties with other states or international organizations is the responsibility of the Secretary of State for Foreign and Commonwealth Affairs who, in turn, looks for advice to the authorities on whom the carrying out of the particular treaty would devolve.

II. Discussion Items

A. *What is an International Agreement?*

1. *General Criteria*

It is trite law that the term "treaty" may be used in a restricted sense as referring to the formal instrument of agreement styled "treaty" by which two or more states establish a relation under international law between themselves; or in a more general sense as embracing a great variety of formal instruments to many of which names other than "treaty" are given.[3]

For the purposes of internal procedures relating to treaties entered into by the United Kingdom, the term "treaty" is, following the definition contained in the Vienna Convention on the Law of Treaties (opened for signature at Vienna on May 23, 1969), taken to denote any international agreement to which the United Kingdom and one or more other states are parties creating rights and obligations taking effect under international law and embodied in a single written instrument or in two or more related instruments ordinarily designated under such terms as "treaty," "convention," "agreement," "protocol," "exchange of notes," "exchange of letters," and so on. Most of the internal procedures are also regarded as being applicable *mutatis mutandis* to agreements entered into between the United Kingdom and international organizations such as the United Nations or its various specialized agencies.[4]

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[3] E. Satow, *supra* note 2, at 239. In its judgment of July 1, 1994 on jurisdiction and admissibility in the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the International Court of Justice held that Agreed Minutes of the Gulf Cooperation Council in December, 1990, relating to the dispute between Qatar and Bahrain, enumerated "commitments to which the Parties have consented" and "constitute an international agreement." Judgment, 125.

[4] The Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations (done at Vienna, March 21, 1986), which has been ratified by the United Kingdom but at the time of writing is not

Special considerations apply, however, to agreements entered into in the context of the European Communities, and special internal procedures are applicable to such agreements. This is partly attributable to the division of competence between the Community and the member states in relation to the conclusion of treaties within the framework of the basic Community treaties.

It may be noted that, in United Kingdom practice, many agreed minutes, memoranda of understanding and exchanges of notes and letters are not regarded as being international agreements subject to the law of treaties because the parties have not intended to create legal rights or obligations, or a legal relationship, between themselves. The question whether an agreed minute or memorandum of understanding should be regarded as an international agreement subject to registration with the United Nations and to the normal internal procedures will therefore depend upon the language of the instrument and the intentions of the parties in formulating it. Equally, United Kingdom practice draws a distinction between those international instruments that are intended to have an obligatory character and those international instruments that are not intended to embody legally binding obligations. International instruments not intended to embody legally binding obligations are not regarded as international agreements for the purposes of the internal procedures applicable in the United Kingdom in respect of treaties entered into by the United Kingdom. An example of such a non-binding international instrument is the U.K/U.S. Memorandum of Understanding on British participation in the Strategic Defense Initiative (SDI).[5]

2. *Agency-to-Agency and Implementing Agreements*

An agency-to-agency agreement, in the sense of an agreement between a government agency such as the Patent Office (which, in the United Kingdom, is an executive agency of the Department of Trade and Industry) and its overseas equivalent, or between a United Kingdom government department and a foreign government department, may, depending upon its content, be regarded as an international agreement for the purposes of the internal procedures applicable in respect of treaties entered into by the United Kingdom. Whether or not an agency-to-agency agreement has this character will depend crucially upon its

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yet in force, extends the definition of "treaty" set out in the Vienna Convention on the Law of Treaties to international agreements between states and international organizations or between international organizations.

[5] H.C. Select Committee on Defense, Second Report, H.C. 233/130 1986–87, at v.

content: that is to say, whether or not the agreement creates rights and obligations taking effect under international law. More often than not, these agreements concern minor and technical matters and do not create such rights and obligations.

Implementing agreements, for which provision is made in a main agreement, will normally be regarded as registrable with the United Nations and subject to the normal internal procedures applicable in respect of treaties entered into by the United Kingdom; but where implementation of a main agreement is entrusted to government agencies or government departments, administrative implementing measures agreed between the agencies or departments concerned may constitute exceptions.

3. *Oral Agreements*

The United Kingdom takes the view that international law does not require that an international agreement be formulated in writing, and that, although it may be rare to find an oral agreement between states, this possibility cannot be excluded. Nevertheless, the internal procedures applicable in respect of treaties entered into by the United Kingdom do not apply as such to oral agreements.

4. *Unilateral Acts*

Again, the United Kingdom acknowledges that unilateral acts may create international commitments binding in international law; such unilateral acts are not however regarded as being treaties for the purposes of the internal procedures applicable to treaties entered into by the United Kingdom. Thus, for example, as regards publication requirements, a unilateral declaration made by the United Kingdom Government under Article 36(2) of the Statute of the International Court of Justice (the Optional Clause) will be published in the Miscellaneous Series, but not in the Treaty Series.[6]

5. *Foreign Aid, Sales Contracts, and Agreements Governed by Municipal Law*

United Kingdom practice acknowledges that an international agreement must be "governed by international law" in the sense that it creates rights and obligations taking effect under international law. This serves to distinguish a treaty, for the purposes of United Kingdom internal procedures, from other agreements which, although concluded between states, or between states and other subjects of international law, are regulated

[6] *See* Section II.H., *infra*.

not by international law but by the national law of one of the parties (or by some other national law system chosen by the parties). An example would be a state contract concluded between the United Kingdom and the Government of Ruritania whereby the latter agreed to sell to the former 1,000 tonnes of meat upon the basis of a standard form of contract used in the meat trade. In United Kingdom practice, such a contract would not be a treaty since it would not be governed by international law, but by the terms of the contract itself, supplemented, where necessary, by general principles of law. In principle, therefore, an agreement which, by its terms or by necessary implication, is governed by municipal law is not regarded as being a treaty for the purposes of United Kingdom internal procedures. Certain transactions, which may be partly of a private law and partly of a public law nature, such as leases of land or buildings and loan agreements, may also be entered into between states; in such cases, it may not be altogether easy to determine whether the parties intended the transaction to be governed by international law or by general principles of law or by a particular system of national law. Generally speaking, however, intergovernmental foreign loan agreements are, at present, regarded as treaties for the purposes of United Kingdom internal procedures.

6. *Who Decides?*

In case of doubt, the question whether a particular agreement concluded between the United Kingdom and another state should be regarded as an international agreement for the purposes of registration with the United Nations or for the purposes of the application of United Kingdom internal procedures in respect of treaties entered into by the United Kingdom will be determined by the Treaty Section of the Foreign and Commonwealth Office, which will take advice, as necessary, from the Legal Advisers to the Foreign and Commonwealth Office.

B. *Executive Authorization and Approval Procedures*

1. *Coordination and Authority for Negotiation and Conclusion of Treaties*

Foreign policy aspects of treaty-making and questions of form and procedure, including the consideration of points of international law, are the responsibility of the Foreign and Commonwealth Office and remain so even where the actual conduct of the negotiations is in the hands not of the Foreign and Commonwealth Office, but of the government department primarily concerned with the execution of the treaty. Accordingly, United Kingdom practice combines a large measure of flexibility with a

degree of central coordination in the Foreign and Commonwealth Office. A government department which has primary responsibility for the execution of a treaty may itself propose to enter into negotiations with another state, but would normally seek advice on foreign policy considerations from the Foreign and Commonwealth Office before taking any initiative. Assuming that there is no foreign policy objection to the initiation of the particular negotiation by the government department primarily concerned with the execution of the treaty, a degree of central coordination is maintained through the requirement that, at the earliest possible stage in the negotiations and at appropriate times thereafter, the Legal Advisers to the Foreign and Commonwealth Office, together with its Treaty Section, should be given the opportunity of commenting on the form and substance of any draft under consideration. In many instances, one of the Legal Advisers to the Foreign and Commonwealth Office will form part of the negotiating team.[7]

2. *No Distinction between Treaties and International Agreements*

No distinction is made by United Kingdom internal procedures (or indeed in United Kingdom constitutional law) between "treaties" and "international agreements other than treaties". Therefore, if the United Kingdom considered that an agency-to-agency agreement in the sense described earlier in this note constituted an international agreement, it would be subject to the same internal procedures as any other treaty or international agreement entered into by the United Kingdom.

3. *Guidance Notes*

The United Kingdom Government does not use detailed regulations, such as those set forth in the U.S. State Department's "Circular 175," to determine procedures for the negotiation and conclusion of treaties. However, the Treaty Section of the Foreign and Commonwealth Office has, in conjunction with the Legal Advisers to the Foreign and Commonwealth Office, recently produced a document, "Treaties and MOUs – Guidance on Practice and Procedures,"[8] which has been circulated around other government departments involved in the negotiation and conclusion of treaties.

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[7] Merrillat, H., *Legal Advisers and Foreign Affairs* 134 (1964). An example would be the negotiation of bilateral air services agreements where the primary responsibility for the negotiations would lie with the Department of Transport but where an FCO legal adviser would normally be attached to the negotiating team.

[8] This document can be found on the Treaties page of the Foreign and Commonwealth Office website at www.fco.gov.uk/treaty.

C. *Legislative Approval*

1. *General*

Generally speaking, in the United Kingdom (leaving aside the special case of European Community treaties) no treaty is self-executing;[9] in other words, no treaty requiring action at the domestic level to give effect to it (other than pure administrative action) can receive that effect without the cooperation of Parliament, whether in the form of a statute, in the form of subordinate legislation, or in some other way. As a matter of constitutional law, therefore, rights and obligations assumed by the United Kingdom under a treaty are not incorporated directly into the national legal order but are, where necessary, given effect to by statute. The classic statement of this principle is to be found in the speech made by Lord Atkin in delivering the Opinion of the Privy Council in *Attorney-General for Canada v. Attorney-General for Ontario*:

> It will be essential to keep in mind the distinction between (1) the formation and (2) the performance of the obligations constituted by a treaty, using the word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. . . . Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.[10]

Although this statement was made at the time in relation to Canada, it is still relevant today in relation to the United Kingdom.

In the case of the following categories of treaties, Parliamentary action in the form of primary legislation (i.e., a statute) is required for their implementation in the United Kingdom:

1. treaties requiring for their execution and application in the United Kingdom a modification of or addition to existing common law or statute;

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[9] This was confirmed in the case of *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg* where Lord Rees-Mogg unsuccessfully sought a declaration from the Division Court that the United Kingdom could not lawfully ratify the Maastricht Treaty. In its judgment of July 28, 1993, denying the application of Lord Rees-Mogg, [1994] Q.B. 552, the Divisional Court stated *inter alia* (at p. 567):

> Mr. Pannick [counsel for Lord Rees-Mogg] accepts, of course, that treaties are not self-executing. They create rights and obligations on the international plane, not on the domestic plane. He accepts also that the treaty-making power is part of the Royal prerogative. Thus to talk of Parliamentary ratification of a treaty is, as the textbooks point out, a constitutional solecism.

[10] [1937] A.C. 326, 347.

2. treaties requiring for their execution in the United Kingdom that the Crown receive some new powers not already possessed by it;
3. treaties affecting private rights;[11]
4. treaties creating a direct or contingent financial obligation upon the United Kingdom;
5. treaties providing for an increase in the powers of the European Parliament.[12]

There is in addition a practice, which now amounts probably to a constitutional convention, whereby treaties involving the cession of British territory are submitted for the approval of Parliament in the form of a statute.

Category 1 is, in principle, a widely drawn category in the sense that it requires the Crown to obtain statutory authority for doing acts, in the execution and application of a treaty, which under existing statutes or at common law it has no power to do. The Executive may, of course, seek and obtain from Parliament authority, in the form of a statute, which enables it to negotiate and conclude bilateral treaties with foreign states provided that the content of these treaties is consistent with the statute; examples are provided by the Foreign Judgments (Reciprocal Enforcement) Act 1933, the International Organisations Act 1968, and the Extradition Act 2003. These statutes provide the framework within which the United Kingdom Government can negotiate, at present, treaties for the reciprocal enforcement of judgments, treaties providing privileges and immunities for international organizations, and extradition treaties respectively. Should the content of a particular treaty go wider than the statutory authority conferred, it would, of course, be necessary for the United Kingdom Government to seek additional powers from Parliament. However, it should be noted that these statutes, while providing the *framework* within which the United Kingdom Government can negotiate specific categories of treaties, do not form the *legal basis* for the conclusion of any particular treaty. That legal basis resides in the treaty-making power of the Crown.

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[11] For possible exceptions, *see* Oppenheim, L., *Oppenheim's International Law* 58 n23 (9th ed. 1992).

[12] Section 12(1) of the European Parliamentary Elections Act 2002 provides that: "No treaty which provides for any increase in the powers of the European Parliament is to be ratified by the United Kingdom unless it has been approved by an Act of Parliament." This is the only example of a *statutory* provision requiring Parliamentary action in the form of primary legislation as a condition precedent to ratification.

2. *Executive Discretion in Deciding Whether Legislative Approval is Required*
In principle, the executive organs have no discretion where the execution and application of the treaty affects private rights or is not covered by existing common law or statute. In the case of the *Parlement Belge*,[13] the question at issue was whether a certain article in an Anglo-Belgian Convention signed and ratified in 1876, which purported to confer upon Belgian Government mailsteamers the immunities of foreign warships, could or could not be applied by an English court so as to protect a particular Belgian mailsteamer against an action for damages in respect of a collision. In giving judgment in this case, Phillimore J. stated:

> If the Crown had power without the authority of Parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for against her as a wrong-doer on account of the collision, cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished. This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution.[14]

Although it is a somewhat unusual occurrence, the approval of Parliament will be obtained where an agreement itself stipulates that this must be done. See, for example, the Anglo-Irish Agreement relating to Northern Ireland which was signed on November 15, 1985, and required the approval of both the British and Irish Parliaments before it could enter into force.[15]

In theory, it is or may be open to the Crown (in exercise of the Royal prerogative) to ratify a treaty signed on behalf of the United Kingdom without having sought or obtained the necessary statutory authority to implement the treaty in the United Kingdom. In such a case, however, the United Kingdom would clearly be in breach of its international obligations in the event that an attempt was made to secure application of the treaty through the United Kingdom courts, as it would not be in a position to fulfil its obligations under the treaty without having the necessary domestic legislation in place. Accordingly, it is and has been the consistent policy of successive United Kingdom Governments to secure the enactment by Parliament of any legislation necessary for the execution and application of a treaty in the United Kingdom before the United Kingdom Government expresses its consent to be bound by the treaty.

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[13] (1879), 4 P.D. 129.
[14] (1879), 4 P.D. 154.
[15] U.K. T.S. No. 62 of 1985.

3. *Legislative Consultation on Whether an Agreement Should be Subject to Approval*

The legislature itself is not, as a general rule, consulted on the question whether legislation is necessary in the United Kingdom to ensure the execution and application of a particular treaty in the United Kingdom. This question is determined by the Legal Advisers to the government department primarily concerned with the execution of the treaty, acting in consultation with the Legal Advisers to the Foreign and Commonwealth Office and, as necessary, the Law Officers of the Crown and Parliamentary Counsel (the latter being responsible for the drafting of legislation).

D. *Reservations Questions*

1. *Bilateral Treaties*

The United Kingdom adheres to the view that for a state to seek to attach a reservation to a bilateral treaty as a condition of acceptance of that treaty is in effect to refuse acceptance of the treaty as drafted, and to require a reopening of the negotiations.

In the case of negotiations for a bilateral treaty, the question of reservations rarely arises

> since it is generally accepted that an attempt by one of the two negotiating States unilaterally to vary the terms of the agreed text after the conclusion of the negotiations will simply mean that negotiations will have to be resumed so that *consensus ad idem* can be reached on the text.[16]

The United Kingdom does not itself seek to make reservations a condition of acceptance of a bilateral treaty. If Parliament were (exceptionally) to refuse to enact the legislation necessary to enable the United Kingdom to give effect to a bilateral treaty, the United Kingdom authorities would normally seek to re-negotiate the treaty in an endeavour to overcome the difficulties. As the International Law Commission has stated:

> A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal re-opening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement – either adopting or rejecting the reservation – the treaty will be concluded; if not, it will fall to the ground.[17]

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[16] E. Satow, *supra* note 2, at 286.

[17] Reports of the International Law Commission, U.N. GAOR 21st Sess., Supp. No. 9, at 35, U.N. Doc. A/6309/rev. 1(1966).

2. *Multilateral Treaties*

United Kingdom practice as regards the making of reservations to multilateral treaties is quite different. The United Kingdom has, where necessary, availed itself of the right to make reservations to multilateral conventions in accordance with the terms of a reservations article contained in the convention in question. Generally speaking, the United Kingdom, while acknowledging that customary international law on the topic of reservations to multilateral conventions is still surrounded by some uncertainty, seeks guidance from the relevant provisions of the Vienna Convention on the Law of Treaties in determining what reservations the United Kingdom may properly attach to non-restricted multilateral conventions and what its attitude should be to reservations attached to such conventions by other states.[18]

E. *Consultation with the Legislature*

Irrespective of whether formal legislative action, in the form of primary legislation or subordinate legislation, is required before the Crown can properly proceed to express the consent of the United Kingdom to be bound by a treaty, there is a felt necessity in the United Kingdom for the Executive to give Parliament an opportunity to consider the desirability of any proposed agreement before action is taken to ratify it. Accordingly, there is a constitutional practice in the United Kingdom, known as the Ponsonby Rule,[19] whereby any treaty requiring ratification is laid before Parliament for a period of 21 sitting days before the instrument of ratification is submitted to the Secretary of State for Foreign and Commonwealth Affairs for signature. In practice, the Rule is also applied to any treaty requiring action akin to ratification subsequent to signature to bring it into force (such as approval or acceptance, or even notification that constitutional procedures have been fulfilled).

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[18] For a brief summary of this complex topic, *see* E. Satow, *supra* note 2, at 284–92; and, for a fuller analysis, *see* Bowett, *Reservations to Nonrestricted Multilateral Treaties* BYBIL 481, 67–92 (1976–77) and Imbert, Pierre H., *Les Reserves aux Traites Multilateraux* (1978).

[19] The Ponsonby Rule is named after Mr. Arthur Ponsonby, MP (then Parliamentary Under-Secretary of State for Foreign Affairs) who, on April 1, 1924 indicated the intention of the then-Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty would be ratified and published in the Treaty Series. The Ponsonby Rule was abandoned a few months later by the succeeding Government but was restored in 1929 and has been operative ever since. A. McNair, *supra* note 1, at 99, 190; E. Satow, *supra* note 2, at 272; 5 BYBIL 190 (1924).

Since January 1997 it has been the practice that all treaties subject to the Ponsonby Rule be accompanied by an Explanatory Memorandum on their being laid before Parliament, as a means of improving the information given to the legislature by the executive on treaty matters. A document, "Guidelines on Explanatory Memoranda for Treaties," has been produced by the Treaty Section of the Foreign and Commonwealth Office.[20]

The Ponsonby Rule applies to all treaties that require ratification, or equivalent action such as notification of completion of the necessary internal procedures, irrespective of whether further Parliamentary action in the form of a statute or in the form of subordinate legislation is required to secure the execution and application of the treaty in the United Kingdom.[21] The Ponsonby Rule is a rule of Parliamentary practice. Alternative procedures may also, if necessary, be adopted to secure compliance with the spirit of the Rule. Thus, for example, the spirit of the Rule will be regarded as having been complied with if a debate is held in Parliament on a motion, say, to approve ratification without delay. The making of an announcement in a debate, or the giving of an answer to a Parliamentary Question indicating an intention to ratify immediately, can also in rare cases be regarded as satisfying the spirit of the Ponsonby Rule. Finally, in cases of urgency when Parliament is not sitting, the Ponsonby Rule may be waived after consultation with the leaders of the major opposition parties. The Agreement between the UK and Ireland establishing the Independent International Commission on Decommissioning was signed and brought into force during the summer recess of Parliament in 1997. Due to the urgency of the matter, the consultation element was effected by the Northern Ireland Secretary writing to the leaders of the opposition parties.

Quite apart from the operation of the Ponsonby Rule, there have been occasions when draft treaties have been laid before Parliament after initialling and before signature. These have usually been cases where there has been considerable Parliamentary interest in the content of the proposed treaty. An example is the Cyprus Treaty of Guarantee which was initialled on February 19, 1959, and was immediately laid before Parliament prior to its signature on August 16, 1960. Another example is provided by the UK/Egyptian Suez Base Agreement of 1954, which was initialed on July 27, 1954 and laid before Parliament in draft later that month, before being signed on October 19, 1954. In all such cases,

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[20] This can be found on the FCO website at www.fco.gov.uk/treaty.

[21] For further information on the Ponsonby Rule, *see* BYBIL 1999, at 404–09; BYBIL 2000, at 529; *Parliamentary Papers*, 1999–2000, *HC, Paper* 210, at 21–23.

a key factor will be the degree of Parliamentary interest in the proposed treaty. The laying before Parliament under the Ponsonby Rule of a treaty requiring ratification is designed to provide an opportunity for Members of Parliament to put down a question or motion about the particular treaty. The Government of the day may itself take the initiative in putting down a motion approving the ratification of the treaty. This is what happened in the case of the Locarno Treaty of 1925 which was initialed on October 16, 1925 and debated in Parliament on November 18, 1925 on a Commons Motion "that this House approves the ratification of the Treaty . . ." The Locarno Treaty was signed by the then-Government on December 1, 1925 and finally ratified on December 14, 1926. Recent examples of this procedure include the 1998 announcement in debate that the Lockerbie Trial Treaty would be brought into force, despite its not having been laid before Parliament under the Ponsonby Rule. Similarly, it was announced in debate that the 'Disappeared' Agreement,[22] which had already been laid, would be brought into force before the 21-day period had elapsed.

F. *Consultation with the Public*

There is no specific or consistent practice in the United Kingdom with respect to consultation with the public on the desirability of a proposed international agreement. During the course of negotiations, the Minister in charge of the government department primarily responsible for those negotiations may of course be questioned in Parliament on the progress of the negotiations; or he may take the opportunity of making regular progress reports to Parliament. In addition, the government department primarily responsible for the execution of a treaty may consult with professional or other interest groups either before or during the negotiations. An example might be a proposed agreement which would affect the jurisdiction of the courts in the United Kingdom, where consultations might be undertaken with leading members of the judiciary, with representatives of the two branches of the legal profession, with representatives of insurance interests and, to the extent necessary, with representatives of other interests likely to be directly affected by the content of the proposed agreement. The Explanatory Memorandum which accompanies the Treaty includes a brief account of the consultations undertaken throughout the process. An example is provided at Annex E.

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[22] Agreement between the UK and Ireland establishing the Independent Commission for the Location of Victims' Remains (Ireland No. 7 (1999) Cm 4344).

The basic decision as to which professional or interest groups should be consulted lies with the government department primarily responsible for the execution of the proposed treaty. The content of the proposed treaty will be a highly relevant consideration in determining who should be consulted. Consultation may be arranged on an ad hoc basis (for example, by organizing a conference or seminar or series of conferences or seminars) or may be carried out within the framework of a committee specially constituted for the purpose.

G. *Legal Bases for Agreements Not Formally Approved By the Legislature*

As discussed above,[23] constitutionally the power to make treaties is vested in the Crown and is exercised on its behalf by the Secretary of State for Foreign and Commonwealth Affairs. With the exception of the European Parliamentary Elections Act 2002, there are no limitations, statutory or otherwise, on the Crown's treaty-making powers. A number of statutes[24] provide the framework within which treaties may be negotiated and concluded, but these do not form the legal base for such action.

H. *Publication and Transmittal Requirements*

1. *Publication of Treaties and Transmission to Legislature*

Under the Ponsonby Rule[25] it is the practice to lay before Parliament, for 21 sitting days, all treaties which have been signed by the United Kingdom and which require ratification prior to entering into force for the United Kingdom. In addition, it is the practice to lay before both Houses of Parliament all treaties to which the United Kingdom intends to become a party by accession and, once signed, treaties binding upon the United Kingdom on signature.

This procedure is followed regardless of whether prior legislative approval is required before the United Kingdom can become party to a treaty.

The text of any treaty which has been signed by the United Kingdom or to which it intends to accede is published as a Command Paper, i.e., laid before Parliament. If the treaty to be laid is not yet binding on the United Kingdom as a contracting party (for example, because it is subject

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[23] See *supra* note 1.
[24] *See supra* note 10.
[25] *See supra* Section II.E.

to ratification or some other form of subsequent approval or has not yet formally entered into force), it is published in the Country Series or Miscellaneous Series of Command Papers. On the definitive entry into force for the United Kingdom of such a treaty, it will be republished and laid in the Treaty Series of Command Papers. A treaty to be laid which is binding on the United Kingdom as a contracting party as from the date of signature will be published immediately after signature in the Treaty Series. Treaties between EU Member States, or between one of the European Communities (with the Member States) and a non-member state/states, are published in the European Communities Series. As a matter of administrative convenience, certain classes of treaty will be published and laid in the Country or Miscellaneous Series by a government department other than the Foreign and Commonwealth Office, for example, International Labour Conventions (Department for Education and Skills), the Acts of the Universal Postal Union and International Telecommunication Union (Department of Trade & Industry); such treaties are of course also published in the Treaty Series by the Foreign and Commonwealth Office if the conditions for publication in that series are met.

2. *Classified Agreements*

There is in the United Kingdom no category of documents recognized as "classified agreements" which would require it to be brought to the attention of the legislature. If it is desired to keep confidential the content of any arrangement agreed between the United Kingdom and one or more other states, the instrument embodying that arrangement would be framed so as not to constitute a treaty required to be published and laid before Parliament, and registered with the United Nations pursuant to Article 102 of the United Nations Charter.[26]

3. *Registration of International Agreements*

Registration with the United Nations of any international agreement entered into by the United Kingdom since the entry into force of the UN Charter on October 24, 1945, is regarded as being a mandatory requirement in view of the terms of Article 102 of the United Nations Charter. This obligation is, of course, reiterated in Article 80(1) of the Vienna Convention on the Law of Treaties.

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[26] *See supra* note 5.

4. *Publication*

There is no specific publication that periodically lists and sets out the status of treaties in force; but details of treaty actions and communications (ratifications, accessions, withdrawals, reservations, objections to reservations, notifications of succession. . . .) are published quarterly in the Treaty Series under the title "Supplementary List of Ratifications, Accessions, Withdrawals, Etc." The Foreign and Commonwealth Office has the responsibility of ensuring that all agreements published in the Treaty Series are registered with the United Nations either by their own action or by that of another government department or international organization which assumes that responsibility.

I. *Incorporation into National Law*

Provisions of treaties to which the United Kingdom becomes a party do not automatically constitute part of the law of the land in the United Kingdom. If the law in force in the United Kingdom (whether statute law or common law) does not enable the United Kingdom to fulfil its obligations under any treaty to which it intends to become a party, the necessary legislation will be enacted prior to the United Kingdom giving its consent to be bound by the treaty. If, after the United Kingdom has become a party to a particular treaty, it is later discovered that it is not able to fulfil its obligations under the treaty, steps will be taken immediately to bring United Kingdom law into line with the treaty in question. Decisions or judgments of the European Court of Human Rights relating to the interpretation or application of the European Convention on Human Rights have occasionally led to a modification of particular aspects of United Kingdom domestic law to accord with such a decision or judgment; but such modifications are now likely to be much rarer following the entry into force in the United Kingdom of the Human Rights Act 1998.

When giving effect to a treaty, the treaty provisions themselves are not necessarily given the force of law in the United Kingdom, although this may be done where it is considered expedient. See, for example, the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968, which give the force of law in the United Kingdom to selected articles of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations respectively.

United Kingdom Overseas Territories are not covered by a treaty to which the United Kingdom is a party unless it is specifically extended to them. This is frequently done in the text of the treaty itself, or alternatively may be done at a later stage by naming the Territory in the

instrument of ratification, by naming it in a declaration to the depositary, or by concluding a bilateral Exchange of Notes. The United Kingdom undertakes an exercise of consultation with the Overseas Territory prior to extending the treaty. The necessary legislation may be enacted by Order in Council, or done at a local level if so desired.

The United Kingdom Government remains responsible for international relations. Nevertheless, it is recognized that the devolved administrations may have a policy interest in the matter, and therefore processes of consultation and provision of information ensure that views of the devolved administrations are heard and taken into account. In some instances, necessary legislation may have to be enacted by the body to which legislative powers in that particular field have been devolved.

J. *Legally Binding Decisions of International Organizations*

The United Kingdom regards legally binding decisions of international organizations as establishing international obligations for the United Kingdom as a member of the international organization in question. In most circumstances, the decisions will have been adopted pursuant to the provisions of a particular treaty, and their legally binding effect will derive from commitments contained in the treaty concerned (e.g., Article 25 of the Charter of the United Nations, Articles 14 and 15 of the Treaty on European Union); but the decisions themselves are not, in United Kingdom practice, viewed as treaty commitments for the purposes of internal procedures relating to international agreements. Legally binding decisions of international organizations may of course require for their implementation in the United Kingdom a modification or an addition to existing common law or statute, or the obtaining by the Crown of some new powers not already possessed by it. Primary legislation conferring powers upon the Crown to implement such legally binding decisions of international organizations may accordingly be enacted. Such legislation may:

1. be in general terms related to the implementation of any legally binding decision of an international organization; or
2. confer general powers to deal with a particular situation, the general powers being formulated in sufficiently broad terms to enable the United Kingdom to implement any legally binding decision of an international organization relating to the particular situation.

An example of the first category of legislation is the United Nations Act 1946, which enables Her Majesty – by Order in Council (a form of subordinate legislation) – to make such provision as appears to Her necessary

or expedient for enabling measures under Article 41 of the UN Charter, which was decided upon by the Security Council, and was to be effectively applied in the United Kingdom.[27]

An example of the second category is the Southern Rhodesia Act 1965 (now repealed in consequence of the Zimbabwe Act 1979), section 2 of which enabled Her Majesty by Order in Council to make such provision in relation to Southern Rhodesia, or persons or things in any way belonging to or connected with Southern Rhodesia, as appeared to Her to be necessary or expedient in consequence of any unconstitutional action taken therein.

K. *Implementation of Multilateral Conventions*

1. *Centralization*

The question whether, in the United Kingdom, implementation of multilateral conventions is centralized under the jurisdiction of a single office or given over to a particular government department dealing primarily with the subject matter of the convention is difficult to answer in the abstract. Generally speaking, although the Foreign and Commonwealth Office has an overall responsibility to ensure that international obligations of the United Kingdom are fully complied with, the implementation of multilateral conventions in the United Kingdom is not centralized under the jurisdiction of a single office, but devolves upon the government department or devolved administration that is primarily responsible for the negotiation or execution of the treaty. In particular cases, responsibility may be shared between several government bodies, in which case the measures to be taken in the implementation of the particular convention are determined by a process of consultation and coordination.

2. *Procedures*

Where the implementation of a multilateral convention requires legislation in the United Kingdom, responsibility for the implementing legislation falls in the first instance upon the government department or devolved administration having primary responsibility for the subject-matter of the particular convention; but in many, if not most, cases there will be a need for consultation and coordination on the content of any proposed implementing legislation.

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[27] Recent Orders in Council made under this statutory provision are the Liberia (United Nations Sanctions) Order 2001 (S.I. 2001 No. 947) and the Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (S.I. 2002 No. 111).

L. *Succession to Treaties*

1. *Former Soviet Union, Yugoslavia and Czechoslovakia*

United Kingdom practice in the case of the former Soviet Union, former Yugoslav and former Czechoslovak states was to confirm upon recognition that, as appropriate, it regarded treaties and agreements then in force to which the former States and the United Kingdom were parties as remaining in force between the United Kingdom and the new State. In addition, and in slower time, agreement was reached with many of the new States on a list of bilateral treaties that continued to apply.[28]

2. *Hong Kong*

Hong Kong became a Special Administrative Region of China (HKSAR) on July 1, 1997. The position regarding existing treaties and their subsequent application to Hong Kong was set out in the Joint Declaration of the United Kingdom and Chinese Governments. Four categories of treaties were provided for:

- Multilateral treaties to which the United Kingdom is a party and which had been extended to Hong Kong. Where China is also a party, the treaty would continue to apply to the HKSAR, with the question of which reservations should apply being resolved by the Joint Liaison Group. Where China is not a party, the treaty may remain implemented in the HKSAR.
- Multilateral treaties not extended to Hong Kong, and to which China is a party. The decision on extension to the HKSAR would be made by China after consultation with the HKSAR Government.
- Bilateral agreements between United Kingdom and a third country and extended to Hong Kong. Such agreements ceased to apply on handover. Steps were taken beforehand to replace these with separate bilateral agreements between Hong Kong and the third country on the same terms, to ensure continuity. China was consulted and involved in this process through the Joint Liaison Group.
- Bilateral agreements between China and a third country. The Joint Declaration provided that China may extend these to the HKSAR following consultation. Extension did not occur automatically, which

[28] *See, for example*, BYBIL 1992, at 636 (Croatia, Slovenia); BYBIL 1996, at 755 (exchange of notes with Czech Republic); BYBIL 1998, at 480–82 (FRY, Bosnia-Herzegovina, Slovenia); *see also* the *International Transport Workers Federation* case, BYBIL 1998, at 482–87.

accords with the high degree of autonomy to conclude agreements which was provided for the HKSAR by the Joint Declaration.[29]

Following handover, Hong Kong reverted to a reasonably straightforward position as a Chinese SAR, to which treaties subsequently concluded by China may be extended following consultation.

M. *Treaty Termination*

The power to make treaties necessarily embraces the power to terminate treaties whether pursuant to a termination clause contained in the treaty or otherwise. In principle, therefore, the power to terminate treaties is vested in the Crown and there is no formal constitutional or other requirement to obtain the approval of the legislature. In particular cases, however, the legislature may be informed of action which the Executive has taken, or proposes to take, to terminate a treaty pursuant to a termination clause contained in the treaty.

N. *Depositary Functions*

1. *Reservations*

The United Kingdom authorities maintain a clear distinction between the United Kingdom position as a party to a treaty (or prospective party to a treaty) and the United Kingdom position as a depositary of a treaty. In its capacity as a depositary, the United Kingdom applies the rules set out in Articles 76 and 77 of the Vienna Convention on the Law of Treaties together with the specific provisions contained in the treaties concerned. On occasion, however, difficulties may arise in determining whether a statement accompanying an instrument of ratification or accession does or does not purport to be a reservation.

2. *Succession*

In its capacity as depositary, the United Kingdom does not normally take any initiative in seeking to discover whether a newly independent state considers itself bound by a treaty which previously applied to the territory concerned, unless special circumstances arise in which it is necessary to know (for example, where a review conference is in contemplation).

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[29] Full consideration of the matter can be found at BYBIL 1997, at 529–538.

3. *Non-Recognized States or Regimes*

Since 1980, the United Kingdom has not accorded recognition to governments as distinct from states. However, as with reservations and succession questions, the United Kingdom – when acting as depositary – acts impartially in the discharge of its functions, despite non-recognition by the United Kingdom of a particular state or entity claiming to be a state. Signatures, instruments of ratification, accession, and other notices are accepted and treaty information notified in the usual way, although the channel of communication may be through an international organization or another state. In cases of this kind, the circular notification to other parties will contain a statement to the effect that the information is being transmitted by the Government of the United Kingdom "in its capacity as depositary" and that its action in no way implies recognition.

O. *International Agreements Concluded by Sub-National Entities*

Authority may be delegated to Overseas Territories in respect of which the United Kingdom has responsibility for international relations to conclude certain limited categories of treaties (for example, trade agreements relating solely to the treatment of goods, agreements of purely local concern with neighboring countries and agreements for technical assistance or of a cultural or scientific nature with neighboring countries). Such a delegation of authority is currently in force in relation to Bermuda.

Generally, the delegation of authority given is subject to the understanding that the territorial government will inform the United Kingdom Government in advance of any proposal for the exercise of the authority to conduct negotiations delegated to the territorial government, and will keep the United Kingdom Government fully informed of the progress of any such negotiations. It is also stipulated that the United Kingdom Government will inform the territorial government if it should appear that the actions or proposals of the territorial government in this field conflict with, or are likely to lead to conflict with, the international commitments, responsibilities or policies of the United Kingdom Government.

III. Basic Data and Documentation

A. *Selected Examples of Treaty Documents*

Annex A: Examples of the Queen's full power and governmental full power
Annex B: Examples of the Queen's Instrument of Ratification and a Governmental Instrument of Ratification
Annex C: Registration Certificate
Annex D: Depositary Circular Note
Annex E: Explanatory Memorandum
Annex F: Official Proclamations of Treaties
Annex G: Certificate of Exchange of Instruments of Ratification

B. *Statistical Data*

Annex H: Statistical Data

ANNEX A

1. QUEEN'S FULL POWERS DOCUMENT

ELIZABETH THE SECOND, BY THE GRACE OF GOD OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND OF HER OTHER REALMS AND TERRITORIES QUEEN, HEAD OF THE COMMONWEALTH, DEFENDER OF THE FAITH, &c., &c., &c. TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETINGS!

WHEREAS, for the better treating of and arranging certain matters which have come into discussion between our United Kingdom of Great Britain and Northern Ireland, and the French Republic relative to frontier controls and policing, co-operation in criminal justice, public safety and mutual assistance relating to the Channel Fixed Link. We have judged it expedient to invest a fit person with Full Power in respect of Our United Kingdom of Great Britain and Northern Ireland; Know ye, therefore, that We, reposing especial Trust and Confidence in the Wisdom, Loyalty Diligence and Circumspection of Our Right Trusty and Well-beloved Counsellor Kenneth Wilfred Baker, Esquire, a Member of Parliament, our Principal Secretary of State for the Home Department, have named, made, constituted and appointed, as We do by these Presents name, make, constitute and appoint him Our undoubted Commissioner, Procurator and Plenipotentiary in respect of Our United Kingdom of Great Britain and Northern Ireland; Giving to him all manner of Power and Authority to treat, adjust and conclude with such Minister or Ministers, Plenipotentiary or Plenipotentiaries as may be vested with similar Power and Authority on the part of the French Republic a Protocol concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance relating to the Channel Fixed Link and to sign the said Protocol in respect of Our United Kingdom of Great Britain and Northern Ireland; Engaging and Promising, upon Our Royal Word, that whatever things shall be so transacted and concluded by Our said Commissioner, Procurator and Plenipotentiary in respect of Our United Kingdom of Great Britain and Northern Ireland shall, subject if necessary to Ratification by Our United Kingdom of Great Britain and Northern Ireland, be agreed to, acknowledged and accepted by Our United Kingdom of Great Britain and Northern Ireland in the fullest manner, and that We will never suffer, either in the whole or in part, any person whatsoever to infringe the same, or act contrary thereto, as far as it lies in Our Power.

IN WITNESS WHEREOF We have caused Our Great Seal to be affixed to these Presents, which We have signed with Our Royal Hand.

GIVEN at Our Court of Saint James's the _____ day of _____ in the Year of Our Lord One thousand Nine hundred and Ninety-one and in the Fortieth Year of Our Reign.

2. GOVERNMENTAL FULL POWERS DOCUMENT

Mr. Andrew Carter, CMG, the United Kingdom Permanent Representative to the Council of Europe, is hereby granted full powers to sign, on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland, without reservation as to ratification, the Protocol of Amendment to the European Convention for the Protection of Animals kept for Farming Purposes, adopted at Strasbourg on 6 February 1992.

In witness whereof I, Jack Straw, Her Majesty's Principle Secretary of State for Foreign and Commonwealth Affairs, have signed these presents.

Signed and sealed at the Foreign and Commonwealth Office, London, the twenty seventh day of November, Two thousand and one.

[SEAL] (Signed) Jack Straw

ANNEX B

1. QUEEN'S INSTRUMENT OF RATIFICATION

ELIZABETH THE SECOND, BY THE GRACE OF GOD OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND OF HER OTHER REALMS AND TERRITORIES QUEEN, HEAD OF THE COMMONWEALTH, DEFENDER OF THE FAITH, &c., &c., &c. TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING!

WHEREAS a Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, was signed at Cotonou on the Twenty-third day of June in the Year of Our Lord Two thousand by the Plenipotentiaries of Us in respect of Our United Kingdom of Great Britain and Northern Ireland and the Plenipotentiaries of the Heads of the other Member States of the European Community, of the one part, and by the Plenipotentiaries of the Heads of certain African, Caribbean and Pacific States of the other part, duly and respectively authorised for that purpose;

NOW THEREFORE WE, having seen and considered the Agreement aforesaid, have approved, accepted and confirmed the same in all and every one of its Articles and Clauses, as We do by these Presents approve, accept, confirm and ratify it, for Ourselves, our Heirs and Successors; engaging and promising upon Our Royal Word that We will sincerely and faithfully perform and observe all and singular the things which are contained and expressed in the Agreement aforesaid, and that We will never suffer the same to be violated by any one or transgressed in any manner, as far as it lies in Our power. For the greater testimony and validity of all which, We have caused Our Great Seal to be affixed to these Presents, which We have signed with Our Royal Hand.

GIVEN at Our Court of Saint James's the Twelfth day of December in the Year of Our Lord Two thousand and one and in the Fiftieth Year of Our Reign.

2. GOVERNMENTAL INSTRUMENT OF RATIFICATION

WHEREAS Protocols Nos. I and II to the African Nuclear-Weapon-Free-Zone Treaty (The Treaty of Pelidaba) were opened for signature by the Governments of certain States at Cairo on 11 April 1996.

AND WHEREAS the said Protocols were signed on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland on 11 April 1996.

NOW THEREFORE The Government of the United Kingdom of Great Britain and Northern Ireland, having considered the Protocols aforesaid, hereby confirm and ratify Protocols I and II and undertake faithfully to perform and carry out all the stipulations therein contained, subject to the declarations contained in the accompanying Note.

IN WITNESS WHEREOF this Instrument of Ratification is signed and sealed by Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs.

Done at London the twenty-seventh day of February, Two thousand and one.

[SEAL]

(Signed)
Her Majesty's Principal Secretary of State
for Foreign and Commonwealth Affairs

ANNEX C

REGISTRATION CERTIFICATE

I HEREBY CERTIFY THAT The document hereto annexed contains a true and complete copy of an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania on Co-operation in the Field of Medicine and Public Health signed at Bucharest on 19 July 1991; and that the document includes all reservations and declarations made by the parties thereto.

I FURTHER CERTIFY THAT the Agreement came into force on 17 June 1992 in accordance with the Provisions of Article 4 thereof.

For the Secretary of State

Foreign and Commonwealth Office,
London,
5 March 1993

ANNEX D

DEPOSITARY CIRCULAR NOTE

Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs presents his compliments to Their Excellencies and Messieurs and Mesdames the Heads of Missions of Certain Governments with reference to:

the **Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter** (**London, Mexico City, Moscow and Washington, 29 December 1972**),

and has the honour to inform them that an instrument of Accession to the above Convention was deposited in London by the Government of Saint Vincent and the Grenadines on 24 October 2001.

Article XIX(2) states that the Convention shall enter into force on the thirtieth day after deposit by a Contracting party of its instrument of Ratification or Accession. Accordingly, the Accession of Saint Vincent and the Grenadines shall take effect on 23 November 2001.

A Status List incorporating this information is enclosed. Status information on the above and other agreements for which the United Kingdom is depositary may also be found on the Internet at the following address:

http://www.fco.gov.uk/directory/treaty.asp

The Secretary of State avails himself of this opportunity to express to Their Excellencies and Messieurs and Mesdames the assurance of his highest consideration.

FOREIGN AND COMMONWEALTH OFFICE
LONDON SW1
12 December 2001

[SEAL]

ANNEX E

EXPLANATORY MEMORANDUM FOR THE CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE MEMBER STATES OF THE EUROPEAN UNION[30]

Title of Convention

Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

Command Paper Number: Cm 5229
Subject Matter

The Convention on Mutual Assistance in Criminal Matters was signed by the Home Secretary on behalf of the United Kingdom on 29 May 2000. The Convention will enhance existing arrangements for cooperation between Member States' judicial and prosecuting authorities in the gathering of evidence for criminal investigations and prosecutions (mutual legal assistance).

The Convention applies to the United Kingdom. It does not apply to Gibraltar at present, though it will automatically apply upon extension of the 1959 Council of Europe Convention on Mutual Assistance to Gibraltar. It does not at present apply either to the Isle of Man or to the Channel Islands, although the provisions of the Convention enable it to be extended to those Islands once the 1959 Convention has been extended to them.

Ministerial Responsibility

The Home Secretary has responsibility for policy on matters relating to the criminal law (except in relation to Scotland and Northern Ireland) and takes the lead on judicial cooperating with other EU Member States within the framework of Title VI, in consultation as necessary with the Scottish Executive Ministers, the Northern Ireland Executive and other

[30] The texts of all treaties signed by the United Kingdom and those requiring accession are laid before Parliament as a matter of course and published as Command Papers: *see* Parts II.E and II.H above. They are laid before Parliament accompanied by an Explanatory Memorandum. In addition, statements may be made to Parliament by the responsible minister on the occasion of the signature of particular treaties.

colleagues. The Secretary of State for Foreign and Commonwealth Affairs also has a policy interest.

Policy Considerations

(i) General

The Convention is a significant development on the existing 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, to which all European Union Member States are Parties. One of the key new provisions is that, in general, assistance should be provided in accordance with the procedural requirements of the requesting Member State, whereas the presumption in the 1959 Convention is that the law of the requested Member State shall prevail. This change is designed to ensure that, so far as possible, evidence provided as a result of international cooperation is admissible in the requesting state. This should help United Kingdom law enforcement authorities to ensure that evidence obtained abroad is admissible in a United Kingdom court. The Convention also allows the service of procedural documents (eg summonses and judgments) directly from the issuing authority in one country to the person concerned in the second country, without being routed through Central Authorities as at present.

Other new measures include the use of live video link for witnesses to give evidence to an overseas court, the use of modern methods of investigation such as the interception of telecommunications, and a framework for the setting up of joint investigation teams, the use of controlled deliveries and covert surveillance. The Convention should make the use of such investigative techniques across national borders easier.

(ii) Financial

There are no significant financial implications from the provisions of this Convention.

(iii) Reservations and declarations

The UK made a declaration at time of signature. This reads:

"In the United Kingdom, Article 20 will apply in respect of interception warrants issued by the Secretary of State to the police service or HM Customs and Excise where, in accordance with national law on the interception of communications, the stated purpose of the warrant is the detection of serious crime. It will also apply to such warrants issued to the Security Service where, in accordance with national law,

it is acting in support of an investigation presenting the characteristics described in Article 20(1)."

We intend to re-confirm this declaration on ratification of the Convention.

The United Kingdom also intends to make a declaration, as provided for in Article 6(3) stating that letters of request shall be sent via our Central Authority. This will enable letters of request to continue to be routed centrally, since our prosecution authorities are not geared to receiving requests directly from overseas prosecutors. The United Kingdom will also make a declaration regarding Article 9(6) to require a prisoner being transferred from the United Kingdom to consent to his transfer. The United Kingdom also expects to make a declaration under Article 24(1) listing competent authorities in addition to those mentioned in our declaration on Article 24 of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters.

Implementation

Primary legislation will be required before the UK can adopt the Convention.

Consultations

The Home Office maintained regular contact with law enforcement agencies and major prosecuting agencies throughout the negotiation of this Convention. Colleagues in Scotland and Northern Ireland were also consulted fully throughout. The data protection provisions were discussed with staff at the Data Protection Registrar's Office. The Scrutiny Committees of both Houses have been provided with the appropriate Explanatory Memoranda whenever changes to the text have taken place. The Governments of Gibraltar, the Channel Islands and the Isle of Man were consulted on the provision on territorial application.

PRESENTED TO PARLIAMENT
AUGUST 2001

ANNEX F

OFFICIAL PROCLAMATION OF TREATIES[31]

1. AN EXAMPLE OF A BILATERAL TREATY PROCLAMATION

LAW

[SEAL]
Treaty Series No. 28 (2001)

AGREEMENT

between the Government of the
United Kingdom of Great Britain and Northern Ireland
and the Government of Canada

regarding the Sharing of Forfeited or Confiscated Assets or their Equivalent Funds

London, 21 February 2001
[The Agreement entered into force on 21 February 2001]

Presented to Parliament
by the Secretary of State for Foreign and Commonwealth Affairs
by Command of Her Majesty
May 2001

Cm 5180 £3.10

[31] In the United Kingdom, "official proclamation" of treaties is by means of publication in the Treaty Series. A copy of each Treaty Series publication is laid before Parliament and copies are put on sale to the public. They are also published on the Foreign and Commonwealth Office website at www.fco.gov.uk/treaty.

2. AN EXAMPLE OF A MULTILATERAL TREATY PROCLAMATION

This Charter was previously Published as Miscellaneous No. 16 (2000) Cm 4750

SOCIAL

[SEAL]
Treaty Series No. 48 (2001)

European Charter
for
Regional or Minority Languages

Strasbourg, 5 November 1992

[The United Kingdom instrument of ratification was deposited on 27 March 2001 and the Charter entered into force for the United Kingdom on 1 July 2001]

Presented to Parliament
by the Secretary of State for Foreign and Commonwealth Affairs
by Command of Her Majesty
October 2001

Cm 5269

£5.00

ANNEX G

CERTIFICATE OF EXCHANGE OF INSTRUMENTS OF RATIFICATION

The Undersigned having met together for the purpose of exchanging the Instruments of Ratification of a Convention relating to the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

I sottoscritti the si sono incontrati al fine di scambiare gli strumenti di ratifica delta Convenzione riguardante l'esenzione dalla Doppia Tassazione e la Preven zione dell'Evasione Fiscale concer nente l'imposta sul reddito

which was signed at Pallanza on the 21st day of October, 1988, by representatives of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Italian Republic;

the is stata firmata a Pallanza it 21 ottobre 1988 da rappresentanti del Governo del Regno Unito delta Gran Bretagna e dell'Irlanda del Nord, e del Governo Italiano.

and the respective Ratifications of the said Convention having been found in good and due form, the said exchange took place this day.

Riconoscendo the le rispettive rati fiche delta sopracitata Conven zione sono nella forma corretta e dovuta, hanno proceduto allo scambio degli strumenti di ratifica.

In witness whereof the Undersigned have signed the present Certificate.

Predendo atto di quarto sopra, i sottoscritti hanno firmato it pre sente documento di ratifica, in

Done in duplicate at London the 30th day of November, 1990.

duplicato, il giorno 30 November 1990.

For the Government of the United Kingdom of Great Britain and Northern Ireland:

Per it Governo del Regno Unito della Gran Bretagna e dell'Irlanda del Nord:

[signed]

[signed]

For the Government of the Italian Republic:

Per it Governo Italiano:

[signed]

[signed]

ANNEX H

STATISTICAL DATA

1. Number of Agreements in Force

The United Kingdom has so many treaties covering such a long period that it is impossible to give a figure. *An Index of British Treaties* from 1101 to 1968 was published in 1970[32] and includes one volume which constitutes the subject index; this volume has 386 pages of double columns. A fourth volume covering the period 1969–1988, which runs to 452 pages, was published in 1991.[33] This volume also updates the information on the earlier volumes. The *Treaty Series* dating from 1892 now runs to 126 volumes of texts (to end 2000). The *Annual Treaty Index*, published as a Command Paper in the Treaty Series, is a numerical and by-subject listing of Treaty Series titles published in the preceding year.

2. Number of Agreements Approved by the Legislature

See Part II.C above. Approval by the legislature is not strictly a constitutional requirement.[34] A certain proportion (considerably less than half) of agreements require legislation or subordinate legislation to give effect to them. This legislation or subordinate legislation is drafted and put through the various Parliamentary processes by the department or devolved administration concerned with the subject matter of the treaty prior to the United Kingdom giving its consent to be bound by the treaty.

3. Number of Agreements Per Year

Basing calculations on the number of treaties published in the Treaty Series in the last ten years, the United Kingdom concludes an average of around 100 agreements per year. This figure includes minor agreements and amendments, but excludes treaties concluded by the European Communities as such (that is, without the participation of the member states).

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[32] *See* Bibliography, *infra*.

[33] *See* Bibliography, *infra*.

[34] This is true although legislature approval may be a statutory requirement, as in the case of treaties increasing the powers of the European Parliament. *See supra* note 12.

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CHAPTER TWENTY

NATIONAL TREATY LAW AND PRACTICE: UNITED STATES

Robert E. Dalton

I. Introduction

The Constitution of the United States was adopted at Philadelphia in 1787. A terse document, it consists of seven articles – four of which pertain to the treaty power. Article I vests all legislative powers in a Congress; section 10 of that Article prohibits any state from entering into a "treaty, alliance, or confederation." Article II vests the executive power in a President. Sections 2 and 3 assign certain powers to the President, including the "power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Article III vests the judicial power of the United States in the courts; section 2 provides "[t]he judicial power shall extend to all cases . . . arising under . . . treaties made, or which shall be made" under the authority of the United States. Article VI, paragraph 2, known as the supremacy clause, provides "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby . . ."

The members of the Federal Convention designed the Constitution to include checks and balances to enable each of the branches to protect itself against encroachments by one or both of the other branches. Indeed, the very purpose of adopting the Constitution was to replace a failed governmental structure under the 1777 Articles of Confederation. This ineffectual document created no executive power, and all legislative and treaty-related power was vested in the Continental Congress and the states.

Given the concise nature of the relevant constitutional provisions and the lack of any experience in dealing with the respective roles of the Executive Branch and the Congress under the old system, the treaty-making provisions of the Constitution constituted a *tabula rasa* in a number of respects.[1] Over the years, the United States has developed a variety

[1] The longtime editor of *The Constitution of the United States: Analysis and Interpretation*,

of means for producing international agreements. Knowledge of this evolving practice in the realm of treaty-making over the past two centuries is necessary to fully understand the current treaty law of the United States. Many of the sections that follow set out that practice to illuminate the constitutional provisions and to demonstrate how the law is being applied at the beginning of the 21st century.

II. U.S. Treaty-Making Law and Practice

A. *What Is an International Agreement?*

For international law purposes, a *treaty* is an international agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.[2] It does not matter whether a treaty is embodied in a single instrument, or in two or more related instruments or whatever its particular designation may be.

From a constitutional law perspective, a treaty is an international agreement (regardless of title, designation, or form) whose entry into force with respect to the United States takes place only after the Senate has given its advice and consent pursuant to Article II, section 2, clause 2, of the Constitution and the President has signed the instrument of ratification or accession on behalf of the United States. A treaty must, of course, deal with matters of international concern and not contravene the Constitution of the United States.[3]

Edwin S. Corwin, observed: "[T]he Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy." Edwin S. Corwin, *The President: Office and Powers, 1787–1984*, 209 (1984).

[2] The Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, para. 1(a), *1155 U.N.T.S. 331*. Although not a party, the United States accepts that the Convention, in most respects, is declaratory of customary international law. *See, e.g.*, S. Exec. Doc. L, at I (1971) (Letter of Submittal from the Secretary of State to the President) ("Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice"). The limitation of the definition of treaty to international agreements "concluded between States" in the 1969 Convention was modified to include agreements concluded by international organizations in the corresponding article of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. Doc. A/CONF.129/15, 25 *I.L.M.* 543 (1986).

[3] The classic formulation of this principle may be found in the remarks of Charles Evans Hughes before the American Society of International Law:

In addition to government-to-government agreements, agency-to-agency agreements, such as a mapping agreement between the Coast and Geodetic Service of the United States and the Hydrographic Office of the Navy Department of Sri Lanka, are generally considered to be international agreements for the purposes of reporting under the Case-Zablocki Act (which requires that the texts of international agreements other than treaties be transmitted to Congress) and printing in the *United States Treaties and Other International Acts* series. However, these rules will not necessarily apply to implementing agreements. For example, a program agreement under an umbrella agreement, such as a science and technology agreement that established a series of weather research projects involving tracing of upper-air currents with balloons, might be reported and published depending on the significance of the program and its duration. However, agreements with respect to individual launches would not be.

With respect to government-to-government agreements, the United States, like most other countries, has a long-standing practice of agreeing to documents that are non-binding from a legal perspective. Two of the better known examples from United States practice during the first half of the last century are the 1907–1908 "Gentlemen's Agreement" between the United States and Japan relating to immigration[4] and the Joint Declaration made on August 14, 1941, by President Franklin Roosevelt and Prime Minister Churchill, a document more commonly known as the Atlantic Charter.[5]

Over the last decade, the number of such documents has shown a marked increase. The lawyer to whom such instruments are brought for review needs to alert a client that even though the document does not give rise to legal obligations, it may give rise to political ones. In commenting on bilateral memoranda of agreement between the Governments of Israel and the United States, former Secretary of State Henry Kissinger noted: "The fact that many provisions are not by any standard international commitments does not mean, of course, that the United States

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> I think it is perfectly idle to consider that the Supreme Court would even hold that any treaty made in a constitutional manner in relation to the external concerns of the nation is beyond the power or the sovereignty of the United States or invalid under the Constitution of the United States where no express prohibition of the Constitution has been violated. . . . The [treaty-making] power is to deal with foreign nations with regard to matters of international concern.

1929 *Proc. Am. Soc'y Int'l L.* 194 (1929).

One has only to look at *Treaties in Force* or the *United Nations Treaty Series* to appreciate that the scope of such matters has expanded over the nearly seven decades since the statement was made. On the constitutional point, *see Reid v. Covert*, 354 U.S. 1 (1957).

[4] [1924] 2 *Foreign Relations of the United States* 339–74.

[5] 55 Stat. 1603; Executive Agreement Series 236.

is morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and they engage the good faith of the United States so long as the circumstances that gave rise to them continue. But they are not binding commitments of the United States."[6]

Although oral agreements are unusual and are not governed by the Vienna Convention on the Law of Treaties, such agreements are concluded from time to time. United States law requires that such agreements be reduced to writing and reported to the Congress in accordance with the Case-Zablocki Act.[7] Unilateral acts, however, are not considered to be international agreements by the United States.

B. *Executive Authorization and Approval Procedures*

In 1955, the Department of State issued Department Circular No. 175 on the negotiation and signature of treaties and other international agreements. The circular, which has been amended on several occasions, currently appears as Chapter 700 in Volume XI of the Department of State's *Foreign Affairs Manual*.[8] While several sections of Circular 175 address the reporting requirements of the original Case-Zablocki Act, the role of the Department of State in coordinating the treaty function is not addressed in detail. Moreover, as some other agencies saw it, the Department's regulations rested solely on the Department's authority and had no binding force outside the Department of State.

When the Congress reviewed compliance with the original Case-Zablocki Act of 1972, it found that the State Department did not have at its disposal the necessary authorities to ensure better reporting. To remedy that problem, the Congress adopted the first in a series of amendments that strengthened the Department's coordination function. The most important changes were: (1) including a provision stipulating that the Secretary of State had broad power to control the conclusion of an agreement by another department or agency even when that other department or agency had independent statutory authority to conclude agreements of a specific kind; (2) giving the Secretary of State power to determine for and within the Executive branch whether an arrangement

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[6] *Dep't St. Bull.*, Oct. 27, 1975, at 609, 612–13. For a general treatment of the subject, see Marian Nash (Leich), "International Acts Not Constituting Agreements: International Documents of a Non-Legally Binding Character," 88 *Am. J. Int'l L.* 515, 516–19 (1994).

[7] 1 U.S.C. § 112(b). The language concerning oral agreements was added after the original enactment of the Act.

[8] The 1974 revision may be found in A.W. Rovine, *Digest of United States Practice in International Law 1974*, 199–215 (1975).

constitutes an international agreement within the meaning of the Act; and (3) providing that the President, through the Secretary of State, would promulgate such rules and regulations as might be necessary to carry out the provisions of the Act.[9] Those rules and regulations were issued on July 13, 1981.[10]

Section 181.4 of the regulations provides that the Secretary of State is responsible, on behalf of the President, for ensuring that all proposed international agreements of the United States are fully consistent with U.S. foreign policy objectives. Any agency wishing to conclude an international agreement must transmit a draft text or summary of the proposed agreement, a precise citation of the constitutional, statutory, or treaty authority for such agreement, and other background information as requested by the Department of State to the interested bureau or office in the Department of State, or to the Office of the Legal Adviser, for consultation pursuant to Section 181.4. The section continues:

> If a proposed agreement embodies a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in an approved budget, the agency proposing the agreement shall state what arrangements have been planned or carried out concerning consultation with the Office of Management and Budget for such commitment. The Department of State should receive confirmation that the relevant budget approved by the President provides or requests funds adequate to fulfill the proposed commitment, or that the President has made a determination to seek the required funds.[11]

In order to avoid duplication, an exception to the procedures set out above is provided in subsection g:

> The consultation requirement shall be deemed to be satisfied with respect to proposed international agreements of the United States about which the Secretary of State (or . . . designee) has been consulted in his capacity as a member of an interagency committee or council established for the purpose of approving such proposed agreements. Designees of the Secretary of State serving on any such inter-agency committee or council are to provide as soon as possible to the interested office or bureaus of the Department of State and to the Office of the Legal Adviser copies of draft texts or summaries of such proposed agreements and other background information as requested.[12]

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[9] Foreign Relations Authorization Act, Fiscal Year 1979, § 708, Pub. L. No. 95–426, 92 Stat. 993 (1978).

[10] 22 C.F.R. pt. 181 (1997).

[11] *Id.* § 181.4(e).

[12] *Id.* § 181.4(g).

C. *Legislative Approval*

Most agreements entered into by the United States do not require approval of the legislature prior to ratification or other form of acceptance. A relatively small number of these agreements are sole executive agreements entered into by the President under certain independent presidential powers – for example, the Commander-in-Chief power under the Constitution. At the same time, if the agreements relate to matters solely within the power of the legislature, the President will need approval unless the Congress has delegated the power to make agreements in those fields or is considered to have acquiesced over a long period of time in allowing the President to conclude certain agreements without the necessity of seeking specific approval.[13]

1. *Preauthorization*

Even though the practice of delegating authority to conclude agreements dates back to 1792, the extent to which the Congress has provided that the President, the Executive Departments, or agencies may or should conclude international agreements is not widely recognized. Some evidence of the scope of delegations may be gleaned from a review of the entries in the 2004 general index to the *United States Code Annotated* under the heading "treaties," which extend for more than 25 column inches. A more comprehensive search would likely demonstrate that there are literally hundreds of such authorizations. They include agreements limiting importation of agricultural commodities into the United States, agricultural research and extension programs, air commerce and safety, agreements by the Coast Guard establishing ice-breaking facilities in waters other than those subject to the jurisdiction of the United States, and negotiations between the President of the United States and the Government of Canada on the Trans-Canadian pipeline. Agreements concluded under these delegations are sometimes referred to as Congressional-Executive Agreements.

2. *Preauthorization, Subject to Review or Possible Further Action*

Statutes authorizing negotiation of certain types of agreements require the transmittal of those agreements to the Congress prior to their entry into force; others require specific approval of the texts. For example, the Atomic Energy Act of 1954, as amended, requires the transmittal of nuclear cooperation agreements to Congress for 90 continuous session

[13] *See infra* note 65 discussion of *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

days to afford it an opportunity to disapprove by joint resolution. The first 30-day period is for consultation with the foreign affairs committees "concerning the consistency of the proposed agreement" with the requirements of the Atomic Energy Act; the next 60-day period is for the Congress to consider whether to adopt a joint resolution disapproving the agreement.[14] The Fishery Conservation and Management Act of 1978, as amended, requires a 60-day waiting period for international fisheries agreements, but no specific approval.[15] (In the application of that statute, however, the Congress has frequently approved agreements in lieu of waiting for the running of the prescribed period.) The Social Security Amendments of 1977 establish a similar procedure for social security agreements between the Social Security Administration and foreign social security systems.[16] Under the International Development and Food Assistance Act of 1978, as amended,[17] and the Enterprise for the Americas Initiative Act of 1992,[18] international agreements concerning or resulting in debt relief must lie before the Congress for 30 days before entry into force. A more limited provision of this character appears in the National Aeronautics and Space Administration Authorization Act of 1988, which required "the Intergovernmental Agreement currently being negotiated between the United States Government" and other governments, as well as any "memoranda of understanding being negotiated between counterpart agencies in Canada, Japan, and Europe concerning the detailed design, development, construction, operation, or utilization of the space station," to be submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Science, Space, and Technology of the House of Representatives 30 days prior to their entry into force.[19]

3. *Statutory Approval of Agreements That Have Not Previously Been Authorized*
Congress, in the exercise of its legislative function, may authorize approval of other agreements negotiated by the President where he or she cannot rely on independent presidential constitutional powers. A significant example is Public Law 92–448, a Joint Resolution that approved and authorized the President to accept the Interim Agreement Between the

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[14] 42 U.S.C.A. §§ 2153 & 2159 (g), (h), & (i) (1994 & Supp. 1997).
[15] 16 U.S.C.A. § 1823 (Supp. 1997).
[16] 42 U.S.C. § 433 (1994).
[17] 22 U.S.C. § 2395a (2) (1994).
[18] Enterprise for the Americas Initiative Act of 1992, § 2, Pub. L. No. 102–532, 106 Stat. 3509 (1992).
[19] National Aeronautics and Space Administration Authorization Act, § 112 Pub. L. No. 100–147, 101 Stat. 860 (1987) (codified at 42 U.S.C. § 2451 note (1994)).

United States and the [former] USSR on Certain Measures with Respect to Limitation of Strategic Offensive Arms.[20] Section 2 of the law embodies the standard model: "The President is hereby authorized to approve on behalf of the United States the interim agreement between the United States of America and the Union of Soviet Socialist Republics on certain measures with respect to the limitation of strategic offensive arms, and the protocol related thereto, signed at Moscow on May 26, 1972. . . ."[21]

A more recent example dates from 1992, when a number of international organizations based in Washington approached the State Department about concluding an agreement on state and local taxation of foreign employees of international organizations. The initiative was a result of the State of Maryland's amendment of its income tax laws, with retroactive effect. The international organizations pointed out that foreign employees of the World Bank were, by treaty, already exempt. They also noted that non-citizen employees were exempt from U.S. Federal tax on income earned from the organizations that employ them, but that the International Organizations Immunities Act, on which the Federal tax exemption was based, did not extend to state taxation.

While the President has no independent constitutional authority to exempt non-citizen employees working for international organizations from state income taxes, the Congress has such power, and the President and the Senate acting pursuant to the treaty power have such power.[22] Therefore, as a first step, an agreement between the United States and the interested international organizations was negotiated. It was then decided to seek authorization from the Congress for the President to conclude such an agreement (rather than to send the text to the Senate for advice and consent to ratification). In April 1994, the Congress authorized the President "to bring into force for the United States the Agreement on State and Local Taxation of Foreign Employees of Public International Organizations, which was signed by the United States on April 21, 1992. . . ."[23] On May 14, 1994, he did so.

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[20] Pub. L. No. 92–448, 86 Stat. 746 (1972).

[21] Pub. L. No. 92–448, § 2, 86 Stat. at 747.

[22] *See, e.g.*, Articles of Agreement of the International Monetary Fund, December 27, 1945, Art. IX, § 9(b), 60 Stat. 1401, 1414, 2 *U.N.T.S.* 40, 76 and Articles of Agreement of the International Bank for Reconstruction and Development, December 27, 1945, Art. VII, § 9(b), 60 Stat. 1440, 1458, 2 *U.N.T.S.* 134, 182.

[23] Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, § 421, Pub. L. No. 103–236, 108 Stat. 382, 456 (1994).

4. *Fast Track: Special Procedures for Trade Agreements*

Under Article I, section 8, clauses 1 and 3 of the Constitution, the Congress has power to "[l]ay and collect Taxes, Duties, Imposts and Excises" and "to regulate Commerce with foreign Nations." During the 1930s, the Congress passed reciprocal trade agreements acts that gave the President authority to negotiate tariff reductions with U.S. trading partners. The Trade Act of 1974, as amended, and the Omnibus Trade and Competitiveness Act of 1988 contained special provisions relating to Congressional approval of trade agreements negotiated by the President. They required that the President notify the Congress concerning the initiation of negotiations and submit the text of any concluded agreements for legislative approval. The "fast track" procedures provided for in the legislation required each House to vote to accept or reject the proposal within 60 legislative days. No amendments were permitted. The authority under the legislation described above expired in 1994.

Fast track authority was restored on August 6, 2002, when President George W. Bush signed the Trade Act of 2002. Title XXI of the Act, entitled the Bipartisan Trade Promotion Authority Act of 2002, establishes a framework for trade agreements concluded under that authority and their review by the Congress.[24] Section 2102 establishes overall trade negotiating objectives of the United States for agreements subject to the fast track procedures included in Section 2103, as well as specific objectives with respect to seventeen subject areas: trade barriers and distortions; trade in services; foreign investment; intellectual property; transparency; anti-corruption; improvement of the WTO and other multilateral trade agreements; regulatory practices; electronic commerce; reciprocal trade in agriculture; labor and the environment; dispute settlement and enforcement; WTO extended negotiations regarding trade in civil aircraft; trade remedy laws; border taxes; textile negotiations; and the worst forms of child labor. The section also provides for extensive consultations with congressional advisers.

Section 2103 authorizes the President to enter into trade agreements regarding tariff and non-tariff barriers under the fast-track provisions established in the 1974 Trade Act described above before June 1, 2005, or before June 1, 2007 should the President request an extension to that date and neither House of the Congress adopt an "extension disapproval resolution" before June 1, 2005. Section 2104 establishes general consultation requirements with the Congress before the President commences negotiations, as well as special consultations prior to negotiations on

[24] Pub L No. 107–210, 116 Stat. 933.

imports of agricultural products, fish or shellfish, and textiles. In addition, Section 2104 calls for the President to provide the International Trade Commission with the details of an agreement under negotiation at least 90 days before he enters into it in order that the Commission can assess the likely impact of the agreement on the United States and submit a report of its assessment to the President and the Congress. Finally, Section 2105 requires the President to notify the Congress 90 days before he enters into an agreement under the trade promotion authority and to provide the Congress with documents explaining changes that need to be made in existing law to permit the United States to comply with the agreement.[25]

The first agreements concluded under the authority of the 2002 Act were the Free Trade Agreements between the United States and Singapore and the United States and Chile. They entered into force on January 1, 2004. Free Trade Agreements with Australia and Morocco have also been approved by the Congress under the procedures established by the Act.[26]

D. *Reservations*

While the Congress, in approving an international agreement by statute, may include reservations, most reservations are made by the Senate when it is sharing the treaty-making power with the President under Article II, section 2, clause 2 of the Constitution.

The treaty power clause of the Constitution does not mention reservations. However, the Senate has exercised the power of attaching conditions to its resolutions of advice and consent to treaties since 1795.[27] The conditions included by the Senate in its resolutions of advice and consent to ratification fall into four general categories: reservations, understandings, declarations, and provisos. A *reservation* is defined in the Vienna Convention on the Law of Treaties as "a unilateral statement, however phrased or named, made by a State when . . . signing [or] ratifying . . . a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[28] Clearly, an amendment of a treaty is a reservation under that definition.

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[25] *See* Annex C *infra*.

[26] The status of U.S. trade agreements can be ascertained by visiting http://www.ustr.gov.

[27] In 1795 the Senate considered the Jay Treaty with Great Britain. A number of senators insisted that part of one article be suspended. By a vote of 20–10, the Senate provided its advice and consent subject to that condition. Great Britain accepted suspension of the article, and the President thereafter ratified it. Samuel B. Crandall, *Treaties: Their Making and Enforcement* 81, 82 (2d ed. 1916).

[28] Vienna Convention on the Law of Treaties, Art. 2, para 1(d), 1155 *U.N.T.S.* 331.

Other conditions, such as declining to accept the obligations in a given article, also constitute reservations if they modify the legal effect of the treaty. An *understanding* differs from a reservation in that it is a statement or other declaration relevant to the application or interpretation of the treaty that is not intended to exclude or modify the provisions of a treaty.[29] *Declarations* are usually statements of the Senate's position, opinion or intentions on matters relating to issues raised by a particular treaty but not to its specific provisions. However, in practice, the distinction between an understanding and a declaration is frequently blurred. A *proviso* is a condition that is intended to operate solely in the domestic sphere. Provisos often specify that the President should not deposit an instrument of ratification of a treaty until the necessary implementing legislation has been enacted. If the Senate includes in its resolution of ratification a reservation or a statement of understanding or a declaration ascribing a particular meaning to a treaty and the President ratifies the treaty subject to those conditions, the treaty becomes effective in domestic law subject to those conditions. Of course, whether or not the Senate has attached reservations to its advice and consent, the President is free to change his mind and decide not to ratify a treaty.

Recent examples of Senate amendments that materially changed the texts agreed to by the parties include those made to the 1977 Panama Canal Treaty[30] and to the Supplementary Treaty Concerning the Extradition Treaty of July 8, 1972 between the United States and the United Kingdom.[31] More limited and finely tuned conditions, some in the form of understandings, appear in the Senate's resolutions of advice and consent to other bilateral treaties, such as the 1991 Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income between the United States and Barbados.[32] Although it is frequently said that reservations are not made to bilateral treaties, a recent study shows that the Senate made reservations to thirteen bilateral treaties between 1975 and 1985.[33]

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[29] *See, e.g.*, John A. Boyd, *Digest of United States Practice in International Law 1977*, 375–376 (1979) (October 27, 1977 Memorandum by Robert G. Beckel, Deputy Assistant Secretary for Congressional Relations, Department of State to Mary Jane Checchi, staff attorney, Senate Committee on the Judiciary); Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate* 97 (1993).

[30] Panama Canal Treaty, 33 U.S.T. 39 (T.I.A.S. 10030).

[31] *Supplemental Treaty Concerning the Extradition Treaty Between the Government of the United States and the Government of the United Kingdom and Northern Ireland (June 8, 1972), reprinted in* 24 *ILM* 1105 (1985) (T.I.A.S. 12050).

[32] Exec. Rpt. No. 103–18.

[33] Replies of the United States to the questionnaire on the law and practice relating to reservations to treaties received by the United States Mission to the United Nations

A reservation to a bilateral treaty requires acceptance by the other party.[34]

Reservations in respect of multilateral treaties raise different issues. Since it is much more difficult to get all the parties to a multilateral treaty to agree to an amendment, it is not practicable for the Senate to try to amend multilateral treaties in connection with the advice and consent process. On the other hand, the Senate frequently makes reservations to multilateral treaties and has on several occasions in recent years emphasized its opposition to the conclusion of multilateral treaties that prohibit reservations. For example, Article XXII of the Chemical Weapons Convention[35] prohibits reservations to the Convention. The first of 28 conditions that the Senate incorporated in its resolution of advice and consent to ratification read as follows:

> (1) Effect of Article XXII – Upon the deposit of the United States instrument of ratification, the President shall certify to the Congress that the United States has informed all other States Parties to the Convention that the Senate reserves the right, pursuant to the Constitution of the United States, to give its advice and consent to ratification of the Convention subject to reservations, notwithstanding Article XXII of the Convention.[36]

Condition 17, entitled "Constitutional Prerogatives," included findings and a Sense of the Senate resolution on its constitutional right to make reservations to treaties.[37]

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from the Secretary-General on December 27, 1995. The replies were transmitted by note from the United States Mission to the Secretary-General of the United Nations on March 18, 1996. Annex I to the note contained materials dealing with reservations to bilateral treaties (question 1.4).

[34] The issue was specifically addressed in condition III of the Senate's draft resolution of advice and consent to the SALT II Treaty: "The advice and consent of the Senate to ratification of the SALT II Treaty is further subject to the condition that, in connection with the exchange of instruments of ratification pursuant to Article XIX of the Treaty, the President shall obtain the agreement of the Union of Soviet Socialist Republics to" two reservations that followed. S. Rep. No. 96–14, at 78 (1979).

Such acceptance is generally manifested in the protocol of exchange of instruments of ratification. An example is the protocol of exchange of instruments of ratification regarding the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal and the Panama Canal Treaty, 33 U.S.T. 31–38 (1979–1981). *See also* Sir Robert Jennings and Sir Arthur Watts, I *Oppenheim's International Law* 1232 & n. 3 (9th ed. 1992) ("Thus, for instance, when the Senate of the USA on 20 December 1900, in consenting to the ratification of the Hay-Pauncefote Treaty, added amendments which modified it, the UK did not accept the amendments, and considered the Treaty to have fallen to the ground. By contrast, when the Senate adopted a similar course in relation to the Supplementary Extradition Treaty with the UK concluded in 1985, the UK chose to agree to the newly proposed terms and the Treaty, as amended, duly entered into force.").

[35] Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (done at Paris, Jan. 13, 1993).

[36] 143 *Cong. Rec.* S3651–57 (daily ed., Apr. 24, 1997).

[37] *Id.* at S3656.

While reservations to multilateral treaties may be made at the time of signature or at ratification, the United States generally makes reservations only at the latter stage. Reservations of other countries to multilateral treaties are not sent to the Senate for its advice and consent. Under the regime of reservations established by the Vienna Convention on the Law of Treaties, a contracting State can accept or object to reservations made by another Party. If a State has not expressly accepted a reservation, it will be presumed, under Article 20 of the Vienna Convention, to have done so if it has not objected within twelve months after it was notified by the depositary of the reservation or by the date on which it expressed its consent to be bound, whichever is later.[38] If the other party objects, it may oppose the entry into force of the treaty between itself and the reserving State.

E. *Consultation with the Legislature*

The Founding Fathers clearly intended the "advice and consent" language in Article H, section 2, clause 2 of the Constitution to require that the President consult with the Senate prior to the opening of treaty negotiations. In August 1789, President Washington met twice with the Senate to consider the terms of a treaty to be negotiated with the Southern Indians. The meetings were regarded as unsatisfactory by both sides, and the President decided never to repeat the process. For some time thereafter, the President sought advice by message, but the general practice of consulting the Senate prior to the opening of negotiations was abandoned by the end of Washington's second Administration. The "advice and consent" language in the Constitution's treaty clause is generally understood today to describe the process of Senate approval of a

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[38] Although not a party to the Vienna Convention, the United States applies the 12-month rule in its practice. On June 11, 1986, Deputy Legal Adviser Mary Mochary testified at a hearing before the Senate Foreign Relations Committee on the Vienna Convention on the Law of Treaties. In her discussion of the reservations articles she noted: "The right of other states to object to a reservation and to refuse treaty relations with the reserving state is maintained in Article 20. If a state does not object to a reservation within 12 months, the reservation operates between the reserving state and the non-objecting state."

In connection with the hearing, the Committee subsequently submitted a number of questions to the Department of State. One of the questions was: "Are there any conflicts between treaty law and practice as set out in the Convention and present U.S. law and practice?" The Department replied: "Although there are a few differences on matters of detail, there are no conflicts between treaty law and practice as set out in the Convention and present U.S. law and practice." For additional information concerning the 1986 hearings on the Vienna Convention on the Law of Treaties, *see* Marian Nash (Leich), I *Cumulative Digest of United States Practice in International Law 1981–1988*, 1229–39 (1993).

treaty following its signature on behalf of the United States and the President's transmittal of the text to the Senate for consideration prior to its ratification.

The abandonment of the earlier practice does not mean that there is an absence of communications between the Executive Branch and the Senate or both Houses of the Congress prior to the conclusion of an international agreement on behalf of the United States. In connection with its consideration of a particular treaty, the Senate may advise the Executive of provisions that it would like to see included in similar or "follow-on" treaties. It may also adopt resolutions specifying provisions that it believes should or should not be included in treaties under negotiation, appoint groups of Senators to monitor the status of specific negotiations and to make reports to the Senate, and require Executive Branch reports on matters relevant to application of treaties or their implementation. The House of Representatives may also pass resolutions, hold hearings, require reports, and otherwise communicate its views in respect of international agreements to the Executive Branch.

F. *Consultation with the Public*

The Department of State's regulations on treaties provide that "where, in the opinion of the Secretary of State or his designee the circumstances permit, the public be given an opportunity to comment on treaties and other international agreements."[39] Model tax treaties, model extradition treaties, and a number of draft treaties in the private international law area have been published in the *Federal Register* for comment.[40]

One of the most extensive areas of public participation is in the field of private international law treaties.[41] The Secretary of State's Advisory Committee on Private International Law was established in 1964 in order to serve as a forum for obtaining expert advice and guidance from national legal organizations in the United States with expertise in the development of law; other private sector interests that were likely to be affected by international unification or harmonization in areas of the law in which they had a particular interest; and legal experts from the academic world who were abreast of needs and trends in the law and could identify possible changes in the law and assess proposals to improve the

[39] § 720.2(d). For text cite, see note 6, *supra.*

[40] E.g., on November 12, 1976, the Department of State published a draft bilateral extradition treaty for that purpose. 41 Fed. Reg. 51,897–51,899 (1976).

[41] Peter H. Pfund, "Contributing to the Progressive Development of Private International Law: The International Process and the United States Approach," 249 *Recueil des Cours*, 52–57 *passim* (1994–V).

law in those areas. In order to participate effectively in work at the international level, the Committee established a series of study groups to evaluate agreements being developed.[42]

The meetings of the Advisory Committee and of the study groups are subject to the provisions of the Federal Advisory Committee Act, open to the public, and announced in advance in the *Federal Register*. The objective is to ensure that no interest is denied an opportunity to be heard during the negotiating process.

In other contexts, industry representatives or members of the public serve as members of U.S. delegations to international meetings at which treaties are being negotiated.[43] Often participation is coordinated through federally chartered committees of Executive Branch Departments or agencies similar to the Advisory Committee on Private International Law. For example, the Department of State's Advisory Committee on International Communications and Information Policy arranges for expert study groups to prepare recommendations for positions that the United States will take in upcoming International Telecommunication Plenipotentiary Conferences and in World Radio Conferences. Some members of the study groups serve as members of U.S. delegations. In aviation negotiations and in negotiations in the international labor field,[44] there is a long-standing practice of private sector participation. Similarly, the negotiation of the Law of the Sea Convention involved extensive use of an advisory committee consisting of members from the private sector.

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[42] As the Chairman of the Advisory Committee has pointed out, members of the study groups can continue to meet after negotiations have been concluded and the United States is reviewing the final text of the convention for possible signature and ratification. Given the perspective they have on the development of the text they are in a good position to assess the advantages that the convention may provide for the United States. Moreover, since private international law conventions almost always affect State law, they tend to be sent to the Senate for advice and consent to ratification. Members of the study groups have the potential of playing an important role in the domestic political process that may lead to the granting of that advice and consent and the ratification of the convention by the United States. *Id.*

[43] For guidelines concerning participation of private citizens as representatives of affected private sector interests on U.S. delegations to international conferences, meetings and negotiations, *see* the Department of State's Public Notice 655 of March 23, 1979, 44 Fed. Reg. 17,846 (1979).

[44] Under Article 3 of the Amended Constitution of the International Labor Organization, meetings of the General Conference of the members shall be "composed of four representatives . . ., of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the work people of each of the Members." A process of tripartite consultations between labor, management and government is required by ILO Convention No. 144 Concerning Tripartite Consultations to Promote the Implementation of International Labor Standards, adopted by the International Labor Conference at Geneva on June 21, 1976. That Convention has been in force for the United States since June 15, 1989.

G. *Legal Bases for Agreements Not Formally Approved by the Legislature*

1. *Agreements under the President's Constitutional Power*

Article II of the Constitution deals with the powers of the Executive. Four of the provisions of that article have been held to give the President the power to make international agreements other than "treaties" under Article II, section 2, clause 2. They are: the Executive Power clause in Section 1; the Commander-in-Chief Power in Section 2; the power to receive Ambassadors and other public Ministers in Section 3; and the duty to take care that the laws be "faithfully executed," with which Section 3 concludes. Where the powers granted to the President are exclusive, as the Commander-in-Chief Power, the President may make an international agreement solely on his own. Such agreements are often called sole Executive agreements. The classic illustration is the armistice agreement.

A leading case regarding the power of the President to conclude international agreements based on his or her independent constitutional powers is *United States v. Belmont*,[45] which involved a lawsuit by private parties to recover from executors a sum of money deposited with their decedent and subsequently assigned to the United States by the former Soviet Government. The Court took judicial notice of the fact that, "coincident with the assignment," the President recognized the Soviet Government. In its view, the "recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments."[46] Noting that this agreement did not receive Senate advice and consent, the Supreme Court stated: "[A]n international compact, as this was, is not always a treaty which requires the participation of the Senate."[47]

Turning to the supremacy clause issue, the Court said:

> [W]hile this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements . . . In respect of all international negotiations and compacts and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.[48]

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[45] 301 U.S. 324 (1937).
[46] *Id.* at 330.
[47] *Id.*
[48] *Id.* at 331.

Notwithstanding cases such as *Belmont* and other cases from that era, Congress attempted during the 1970s to limit the President's constitutional power to negotiate and conclude executive agreements on the basis of the Article II powers set out above. The hearings on those efforts, which are listed in the bibliography at the end of this chapter, contain a comprehensive review of the authorities. The October 31, 1975 memorandum entitled "Authority of the President to Enter Into Executive Agreements Pursuant to His Independent Authority" is a particularly convincing presentation of that authority.[49] The 1970s legislative efforts to limit the President's executive agreement authority ultimately failed.

United States courts are generally reluctant to decide disputes between members of Congress and the President concerning the treaty-making power. Such cases are usually dismissed on the ground that the issue is a nonjusticiable political question or that the plaintiff lacks standing to bring the case. In *Dole v. Carter*,[50] a case that was ultimately decided to be nonjusticiable, the unusually broad discussion of the merits at the District Court level seem to reinforce the President's authority to make executive agreements. Senator Dole sought an injunction to prevent President Carter from returning the crown of Saint Stephen, of which the United States had custody, to the People's Republic of Hungary pursuant to an executive agreement in the form of an exchange of letters between the two governments. Senator Dole argued that owing to a "tacit agreement" between Hungary and the United States relating to the Treaty of Peace with Hungary of February 10, 1947,[51] the President lacked the authority to deal with the matter by an exchange of letters and that the crown could be returned only pursuant to a bilateral treaty subject to Senate advice and consent. The court found there was no such "tacit agreement." Citing with approval *United States v. Belmont*,[52] *United States v. Pink*,[53] and *United States v. Curtiss-Wright Export Corp.*,[54] the court went out of its way to conclude "[a]s a matter of law . . . that the President's agreement to return the Hungarian coronation regalia is not a commitment requiring the advice and consent of the Senate under Article II, Section 2, of the Constitution."[55] Having specifically declined

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[49] *Congressional Oversight of Executive Agreements – 1975, Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate*, 94th Cong., 1st Sess. on S. 632 and S. 1251 at 306–11 (1975).

[50] 444 F. Supp. 1065 (D. Kan. 1977), *motion for injunction pending appeal denied*, 569 F.2d 1109 (10th Cir. 1977).

[51] Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, 41 *U.N.T.S.* 135.

[52] 301 U.S. 324 (1937).

[53] 315 U.S. 203 (1942).

[54] 299 U.S. 304 (1936).

[55] *Dole v. Carter*, 444 F. Supp. at 1071.

to consider matters relating to standing or jurisdiction, the court denied the injunction on the ground that Senator Dole was unlikely to prevail on the merits.

The next day, the Court of Appeals denied a motion for an injunction pending appeal. In reaching its decision, the court relied on the traditional approach of United States courts when asked to take jurisdiction of cases between the Executive and Legislative branches that arise in the field of foreign relations. It found that the action of the President to return to the people of Hungary property that belongs to them "uniquely demand[s] single voiced statement of the Government's views." It continued:

> We are aware of no 'judicially discoverable and manageable standards for resolving [the issue]' . . . The President has decided that our foreign relations are best served by the return of the crown. We decline to enter into any controversy relating to distinctions which may be drawn between executive agreements and treaties. We say only that on the facts before us we find no justiciable controversy.[56]

It is clear that a sole executive agreement made by the President on his or her independent constitutional authority is the law of the land and supersedes state law under Article VI of the Constitution.[57] However, most attempts by the President to conclude an agreement in an area in

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[56] *Dole v. Carter*, 569 F.2d at 1110. A subsequent case, *Greater Tampa Chamber of Commerce v. Brock Adams*, No. C.A. 78–0157 (D.D.C. 1979), *excerpted in* Marian Lloyd Nash (Leich), *Digest of United States Practice in International Law 1978*, 678–80 (1980), further illustrates both the nonjusticiability and lack-of-standing principles on which Federal courts frequently rely when denying jurisdiction in treaty cases. District Judge June L. Green's opinion of November 29, 1979 noted that the plaintiffs had sought to enjoin enforcement of the Agreement Concerning Air Services between the United States and the United Kingdom, July 23, 1977, 28 U.S.T. 5367 (commonly known as the Bermuda II agreement), because it contravened provisions of the Federal Aviation Act of 1958, and the President should therefore have submitted it to the Senate for advice and consent to ratification. The court noted that it would "undoubtedly constitute an unprecedented encroachment upon the discretion traditionally vested in the executive branch to determine the form international agreements shall take. Although the State Department has promulgated guidelines to aid the President in making such a determination, these guidelines are not of such a legally binding nature as to merit the Court's inquiry into the exercise of that discretion." The court therefore concluded that the President's decision to negotiate an international agreement as a treaty or executive agreement was not reviewable, denied the plaintiffs' claim for injunctive relief, and granted defendants' motion to dismiss on grounds of nonjusticiability the issue of whether the President should have submitted the agreement to the Senate for advice and consent. Plaintiffs appealed to the United States Court of Appeals which found that the plaintiffs lacked standing to maintain the action and remanded the case to the District Court with instructions to dismiss the complaint. *Greater Chamber of Commerce v. Goldschmidt*, 627 F.2d 258 (1980).

[57] *American Insurance Association v. Garnmendi*, 539 U.S. 396 (2003).

which he or she lacks both independent authority and Congressional approval will fail. In *United States v. Guy W. Capps, Inc.*,[58] the United States sued an importer for breach of a contract that was based on an executive agreement. The court held that the executive agreement was void: "[W]hile the President has certain inherent powers under the Constitution . . . the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress."[59] It continued:

> Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The Executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports.[60]

2. *Treaties and the Senate*

Article II, section 2, clause 2, establishes a special mechanism by which the President has power, "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur . . ." This provision enables the President and the upper House of the U.S. Congress to make treaties in a special way.[61] The advice and consent procedure is used to conclude approximately five percent of U.S. international agreements. Although there are no prescribed subjects, a review of practice shows that international agreements dealing with defense, extradition, tax, disarmament, the environment, and private international law tend to be dealt with by treaties.

If the President decides a particular international agreement should be handled as a treaty under the Constitution, he will transmit it to the Senate for advice and consent to ratification, acceptance, or approval.

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[58] 204 F. 2d 655, 660 (4th Cir. 1953), *affirmed on other grounds*, 348 U.S. 296 (1955).

[59] *Id.* at 659.

[60] *Id.* at 660.

[61] In the case of *Edwards v. Carter*, the court affirmed the general principle that treaties may deal with matters within the legislative power of Congress. The court said:

> It is important to the correct resolution of the legal issue now before us not to confuse what the Constitution permits with what it prohibits. In deciding that Article IV, § 3, cl. 2 is not the exclusive method contemplated by the Constitution for disposing of Federal property, we hold that the United States is not prohibited from employing an alternative means constitutionally authorized. Our judicial function in deciding this lawsuit is confined to assessing the merits of the claim of appellants that in the conduct of foreign relations in this matter, involving, *inter alia*, the transfer of property of the United States, the treaty power as contained in Article 2, § 2, cl. 2, was not legally available. We hold, contrarily, that this choice of procedure was clearly consonant with the Constitution.

Edwards v. Carter, 580 F.2d 1055, 1064 (D.C. Cir.) (footnote omitted), *cert. denied*, 463 U.S. 907 (1978).

Criteria in the State Department's regulations may help in clarifying how a particular instrument should be treated, but it is not possible to be categorical about what agreements must be handled as treaties. In almost all cases, it will be possible to seek legislative approval of an agreement by both houses of the Congress. Indeed, in some cases it is politically easier for the President to obtain the support of a majority in both houses than two-thirds of the Senate. In the nineteenth century the President failed to secure the advice and consent of the Senate to the treaty of annexation with Texas. The treaty subsequently was approved by joint legislation on March 1, 1845. When the treaty for the annexation of Hawaii was delayed in the 1890s, President McKinley obtained the annexation by joint resolution approved July 7, 1898.[62]

In 1996 the President sought legislative authorization to confirm U.S. approval of a Document Agreed Among the States Parties to the Convention on Conventional Armed Forces in Europe. The Senate, which had given advice and consent to ratification of the Conventional Armed Forces in Europe Convention, informed the Department of State that it believed that the Document should be handled as a treaty and sent to it for advice and consent to ratification. In light of the Senate's concern on this issue, the Administration refrained from reintroducing the draft legislation it had submitted to an earlier Congress and transmitted the Document to the Senate for its advice and consent to ratification. The Senate gave its advice and consent on May 14, 1997.

There are cases in which the Administration consults with the Senate as to whether or not the Senate wishes a particular treaty to be sent to it for advice and consent prior to ratification or acceptance. For example, after consultations with the Senate Foreign Relations Committee staff with respect to the Budapest Treaty on the International Recognition of Deposit of Microorganisms for Purposes of Patent Procedure, the Legal Adviser recommended to Secretary of State Cyrus R. Vance that the treaty be concluded as an executive agreement. On August 31, 1979, Secretary Vance signed an instrument of acceptance of this "treaty," which was subsequently deposited with the Director General of the World Intellectual Property Organization.[63]

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[62] George H. Haynes, *The Senate of the United States: Its History and Practice*, 633–35 (1938).

[63] Marian Nash Leich, *Digest of United States Practice in International Law 1980*, 408–409 (1986).

3. *Agreements Authorized by Treaty*

Some treaties provide authority to conclude related or implementing agreements. If the President and the Senate have concluded a treaty, under Article II, section 2, clause 2 of the Constitution, that authorizes related international agreements, no other approval is required.[64]

4. *Acquiescence*

In addition to legislative delegations of authority to conclude international agreements, in some cases the Congress will be held to have acquiesced in a long-standing practice of the Executive in concluding a class of sole executive agreements where it has known of the practice and has not objected.[65]

H. *Publication and Transmittal Requirements*

Treaties and other international agreements must be published unless they are exempted from publication pursuant to law. The basic publication requirements are set out in the Act of September 23, 1950,[66] which provides:

> The Secretary of State shall cause to be compiled, edited, indexed, and published . . . a compilation entitled 'United States Treaties and Other International Agreements,' . . . that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party . . . or with reference to which any final formality has been executed, during each calendar year.[67]

An amendment to the 1950 act provides that the "Treaties and Other International Agreements" publication shall be legal evidence of the texts contained therein in all the courts of the United States, the several States, and the Territories and insular possessions of the United States. Due to budgetary constraints, the Department of State has been unable in recent years to publish agreements as promptly as it once did. However, as indicated below, texts that have not yet been published may be available from several commercial providers.

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[64] *See, e.g.*, Panama Canal Treaty, Art. IX, para. 11, & Art. XI, para. 7 (signed at Washington Sept. 7, 1977), 33 U.S.T. 39, 65, 73; Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, Art. IV, para 2 (signed at Moscow May 24, 2002), 107th Cong., 2d Sess., Treaty Doc. 107–8.

[65] *See Dames & Moore v. Regan*, 453 U.S. 654 (1981) and text accompanying note 13, *supra*.

[66] 1 U.S.C. § 112a (1994).

[67] *Id.*

In 1994, the Congress amended the publication statute[68] by authorizing the Secretary of State to determine that publication of certain categories of agreements is not required, if the following criteria are met:

- such agreements are not treaties which have been brought into force for the United States after having received Senate advice and consent pursuant to section 2(2) of Article II of the Constitution of the United States;
- the public interest in such agreements is insufficient to justify their publication . . . [on one of 4 specified grounds]; and
- copies of such agreements . . ., including certified copies where necessary for litigation or similar purposes, will be made available by the Department of State upon request.

Any determination under one of the categories specified above must be published in the *Federal Register*.

The first determination under the statute appeared in the *Federal Register* on October 23, 1995.[69] Nine categories of agreements are listed in the amendment to 22 C.F.R. Part 181. They include: bilateral agreements for the rescheduling of intergovernmental debt payments; bilateral textile agreements concerning the importation of products containing specified textile fibers; bilateral agreements that apply to specified military exercises; bilateral military personnel exchange agreements; bilateral judicial assistance agreements that apply only to specified civil or criminal investigations or prosecutions; bilateral mapping agreements; and tariff and other schedules under the General Agreement on Tariffs and Trade and the World Trade Organization Agreement.

The status of U.S. treaties is reflected in *Treaties in Force*, a Department of State publication that lists treaties in force on January 1st of each year. The information in the latest annual volume is supplemented electronically by a listing of subsequent Treaty Actions that can be found, along with the text of the latest annual volume, under "International Topics and Issues" on the Department's website at http//:www.state.gov.

The Case-Zablocki Act requires that the texts of international agreements other than treaties, entered into by the United States subsequent to August 22, 1972, be transmitted to the Congress as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than 60 days thereafter.[70] The same

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[68] Foreign Relations Authorization Act, Pub. L. No. 102–236, 108 Stat. 382, 396 (1994).

[69] 60 Fed. Reg. 54,320 (1995). The Final Rule appears at 61 Fed. Reg. 7,070 (1996).

[70] Section 7121 of Public Law 108–458 (2004) amended the Case-Zablocki Act by

timing applies to any agreement "the immediate public disclosure of which would in the opinion of the President, be prejudicial to the national security of the United States."[71] However, the latter group of agreements are transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.

In order to implement the Case-Zablocki Act, the Department of State sends texts to the Congress on a biweekly schedule. Although the legislation does not require additional information, at the request of the Congress, the Department of State has included in the regulations implementing the Case-Zablocki Act a requirement that a background statement accompany each agreement. Each background statement describes the agreement to which it relates and contains a statement of the legal authority for the agreement. Pursuant to the Freedom of Information Act, arrangements have been made by seven publishers to obtain and publish all or portions of these packages. While some of the publishers specialize in certain subjects, such as tax, intellectual property, maritime, or law enforcement matters, others disseminate the texts of all reported agreements, as well as the texts of treaties sent to the Senate, which are not covered by the Case-Zablocki Act. The text of most agreements transmitted under the Act since January 1, 2004 can be found under "International Agreements" on the State Department Bureau of Administration's Freedom of Information Act (FOIA) webpage list of Declassified/Released Document Collections at http://www.state.gov.[72]

The United States recognizes its obligation to submit treaties and other international agreements for registration and publication in accordance with Article 102 of the United Nations Charter.

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inserting a new subsection that requires the Secretary of State to submit an annual report to the Congress that contains an index of international agreements concluded during the preceding calendar year and adding language with respect to arrangements that constitute international agreements.

[71] *See supra* note 7, for cite.

[72] Section 7121 of Public Law 108–458 (2004) amended the Case-Zablocki Act to require the Secretary of State to "make publicly available through the Internet website of the Department of State each treaty or international agreement proposed to be published in the compilation entitled 'United States Treaties and Other International Agreements' not later than 180 days after the date on which the treaty or agreement enters into force."

I. *Incorporation into National Law*

1. *Self-Executing and Non-Self-Executing Treaties*

Article VI of the Constitution provides that "[t]his 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." Under this provision, treaties and other international agreements may be self-executing. The phrase "may be self-executing" is used to indicate that, in some circumstances, treaties and other international agreements will not be directly incorporated into national law, and additional action will need to be taken at the national level. While the precise nature of the distinction between self-executing and non-self-executing treaties is a matter of some confusion, for the purposes of this section a treaty will be considered self-executing if it becomes directly and immediately applicable – i.e., if it requires no implementing legislation or regulations in order to become fully effective.

If the text of a particular agreement is given legislative approval, that legislation will generally include any necessary implementing provisions. Examples of self-executing treaties include Friendship, Commerce, and Navigation Treaties, as well as the more recent bilateral investment treaties, their lineal descendants.

There are several circumstances in which a treaty will not be self-executing. The first of these is where the treaty or other international agreement specifically requires that parties enact certain provisions into domestic law. One example under this rubric is the Genocide Convention, Article V of which requires the Contracting Parties to enact "necessary legislation to give effect to the provisions of the Convention and, in particular, to provide effective penalties for persons guilty of genocide."

The second scenario occurs when a treaty requires a Party to punish a certain crime, e.g., airline hijacking, and there is no statute criminalizing that behavior. Under the Constitution of the United States, the Congress has exclusive power to define crimes. Thus, there is authority for the proposition that an individual could not be prosecuted for a crime set out in a treaty unless the Congress had made that crime a part of the criminal law of the United States.[73]

Examples of implementing legislation include the U.N. Participation Act,[74] which gives the President authority to carry out certain obligations of the United States under the United Nations Charter and a num-

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[73] *Over the Top*, 5 F.2d 838, 845 (D. Conn, 1925).
[74] 22 U.S.C. § 287(c) (1994).

ber of United States statutes, such as the one defining genocide, by which the United States makes genocide a crime under its domestic law and provides penalties for those who engage in prohibited activity. When implementing legislation is necessary with respect to a treaty that has received Senate advice and consent to ratification, it is the practice of the United States to delay deposit of its instrument of ratification until enactment of the legislation.

In some cases, a combination of new legislation and the exercise of additional authority under existing law – even though it was not enacted to address the particular obligations established by the treaty – may provide a basis for carrying out the new treaty obligations. For example, the United States ratified the Environmental Protocol to the Antarctic Treaty in 1998. The obligations were not self-executing and no existing legislation directly addressed certain obligations contained in the Protocol. In order to meet those obligations, the Administration proposed implementing legislation. In the course of drafting the new legislation, the Administration found existing legislation that permitted the executive branch to implement other obligations of the Convention. Drawing on such authority, the National Science Foundation issued new regulations that enabled the Executive Branch to discharge those obligations.

2. *Status of Treaties in U.S. Law*

As indicated in the extract from Article VI of the Constitution with which this section begins, under the law of the United States there is no hierarchy between treaties and other international agreements and laws made pursuant to the Constitution; they are of equal authority as the supreme law of the land. In this respect, the law of the United States differs from that of many other countries, where the Constitution or national jurisprudence gives effect to the international agreement notwithstanding the subsequent enactment of inconsistent legislation.[75]

In order to resolve inconsistencies between treaties and other international agreements and domestic law, two rules of interpretation have been developed: When an Act of Congress and an international agreement relate to the same subject, the Executive Branch and the courts will endeavor to: (1) construe them so as to give effect to both;[76] or (2) reconcile the international agreement and an Act of Congress, with the "later

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[75] *See, e.g., supra* Chapter 8, Section II.E.3 and Annex A (citing the implications of Article 55 of the French Constitution of October 4, 1958).

[76] Recent cases in U.S. courts applying this principle include *Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 252 (1984); *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988); and *South African Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 896.

in time" generally prevailing as domestic law.[77] If application of these rules results in supersession of treaty provisions as domestic law, that result does not relieve the Untied States of its international obligations.

The classic example of the subsequent, inconsistent statute is the Seamen's Act of March 4, 1915, which contravened one or more articles in bilateral treaties between the United States and seventeen other countries. Agreements to abrogate the treaties in their entirety were reached with a number of countries. Others agreed that the treaties should continue in force subject to abrogation of the inconsistent articles.[78]

J. *Legally Binding Decisions of International Organizations*

The United States is a member of the United Nations. Under its Charter, the United Nations can make decisions that are legally binding on its members. Article 25 of the Charter provides that the Security Council may make such decisions when acting under Chapter VII. The Senate, having given its advice and consent to ratification of the Charter containing those powers, and the President, having ratified it, have bound the United States to carry out those obligations. An obligation made binding on the United States pursuant to one of those provisions is not viewed as a new treaty commitment that requires new authorization. On the other hand, implementation of the new obligation may require legislation, issuance of executive orders, or a new proclamation laying out the legal or factual predicate.

On May 25, 1993, the United Nations Security Council decided to establish an international tribunal for the purpose of prosecuting persons responsible for serious violations of international humanitarian law in the former Yugoslavia. The Security Council also decided to adopt a Statute creating the basic framework of the Tribunal. Article 29 of the Statute obligates States to comply with Tribunal requests for assistance, including Tribunal requests for the transfer of persons indicted by the Tribunal from the territory of a State to Tribunal custody in The Hague. Since the creation of the Tribunal and the adoption of its Statute were pursuant to Chapter VII of the U.N. Charter, this Article 29 obligation is binding under international law.

Under U.S. domestic law in force in 1993, extradition was allowed only pursuant to specific authorization by statute or treaty. In order to

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[77] For a comprehensive discussion of the later-in-time rule *see Restatement (Third) Foreign Relations Law of the United States* § 115 (1987).

[78] Green Haywood Hackworth, V *Digest of International Law* 309–12 (1943); *see, e.g.*, Convention concerning the Rights and Privileges of Consuls, Nov. 19 and Dec. 2, 1902, U.S.-Gre, 32 Stat. 2122; *Treaties in Force* 116, note (2004).

comply with the obligations with respect to the Yugoslavia Tribunal, the Administration drafted a bilateral agreement with the Tribunal and sought the necessary statutory authority to carry out the surrender obligations for which it provided. Prior to enactment of the legislation, the Security Council adopted a resolution establishing a similar Rwanda Tribunal with which the Administration drafted a similar agreement. In January 1996, Congress enacted Public Law 104–106 authorizing the transfer of persons to the Tribunals pursuant to the agreements.[79] It also authorized the other judicial assistance provided for the Tribunals in the Security Council Resolutions. The United States brought the agreements on surrender of persons to the two Tribunals into force on February 14, 1996.

K. *Implementation of Multilateral Conventions*

It is necessary to divide examination of this question into two phases. Since most multilateral conventions are sent to the Senate for advice and consent and ratified by the President, the first phase will normally be the pre-ratification phase. With respect to multilateral conventions that are not subject to ratification, the first phase ends when the United States expresses its consent to be bound.

During the first phase, the Treaty Office coordinates planning for implementation of the convention in order to ensure that the United States will be in a position to fulfill its international obligations. If a treaty requires implementing legislation, the Secretary of State's report on the treaty will usually note that fact. If it is to be implemented under existing authority, the Treaty office will coordinate with the departments or agencies that will have responsibility for implementation to ensure that they will have completed any action that may be necessary, such as issuance of regulations, establishment of procedures, assignment of responsibilities, printing of forms, or publication of notices, prior to the date on which the treaty will enter into force for the United States.

After the treaty enters into force for the United States, the departments or agencies primarily responsible for the subject matter of the treaty are charged with its implementation. If the Department of State receives complaints from other parties concerning U.S. application of a treaty, it will meet with those departments or agencies in order to address and resolve the complaints.

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[79] On August 5, 1998, the United States District Court for the Southern District of Texas, *In the Matter of the Surrender of Elizaphan Ntakirutimana*, Civil Action No. L-98–43 found that the statute "and the executive agreement it implements" constituted "constitutional bases for Ntakirutimana's surrender to the [Rwanda] Tribunal." *Id.*, at 31.

Some international agreements – particularly those dealing with human rights and international trade – establish bodies that review performance by the parties of their treaty obligations. In addition, a number of international organizations – such as The Hague Conference on Private International Law and the Council of Europe – hold regularly scheduled meetings at which the national authorities responsible for implementation of certain treaties review problems that have arisen in applying the treaties and make recommendations for resolving those problems, either by changes in the texts of the conventions or changes by certain States in the procedures under which they are implementing their obligations. U.S. delegations to both types of meetings generally include representatives of the State Department and of the lead departments or agencies.

L. *Termination*

The Constitution does not address the power to terminate treaties or other international agreements. No serious question exists as to the President's authority to terminate executive agreements. However, practice has varied with respect to treaties. The President has: (a) acted on his own authority; (b) acted pursuant to a Senate resolution of advice and consent passed by the special majority required for advice and consent to ratification; and (c) acted pursuant to a joint resolution of the Congress.

In 1979, President Carter gave notice of termination of the 1954 Mutual Defense Treaty with the Republic of China. A number of Senators and members of the House of Representatives brought suit to enjoin the termination. The District Court held that authorization by either the Senate or a majority of both Houses of the Congress was required. That decision was reversed by the Court of Appeals. The Supreme Court vacated the judgment of the Court of Appeals and remanded the case with instructions to dismiss the complaint.[80]

Two subsequent cases have clarified the law of the United States with respect to termination. On May 1, 1985, President Reagan gave notice of termination of the Treaty of Friendship, Commerce, and Navigation with Nicaragua. In accordance with Article XXV of the treaty, it ter-

[80] *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C. 1979), *rev'd*, 617 F. 2d 697 (D.C. Cir.), *rev'd and remanded with directions to dismiss the complaint*, 444 U.S. 996 (1979). Since the decision in *Goldwater*, the consistent practice of the United States has been that the President terminates on his own authority treaties that have received Senate advice and consent. *See* "Article II, Section 2 Treaties Terminated by the President Since 1980," *Digest of U.S. Practice in International Law 2002*, at 202–6.

minated one year later, on May 1, 1986. In *Beacon Products Co. v. Reagan*, 633 F.Supp. 1191, 1198–99 (D. Mass. 1986), a challenge to termination of the treaty without approval of the Senate or the Congress was dismissed as a nonjusticiable political question. In 2002, Congressman Kucinich and 31 other Members of the House of Representatives sought an injunction against termination without the consent of the Congress of the Treaty between the United States and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, signed at Moscow May 26, 1972. Under Article XV, paragraph 2, each party had the right to withdraw from the Treaty if it decided that extraordinary events relating to the subject matter of the Treaty had jeopardized its supreme interests. President Bush gave such notice on behalf of the United States; withdrawal took effect after six months in accordance with the Treaty. The District Court for the District of Columbia dismissed the action on the ground that the congressmen had not alleged the requisite injury to establish standing to pursue their claim and that the treaty termination issue is a nonjusticiable "political question" that cannot be resolved by the courts.[81]

All of the treaties mentioned in the preceding paragraphs included provisions for termination after notification. Given the customary international law on termination of treaties that contain no provision regarding termination – Article 56 of the Vienna Convention on the Law of Treaties – it would seem that the absence of a termination provision in a treaty receiving Senate advice and consent would not preclude a President from terminating that treaty on his own authority. For example, most treaties do not have a provision with respect to termination for breach, but there is practice in the United States of the President having terminated or suspended operation of a treaty in response to breach. On September 17, 1986, the United States and Australia both suspended the Security Treaty (ANZUS Pact) signed in San Francisco, September 1, 1951 vis-à-vis New Zealand.[82]

M. *Depositary Problems*

The United States is a depositary for over 200 multilateral treaties. In addition to the U.N. Charter, these include many of the treaties establishing the specialized agencies, the International Monetary Fund, and

[81] *Kucinich v. Bush*, 236 F.Supp.2d 1, 2 (D.D.C. 2002).
[82] *Treaties in Force* 375 (2004).

the International Bank for Reconstruction and Development. In carrying out its depositary responsibilities, the United States follows the rules established under the relevant treaty. With respect to depositary matters not addressed in a given treaty, it generally conducts itself in accordance with the rules in Article 77 of the Vienna Convention on the Law of Treaties.

In connection with its depositary duties under the Statute of the International Atomic Energy Agency, for example, the United States informed the Board of Governors of the Organization that it had received for deposit an instrument of accession from an entity that was not a State and that the final clauses of the Statute specified that the Statute was open only to States. In accordance with Article 77, it subsequently circulated a statement of the facts in the case to the Parties and asked for their views. While the United States and one other State supported the ineligibility of the entity under the final clauses, a majority of the parties clearly favored acceptance of the instrument. Accordingly, the United States, in its depositary capacity, accepted the instrument.[83]

In the wake of the breakup of the USSR, Edwin D. Williamson, then-Legal Adviser of the Department of State, addressed the status of agreements between the United States and the USSR at the time of the dissolution of the Union. He stated: "We have decided that the better legal position is to presume continuity in treaty relations between the United States and the former Republics. As a general principle, agreements in force between the United States and the former Soviet Union at the time of the dissolution will be presumed to continue in force with the newly independent republics."[84]

The continuity presumption on which Mr. Williamson relied is contained in Article 34 of the Vienna Convention on the Succession of States to Treaties.[85] In respect of multilateral treaties, it is the practice of depositaries to refrain from listing a successor State as a party in the absence of a notice of succession or accession by that State. In some cases, however, one or more depositaries – there are eleven treaties from the Cold War era for which the United States, the United Kingdom, and the USSR are named as depositaries – have urged successor states to resolve any ambiguity by filing either of those documents.

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[83] *See* Nash, *supra* note 38, at 1203–07.

[84] Edwin J. Williamson, "A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia," 1992 *Proc. Am. Soc'y Int'l L.* 10–12, 15 (1992).

[85] Vienna Convention on Succession of States in Respect of Treaties, 23 Aug. 1978, 1946 *U.N.T.S.* 3, 25 *I.L.M.* 1640.

The Russian Federation has generally given depositaries notice that it would continue to be bound by treaties of the USSR. Inasmuch as Ukraine and Belarus had been members of the United Nations and recognized as having treaty-making capacity for many years, the treaty status of those countries is generally clear. With respect to other former republics, however, the situation may not always be clear.

The subsequent breakups of Czechoslovakia and Yugoslavia have caused the United States to take a more active role in discharging its depositary responsibilities with respect to succession to multilateral treaties. For example, it reviewed with Slovenian authorities those multilateral treaties for which the United States is depositary so that those authorities might determine to which of the multilateral treaties to which Yugoslavia had been a party Slovenia wished to succeed or accede. All of the treaties discussed except one were multilateral treaties that were generally open to States. The exception was the Agreement of January 4, 1956 regarding Financial Support of the North Atlantic Ice Patrol. In its depositary capacity, the United States informed the Slovenians that in order to become a party to that agreement it was necessary for a State to be benefiting to an appreciable degree from the services of the Ice Patrol and that its proposed membership be acceptable to all existing parties. The Slovenian authorities decided not to pursue succession to the Ice Patrol Agreement.

Modern multilateral treaties frequently call for the designation of competent authorities or other entities to cooperate in activities under those treaties. In its capacity as depositary, the United States has called for attention to such provisions from succeeding or acceding States that have not done so.[86]

N. *International Agreements Concluded by Sub-National Entities*

As indicated in the Introduction, the Constitution prohibits the conclusion of international agreements by sub-national entities, without the consent of Congress.

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[86] For further particulars concerning this subject *see* "Depositary Practice of the United States of America in Relation to the Succession of States in Respect of Treaties," Council of Europe Committee of Legal Advisers on Public International Law, Doc. CAHDI (93)16 (Sept. 10, 1993).

III. Basic Data and Documentation

A. *National Constitution*

Annex A: The Constitution of the United States

B. *National Legislation*

Annex B: The Case-Zablocki Act of 1972
Annex C: Selected Statutory Provisions with Respect to the Bipartisan Trade Promotion Authority Act of 2002 (Bipartisan Trade Promotion Authority, through January 2003)

C. *Examples of Internal Procedural Documents*

Annex D: Full Powers Document
Annex E: Instrument of Ratification
Annex F: Registration Certificate
Annex G: Depositary Circular Note
Annex H: Treaty Transmittal Message to the Senate
Annex I: Official Proclamation
Annex J: Protocol of Exchange of Instruments of Ratification
Annex K: Notification of Completion of Constitutional and Statutory Requirements

D. *Statistical Data*

Annex L: Statistical Data

ANNEX A

THE CONSTITUTION OF THE UNITED STATES

Article I, § 8

The Congress shall have Power . . .

Clause 3: To regulate Commerce with foreign Nations, and among the several states, . . .;

* * *

Clause 10: To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

* * *

Clause 18: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article l, § 10

Clause 1: No State shall enter into any Treaty, Alliance, or Confederation Clause 3: No State shall, without the Consent of Congress . . . . enter into any Agreement or Compact . . . . with a foreign Power. . . .

Article II, § 2

Clause 1: The President shall be Commander in Chief of the Army and Navy of the United States, . . .;

Clause 2: He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;

Article II, § 3

. . . he [the President] shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article VI, § 2

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; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

ANNEX B

THE CASE-ZABLOCKI ACT OF 1972 (1 U.S.C. § 112b)[87]

§ 112b. United States international agreements; transmission to Congress

(a) The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President. Any department or agency of the United States Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than twenty days after such agreement has been signed.

(b) Not later than March l, 1979, and at yearly intervals thereafter, the President shall, under his own signature, transmit to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate a report with respect to each international agreement which, during the preceding year, was transmitted to the Congress after the expiration of the 60-day period referred to in the first sentence of subsection (a), describing fully and completely the reasons for the late transmittal.

(c) Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State. Such consultation may encompass a class of agreements rather than a particular agreement.

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[87] This version of the Case-Zablocki Act has been amended by Section 7121 of Public Law 108–458 (2004).

(d) The Secretary of State shall determine for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of this section.
(e) The President shall, through the Secretary of State, promulgate such rules and regulations as may be necessary to carry out this section.

ANNEX C

SELECTED STATUTORY PROVISIONS WITH RESPECT TO THE BIPARTISAN TRADE PROMOTION AUTHORITY ACT OF 2002 (BIPARTISAN TRADE PROMOTION AUTHORITY THROUGH JANUARY 2003)

19 USC § 3803

§ 3803. Trade agreements authority

(a) *Agreements Regarding Tariff Barriers.* –

(1) *In general.* – Whenever the President determines that one or more existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that the purposes, policies, priorities, and objectives of this title will be promoted thereby, the President –

(A) may enter into trade agreements with foreign countries before –

(i) June 1, 2005; or

(ii) June 1, 2007, if trade authorities procedures are extended under subsection (c); and

(B) may, subject to paragraphs (2) and (3), proclaim –

(i) such modification or continuance of any existing duty,

(ii) such continuance of existing duty-free or excise treatment, or

(iii) such additional duties,

as the President determines to be required or appropriate to carry out any such trade agreement. The President shall notify the Congress of the President's intention to enter into an agreement under this subsection.

* * *

(b) *Agreements Regarding Tariff and Nontariff Barriers.* –

(1) *In general.* –

(A) Whenever the President determines that –

(i) one or more existing duties or any other import restriction of any foreign country or the United States or any other barrier to, or other distortion of, international trade unduly burdens or restricts the foreign trade of the United States or adversely affects the United States economy, or

(ii) the imposition of any such barrier or distortion is likely to result in such a burden, restriction, or effect, and that

the purposes, policies, priorities, and objectives of this title will be promoted thereby, the President may enter into a trade agreement described in subparagraph (B) during the period described in subparagraph (C).

(B) The President may enter into a trade agreement under subparagraph (A) with foreign countries providing for –

(i) the reduction or elimination of a duty, restriction, barrier, or other distortion described in subparagraph (A); or

(ii) the prohibition of, or limitation on the imposition of, such barrier or other distortion.

19 USC §. 3804

§ 3804. Consultations and assessment

(a) *Notice and Consultation Before Negotiation.* – The President, with respect to any agreement that is subject to the provisions of section 3803(b), shall –

(1) provide, at least 90 calendar days before initiating negotiations, written notice to the Congress of the President's intention to enter into the negotiations and set forth therein the date the President intends to initiate such negotiations, the specific United States objectives for the negotiations, and whether the President intends to seek an agreement, or changes to an existing agreement;

(2) before and after submission of the notice, consult regarding the negotiations with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives, such other committees of the House and Senate as the President deems appropriate, and the Congressional Oversight group convened under section 3807; and

(3) upon the request of a majority of the members of the Congressional Oversight Group under section 3807(c), meet with the Congressional Oversight Group before initiating the negotiations or at any other time concerning the negotiations.

(b) Negotiations regarding agriculture

(1) In general . . .

* * *

(2) Special consultations on import sensitive products . . .

* * *

(3) Negotiations regarding the fishing industry . . .

* * *

(c) Negotiations regarding textiles . . .

* * *

(d) Consultation with Congress before agreements entered into
(1) Consultation . . .

* * *

(3) Report regarding United States trade remedy laws . . .

* * *

(A) *Changes in certain trade laws.* – The President, at least 180 calendar days before the day on which the President enters into a trade agreement under section 3803(b), shall report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate –

(i) the range of proposals advanced in the negotiations with respect to that agreement, that may be in the final agreement, and that could require amendments to title VII of the Tariff Act of 1930 or to chapter 1 of title II of the Trade Act of 1974; and

(ii) how these proposals relate to the objectives described in section 3802(b)(14).

* * *

(C) *Resolutions.* –

(i) At any time after the transmission of the report under subparagraph (A), if a resolution is introduced with respect to that report in either House of Congress, the procedures set forth in clauses (iii) through (vi) shall apply to that resolution if –

(I) no other resolution with respect to that report has previously been reported in that House of Congress by the Committee on Ways and Means or the Committee on Finance, as the case may be, pursuant to those procedures; and

(II) no procedural disapproval resolution under section 3805(b) introduced with respect to a trade agreement entered into pursuant to the negotiations to which the report under subparagraph (A) relates has previously been reported in that House of Congress by the Committee on Ways and Means or the Committee on Finance, as the case may be.

(ii) For purposes of this subparagraph, the term "resolution" means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: "That the XXXX finds that the proposed changes to United States trade remedy laws

contained in the report of the President transmitted to the Congress on XXXX under section 3804(d)(3) of the Bipartisan Trade Promotion Authority Act of 2002 with respect to XXXX, are inconsistent with the negotiating objectives described in section 3802(b)(14) of that Act.", with the first blank space being filled with the name of the resolving House of Congress, the second blank space being filled with the appropriate date of the report, and the third blank space being filled with the name of the country or countries involved.

* * *

(iii) Resolutions in the House of Representatives –
  (I) may be introduced by any Member of the House;
  (II) shall be referred to the Committee on Ways and Means and, in addition, to the Committee on Rules; and
  (III) may not be amended by either Committee.

(iv)[88] Resolutions in the Senate –
  (I) may be introduced by any Member of the Senate;
  (II) shall be referred to the Committee on Finance; and
  (III) may not be amended.

(iv) It is not in order for the House of Representatives to consider any resolution that is not reported by the Committee on Ways and Means and, in addition, by the Committee on Rules.

(v) It is not in order for the Senate to consider any resolution that is not reported by the Committee on Finance.

(vi) The provisions of section 152(d) and (e) of the Trade Act of 1974 (19 U.S.C. 2192(d) and (e)) (relating to floor consideration of certain resolutions in the House and Senate) shall apply to resolutions.

19 USC § 3805

§ 3805. Implementation of trade agreements

(a) *In General.* –

(1) *Notification and submission.* – Any agreement entered into under section 3803(b) shall enter into force with respect to the United States if (and only if) –

(A) the President, at least 90 calendar days before the day on which the President enters into the trade agreement, notifies the House of Representatives and the Senate of the President's

[88] So in the original. Two cls. (iv) have been enacted.

intention to enter into the agreement, and promptly thereafter publishes notice of such intention in the Federal Register;

(B) within 60 days after entering into the agreement, the President submits to the Congress a description of those changes to existing laws that the President considers would be required in order to bring the United States into compliance with the agreement;

(C) after entering into the agreement, the President submits to the Congress, on a day on which both Houses of Congress are in session, a copy of the final legal text of the agreement, together with –

(i) a draft of an implementing bill described in section 3803(b)(3);

(ii) a statement of any administrative action proposed to implement the trade agreement; and

(iii) the supporting information described in paragraph (2); and

(D) the implementing bill is enacted into law.

* * *

(b) *Limitations on Trade Authorities Procedures.* –

(1) *For lack of notice or consultations.* –

(A) *In general.* – The trade authorities procedures shall not apply to any implementing bill submitted with respect to a trade agreement or trade agreements entered into under section 3803(b) if during the 60-day period beginning on the date that one House of Congress agrees to a procedural disapproval resolution for lack of notice or consultations with respect to such trade agreement or agreements, the other House separately agrees to a procedural disapproval resolution with respect to such trade agreement or agreements.

(B) *Procedural disapproval resolution.* – (i) For purposes of this paragraph, the term "procedural disapproval resolution" means a resolution of either House of Congress, the sole matter after the resolving clause of which is as follows: "That the President has failed or refused to notify or consult in accordance with the Bipartisan Trade Promotion Authority Act of 2002 on negotiations with respect to XXXX and, therefore, the trade authorities procedures under that Act shall not apply to any implementing bill submitted with respect to such trade agreement or agreements", with the blank space being filled with a description of the trade agreement or agreements with

respect to which the President is considered to have failed or refused to notify or consult.

(2) *Procedures for considering resolutions*

(A) Procedural disapproval resolutions –

(i) in the House of Representatives –

(I) may be introduced by any Member of the House;

(II) shall be referred to the Committee on Ways and Means and, in addition, to the Committee on Rules; and

(III) may not be amended by either Committee; and

(ii) in the Senate –

(I) may be introduced by any Member of the Senate;

(II) shall be referred to the Committee on Finance; and

(III) may not be amended.

(B) The provisions of section 2192(d) and (e) of this title (relating to the floor consideration of certain resolutions in the House and Senate) apply to a procedural disapproval resolution introduced with respect to a trade agreement if no other procedural disapproval resolution with respect to that trade agreement has previously been reported in that House of Congress by the Committee on Ways and Means or the Committee on Finance, as the case may be, and if no resolution described in section 3804(d)(3)(C)(ii) of this title with respect to that trade agreement has been reported in that House of Congress by the Committee on Ways and Means or the Committee on Finance, as the case may be, pursuant to the procedures set forth in clauses (iii) through (vi) of such section 3804(d)(3)(C) of this title.

(C) It is not in order for the House of Representatives to consider any procedural disapproval resolution not reported by the Committee on Ways and Means and, in addition, by the Committee on Rules.

(D) It is not in order for the Senate to consider any procedural disapproval resolution not reported by the Committee on Finance.

(3) For failure to meet other requirements

19 USC § 3807

§ 3807. Congressional Oversight Group

(a) Members and functions

(1) In general

By not later than 60 days after August 6, 2002, and not later than 30 days after the convening of each Congress, the chairman of the Committee on Ways and Means of the House of Representatives and the chairman of the Committee on Finance of the Senate shall convene the Congressional Oversight Group.

(2) Membership from the House

In each Congress, the Congressional Oversight Group shall be comprised of the following Members of the House of Representatives:

(A) The chairman and ranking member of the Committee on Ways and Means, and 3 additional members of such Committee (not more than 2 of whom are members of the same political party)

(B) The chairman and ranking member, or their designees, of the committees of the House of Representatives which would have, under the Rules of the House of Representatives, jurisdiction over provisions of law affected by a trade agreement negotiations for which are conducted at any time during that Congress and to which this chapter would apply.

(3) Membership from the Senate

In each Congress, the Congressional Oversight Group shall also be comprised of the following members of the Senate:

(A) The chairman and ranking member of the Committee on Finance and 3 additional members of such Committee (not more than 2 of whom are members of the same political party).

(B) The chairman and ranking member, or their designees, of the committees of the Senate which would have, under the Rules of the Senate, jurisdiction over provisions of law affected by a trade agreement negotiations for which are conducted at any time during that Congress and to which this chapter would apply.

(4) Accreditation

Each member of the Congressional Oversight Group described in paragraph[89] (2)(A) and (3)(A) shall be accredited by the United

[89] So in original. Probably should be "paragraphs."

States Trade Representative on behalf of the President as an official adviser to the United States delegation in negotiations for any trade agreement to which this chapter applies. Each member of the Congressional Oversight Group described in paragraph (2)(B) and (3)(B) shall be accredited by the United States Trade Representative on behalf of the President as an official adviser to the United States delegation in the negotiations by reason of which the member is in the Congressional Oversight Group. The Congressional Oversight Group shall consult with and provide advice to the Trade Representative regarding the formulation of specific objectives, negotiating strategies and positions, the development of the applicable trade agreement, and compliance and enforcement of the negotiated commitments under the trade agreement.

(5) Chair

The Congressional Oversight Group shall be chaired by the Chairman of the Committee on Ways and Means of the House of Representatives and the Chairman of the Committee on Finance of the Senate.

(b) Guidelines

(1) Purpose and revision

The United States Trade Representative, in consultation with the chairmen and ranking minority members of the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate –

(A) shall, within 120 days after August 6, 2002, develop written guidelines to facilitate the useful and timely exchange of information between the Trade Representative and the Congressional Oversight Group convened under this section; and

(B) may make such revisions to the guidelines as may be necessary from time to time.

(2) Content

The guidelines developed under paragraph (1) shall provide for, among other things –

(A) regular, detailed briefings of the Congressional Oversight Group regarding negotiating objectives, including the promotion of certain priorities referred to in section 3802(c) of this title, and positions and the status of the applicable negotiations, beginning as soon as practicable after the Congressional Oversight Group is convened, with more frequent briefings as trade negotiations enter the final stage;

(B) access by members of the Congressional Oversight Group and staff with proper security clearances, to pertinent documents relating to the negotiations, including classified materials;

(C) the closest practicable coordination between the Trade Representative and the Congressional Oversight Group at all critical periods during the negotiations, including at negotiation sites;

(D) after the applicable trade agreement is concluded, consultation regarding ongoing compliance and enforcement of negotiated commitments under the trade agreement;

* * *

(c) Request for meeting

Upon the request of a majority of the Congressional Oversight Group, the President shall meet with the Congressional Oversight Group before initiating negotiations with respect to a trade agreement, or at any other time concerning the negotiations.

* * *

ANNEX D

FULL POWERS DOCUMENT

I invest Stobe Talbott, Deputy Secretary of State, or in his absence, John C. Kornblum, Assistant Secretary of State for European and Canadian Affairs, with full power and authority for and in the name of the Government of the United States of America to sign the Treaty Between the United States of America and the Republic of Latvia on Mutual Legal Assistance in Criminal Matters, together with any related documents, the said Treaty to be transmitted to the President of the United States of America for his ratification by and with the advice and consent of the Senate of the United States of America.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Department of State to be affixed at the city of Washington, in the District of Columbia, this tenth day of June, 1997.

[signature Madeleine Albright]
Secretary of State

[SEAL]

ANNEX E

INSTRUMENT OF RATIFICATION

William J. Clinton

President of the United States of America

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

CONSIDERING THAT:

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the "Chemical Weapons Convention" or CWC) with Annexes, was done at Paris on January 13, 1993 and signed that date by the United States; and

The Senate of the United States of America by its resolution of April 24, 1997, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Convention, with Annexes, subject to the condition which relates to the Annex on Implementation and Verification, that no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States.

NOW, THEREFORE, I, William J. Clinton, President of the United States of America, ratify and confirm the said Convention, with Annexes, subject to the aforesaid condition.

IN TESTIMONY WHEREOF, I have signed this instrument of ratification and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-fifth day of April in the year of our Lord one thousand nine hundred ninety-seven and of the Independence of the United States of America the two hundred twenty-second.

[SEAL]

By the President: [signature William J. Clinton]

[signature Madeleine Albright]
Secretary of State

ANNEX F

REGISTRATION CERTIFICATE

I CERTIFY THAT the documents attached hereto are true and complete copies of

(1) **TIAS 10632** – Agreement between the United States of America and Italy amending the agreement of August 4, 1964 relating to the safeguarding of classified information. Effected by exchange of letters at Rome April 15 and September 2, 1982. Entered into force September 2, 1982, by present exchange of letters. Reservation: none.

(2) **TIAS 10633** – Memorandum of understanding between the United States of America and Venezuela relating to interim agreement on maritime matters. Signed at Washington January 14, 1983. Entered into force January 14, 1983, upon signature. Reservation: none.

* * *

IN TESTIMONY WHEREOF, I,
Warren Christopher,
Secretary of State, have hereunto caused the Seal of the Department of State of the United States of America to be affixed and my name subscribed by the Treaty Registration Officer of the said Department, at the City of Washington, in the District of Columbia, this twenty-fourth day of August, 1995.

_____
Secretary of State
[SEAL]

By: _____
Treaty Registration Officer

ANNEX G

DEPOSITARY CIRCULAR NOTE

The Secretary of State presents her compliments to Their Excellencies and Mesdames and Messieurs the Chiefs of Mission of the States Parties to the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation done at Montreal on February 24, 1988, and has the honor to inform them of the following:

The Department of State has received a note No. 99/97 of June 11, 1997, from the British Ambassador stating that following the restoration of Hong Kong to the People's Republic of China, on July 1, 1997, the Government of the United Kingdom will cease to be responsible for the international rights and obligations arising from the application of the Protocol to Hong Kong. There is enclosed a copy of the Ambassador's note.

The Secretary of State would be grateful if the Chiefs of Mission would forward this information to their respective Governments.

Enclosures: As stated. [initials]

Department of State,
Washington, July 3, 1997

ANNEX H

TREATY TRANSMITTAL MESSAGE TO THE SENATE

86th Congress *2d Session* SENATE Executive G

CONVENTION OF ESTABLISHMENT BETWEEN THE UNITED STATES OF AMERICA AND FRANCE

MESSAGE

from

THE PRESIDENT OF THE UNITED STATES

transmitting

A CONVENTION OF ESTABLISHMENT BETWEEN THE UNITED STATES OF AMERICA AND FRANCE, TOGETHER WITH A PROTOCOL AND A JOINT DECLARATION RELATING THERETO, SIGNED AT PARIS ON NOVEMBER 25, 1959

April 6, 1960 – Convention was read the first time and the injunction of secrecy was removed therefrom. The convention, the President's message of transmittal, and all accompanying papers were referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate.

THE WHITE HOUSE
April 6, 1960

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a convention of establishment between the United States of America and France, together with a protocol and a joint declaration relating thereto, signed at Paris on November 25, 1959.

I transmit also, for the information of the Senate, the report by the Secretary of State with respect to the convention.

[Enclosures: (1) Report of the Secretary of State; (2) convention of establishment, with protocol and joint declaration, signed at Paris, November 25, 1959.]

DEPARTMENT OF STATE
Washington, April l, 1960

The President,
The White House:

I have the honor to submit to the President, with a view to its transmission to the Senate to receive the advice and consent of that body to ratification, if the President approve thereof, a convention of establishment between the United States of America and France, together with a protocol and a joint declaration relating thereto, signed at Paris, November 25, 1959.

The present treaty, although designated a convention of establishment because it is concerned principally with the establishment and conduct of business enterprises, belongs in the series of commercial treaties initiated by the United States in 1946, being the 19th in that series. In common with the others in the series, its object is the creation of a comprehensive agreed basis in reciprocal terms for the protection of American citizens, their property and other interests abroad. It establishes such a basis for relations with France for the first time, although it may be considered as a modern successor to the 1778 treaty of amity and commerce with France (8 Stat. 12; TS 83), the first treaty concluded by the United States.

The present treaty contains provisions relating to entry and sojourn, personal freedoms, property rights, rights with respect to business activities, taxation, exchange regulation, and other matters affecting the status and activities of citizens and enterprises of one country within the territories of the other. The provisions on these subjects are in most respects similar in substance to provisions in treaties in force between the United States and a number of other countries. They follow the same general pattern, for example, as that set forth by the provisions on establishment in the treaties of friendship, commerce, and navigation with the Federal Republic of Germany (7 UST 1839; TIAS 3593) and the Netherlands (8 UST 2043; TIAS 3942), which were concluded in 1954 and 1956, respectively. Principal points of difference are referred to below.

The most notable difference between the present treaty and other recent commercial treaties is the absence from the former of provisions dealing specifically with the exchange of goods and with navigation. As concerns the exchange of goods, France, like a number of other European countries, is reluctant to enter into new long-term commitments, in view of the new problems created and new approaches necessitated by the incidence of the various economic integration projects. Inasmuch as the

commercial relations with France have been subject to the General Agreement on Tariffs and Trade since that agreement became effective on January 1, 1948, neither party considered an additional conventional arrangement on the subject essential. As regards navigation, France desired to retain without change certain regulations that favor French shipping over foreign shipping. While these regulations appear to have little or no adverse impact upon United States shipping interests, it was thought to be better, from the standpoint of U.S. policy, to exclude navigation from the treaty rather than agree to a reservation that might be interpreted as a substantial departure from the established position against discrimination. Furthermore, the treaty does not contain provisions on social security found in a number of recent commercial treaties, nor the usual clauses assuring rights to engage in nonprofit activities on a national treatment basis. Other divergences from the texts of previous treaties, most of which resulted from minor negotiation requirements or from restatements for stylistic reasons are not regarded as of substantial importance.

The protocol, considered an integral part of the treaty, contains clauses clarifying or construing certain provisions of the treaty proper. The attached joint declaration affirms the intent of the parties to facilitate to the greatest possible extent on a basis of true reciprocity the admission of personnel indispensable to the operation of enterprises established by the nationals or companies of one country within the other. In the United States this declared purpose is to be attained for nationals of France by virtue of the normal immigration quota and the provisions for treaty-trader and treaty-investor privileges. In France it would be attained by means of a liberal administration of the work-permit system.

Provision is made in the treaty for its entry into force one month after the day of exchange of ratifications and for its continuance in force for a period of 10 years from that day and indefinitely thereafter, subject to termination on one year's written notice by either party to the other. Its provisions are to extend initially only to metropolitan France and the overseas department, but provision is made for possible future extension to the overseas territories and member states of the French Community.

Respectfully submitted,
CHRISTIAN A. HERTER

[Enclosure: Convention of establishment, with protocol and joint declaration, signed at Paris, November 25, 1959.]

ANNEX I

OFFICIAL PROCLAMATION

By the President of the United States of America
A Proclamation

CONSIDERING THAT:

The Consular Convention between the United States of America and the Republic of Tunisia was signed at Tunis on May 12, 1988, a copy of which in the English, Arabic, and French languages is hereto annexed;

The Senate of the United States of America by its resolution of May 13, 1992, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Convention;

The Protocol was ratified by the President of the United States of America on August 12, 1992, in pursuance of the advice and consent of the Senate, and was ratified by the Republic of Tunisia on January 31, 1989;

It is provided in Article 46(1) of the Convention that the Convention shall enter into force 30 days following the date of the exchange of instruments of ratification; and

The instruments of ratification of the Convention were exchanged at Washington December 16, 1993, and accordingly the Convention entered into force on January 15, 1994.

NOW, THEREFORE, I, William J. Clinton, President of the United States of America, proclaim and make public the Convention, to the end that it be observed and fulfilled with good faith on and after January 15, 1994, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

Done at the city of Washington this second of August in the year of our Lord one thousand nine hundred ninety-four and of the Independence of the United States of America the two hundred nineteenth.

By the President: [signature William J. Clinton]

[signature Warren Christopher]
Secretary of State

ANNEX J

PROTOCOL OF EXCHANGE OF INSTRUMENTS OF RATIFICATION

The undersigned, Winston Lord, Assistant Secretary of State for East Asian and Pacific Affairs, and M.L. Birabhongse Kasemsri, Ambassador Extraordinary and Plenipotentiary of Thailand to the United States of America, being duly authorized by their respective Governments, have met for the purpose of exchanging instruments of ratification of the Treaty between the Government of the United States of America and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986.

The United States ratification is subject to two understandings which are contained in the United States instrument of ratification.

The Thai ratification is subject to a declaration which is appended to the Thai instrument of ratification.

The respective instruments of ratification of the Treaty having been examined and found to be in due form, the exchange took place this day.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed the present Protocol of Exchange of Instruments of Ratification.

DONE in duplicate, in English, at Washington, this tenth day of June, 1993.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

[signature]

FOR THE GOVERNMENT OF THE KINGDOM OF THAILAND:

[signature]

ANNEX K

NOTIFICATION OF COMPLETION OF CONSTITUTIONAL AND STATUTORY REQUIREMENTS

DEPARTMENT OF STATE
WASHINGTON

December 5, 1995

Excellency:

I have the honor to refer to the Convention between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Paris on August 31, 1994, together with two related exchanges of notes.

The Government of the United States of America has completed its constitutional and statutory requirements for the entry into force of the Convention. Therefore, I have the honor to transmit herewith the United States instrument of ratification. In accordance with Article 33, paragraph 1, the Convention shall enter into force upon written notification that the Government of the French Republic has complied with its constitutional and statutory requirements.

Accept, Excellency the renewed assurances of my highest consideration.

For the Secretary of State:
[signature]

Enclosure:
United States Instrument of Ratification

His Excellency
Francois Bujon de l'Estang,
Ambassador of France

ANNEX L

STATISTICAL DATA

1. The latest edition of *Treaties in Force* lists approximately 10,000 treaties and other international agreements of the United States on record in the Department of State on January 1, 2004, which had not expired by their terms or which had not been denounced by the parties, replaced or superseded by other agreements or otherwise definitively terminated.
2. The following statistics pertain to the period 1986–2003:

Year	Treaties and Other International Agreements Concluded	Treaties That Received Senate Advice and Consent
1986	417	13
1987	446	3
1988	408	19
1989	378	9
1990	418	14
1991	297	15
1992	324	31
1993	273	20
1994	362	7
1995	317	10
1996	282	28
1997	293	15
1998	246	51
1999	215	12
2000	200	39
2001	151	3
2002	185	7
2003	251	18

3. Based upon statistics for the years 1986–2003, the United States concludes an average of 313 international agreements a year.
4. The average number of international agreements that were treaties that received Senate advice and consent during the 1986–2003 period was just under 18. In addition, several other international agreements, such as the North American Free Trade Agreement and the Uruguay Round Agreements, received legislative approval during that period by Act of Congress.

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