Chicago-Kent Law Review

Volume 67
Issue 2
Symposium on Parliamentary Participation in the Making and Operation of Treaties

June 1991

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THE SCOPE OF U.S. SENATE CONTROL OVER THE CONCLUSION AND OPERATION OF TREATIES

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I. INTRODUCTION

This article will briefly describe the basic allocation of the treaty power in the United States and the status of treaty law in the municipal legal system. These matters are the subject of a number of excellent studies by American1 and foreign scholars.2 Our main concern, however, is with a particular feature of the constitutional landscape—the role which the Senate plays in the treaty-making process through the attachment of qualifications to resolutions of ratification; namely amendments, reservations, understandings, declarations, and provisos.3 We are concerned

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3. This area has received far less scholarly attention than the treaty power in general, Professors Henkin, Glennon and one of the co-authors being the notable exceptions. With respect to Louis Henkin, see, e.g., The Treaty Makers and the Law Makers: The Niagara Power Reservation, 56 COLUM. L. REV. 1151 (1956); Foreign Affairs and the Constitution, supra note 1, at 133-36, 160-61; Treaties in a Constitutional Democracy, 10 MICH. J. INT'L L. 406 (1989); The ABM Treaty and the Constitution: Hearings Before the Senate Committee on Foreign Relations and the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 81-105 (1987) (testimony of Henkin and others). With respect to Michael J. Glennon, see, e.g., CONSTITUTIONAL DIPLOMACY (1990), supra note 1, which incorporates a number of prior works concerning the foreign affairs and treaty powers. With respect to Stefan A. Riesenfeld, see, e.g., The Power of Congress and the President in International Relations, supra note 1, and International Agreements, in Reviews of the Restatement (Third) of the Foreign Relations Law of the United States, 14 YALE J. INT'L L. 455. See also Note, The Reservation Power and the Connally Amendment, 11 N.Y.U.J. INT'L L. & POL. 323 (1978). Human rights scholars have focused on some of the issues we will discuss. See, e.g., David Weissbrodt, United States Ratification of the Human Rights Covenants, 63 MINN. L. REV. 35, 70 (1978).
with the effect these conditions are accorded by the President, United States courts, and the international community. We are concerned with whether a minority of the Senate will be enabled to effect an influence on the international and domestic legal process greatly in excess of the constituency it represents. We believe that the phenomenon of Senate conditions must be carefully examined in the light of developments in the international legal system, and particularly the growing acceptance of individuals and individual rights as proper subjects of international law.

The Constitution of the United States speaks very briefly to the treaty-making power.4 This is not remarkable as the Constitution is on the whole a terse instrument. The U.S. Supreme Court has spoken infrequently on the respective roles of the Executive and Legislative branches in the treaty-making process. The development of the separation of powers with respect to the respective roles of the Legislative and Executive branches in the United States treaty-making process has therefore come primarily from the organic and continuous process of interaction between these political branches. This process of evolution has proceeded from President Washington's often quoted declaration that having once gone directly to the Senate to discuss a prospective treaty, he would be damned if he would ever do so again;5 to the endorsement by Congress of, and acquiescence by the Supreme Court to, the last-in-time doctrine and its implicit adoption of a partially dualist constitutional system; to the growing role of Senate reservations, understandings, declarations and provisos in the treaty-making process; and most recently to the prominence of the Congressional-Executive agreement and the "fast track" procedure.

Certain fundamental issues concerning the allocation of power be-

4. The U.S. Constitution refers to treaty-making in the context of the process by which the President acts with the advice and consent of the Senate, although this is only one of a number of treaty-making procedures. As a result, U.S. practice often distinguishes between treaties and other international agreements even though the distinction is not meaningful from an international law perspective. See Restatement (Third) of the Law of Foreign Relations, § 303, cmt. a [hereinafter Restatement] and Cong. Res. Study, supra note 1, at 60. We use the word "treaty" throughout this article in its international sense, i.e., without reference to the customary distinction in United States practice between treaties and other forms of international agreement, except where the context specifically indicates otherwise.

The Restatement is one of a series of treatises prepared under the auspices of the American Law Institute, a private organization whose members are elected on the basis of their standing in the legal profession. The treatises are primarily intended to formulate and clarify the law as it is applied in United States courts. As will be apparent, we are in disagreement with the Restatement on certain issues relating to the municipal legal effect of reservations and understandings to treaties. See also Stefan A. Riesenfeld, International Agreements, supra note 3, at 458.

5. See Cong. Res. Study, supra note 1, at 30-33, recounting first and last visit of President Washington to Senate to discuss prospective treaty with Creek Indians and his statement of dissatisfaction as recorded in the memoirs of John Quincy Adams.
between the Executive, Legislative and Judicial branches of government in the United States deserve particular attention in light of the rules of international law which impact on the American constitutional process. A most serious constitutional issue is whether the Senate (or the Congress) has the power to attach reservations or understandings to treaties which are not valid and effective under international law, and yet cause them to have binding effect in United States courts. Of particular concern are recent attempts by the Senate to expressly reserve the supremacy of the internal law of the United States with respect to important international legal instruments and to determine by declaration the non-self-executing character of various treaties. Of perhaps equal concern is whether the Senate (or the Congress) has the power to control the interpretation of treaties in a manner inconsistent with their international interpretation, yet with binding domestic effect. Our concerns are by no means limited to the field of human rights, although it is in this area that the most troubling manifestations of misguided Senate effort have emerged. As the international legal system continues the trend toward developing and protecting the rights and interests of individuals—in the fields of the environment, trade, communications and so forth—questions relating to the conditions under which such rights may be invoked in national courts will become of increasing importance. It is therefore of the utmost urgency to consider who will determine the scope of these rights and under what rules.

II. TREATY LAW OF THE UNITED STATES

The municipal law of the United States with respect to treaties (like the law of other nations) must concern itself with the status of treaty law in the municipal legal framework, the internal allocation of the treaty-making power, the power to execute and interpret treaties and the power to terminate treaties. The U.S. Constitution expressly addresses the status of treaty law in the municipal system and the treaty-making procedure, but in each case in a manner that leaves considerable room for interpretation. The powers to execute and interpret treaties are implicitly allocated by various provisions of the Constitution, while the power to terminate is the least well addressed.

6. Congress as a whole has also specified the non-self-executing nature of trade agreements in implementing legislation, but this is distinguishable on constitutional grounds from the actions of the Senate. See discussion infra text accompanying notes 269-75.
A. Treaties in International Law

1. Treaty Defined

The international law of treaties is codified in the Vienna Convention on the Law of Treaties of 1969.7 The United States signed but has not yet ratified the Convention. Although the United States is not a party to the Convention, the U.S. Department of State as well as the courts have indicated that they consider the Convention for the most part to restate the customary international law of treaties.8 According to that Convention, a treaty is an international agreement between states in written form and governed by international law.9 The validity of a treaty is not dependant on its form or its label,10 and the consent of the parties to its making may be expressed by a variety of means.11

In addition to the Vienna Convention rules, the law of treaties is supplemented by customary international law, general principles of law recognized by municipal legal systems and, as subsidiary sources, judicial decisions and the teachings of the most highly qualified scholars.12

2. Self-executing or Executory Character

Treaties may not require municipal implementing legislation and may create rights in favor of individuals which are directly cognizable by municipal courts. Such treaties are generally referred to as "self-executing."13 Treaties may expressly provide for a self-executing character or

8. See RESTATEMENT, supra note 4, at Part III, Introductory Note, for reference to State Department statement that Vienna Convention is recognized as authoritative guide to current law and practice (prior to its entry into force), for references to Department statements that particular provisions codify existing international law, and for authorities demonstrating that U.S. courts have treated particular provisions as authoritative.
9. Vienna Convention, supra note 7, at art. 2(1)(a).
10. Id.
11. The Vienna Convention specifies "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession" as well as "any other means if so agreed." Vienna Convention, supra note 7, at art. 11. An interesting form of international agreement is reflected in the mutual adherences of Iran and the United States to the Declarations by the Government of the Democratic and Popular Republic of Algeria employed in resolving the hostage dispute and claims. See Riesenfeld, International Agreements, supra note 3, at n.12.
12. These are, of course, the sources of law prescribed for the International Court of Justice by Article 38 of the Statute of the Court. See RESTATEMENT, supra note 4, §§ 102-03, 112.
such character may be implied from the terms and context. Treaties may be self-executing in some parts and not in others. In contrast, other treaties require municipal legislative action before private rights may be enforced, if the enforceability of such rights is contemplated at all. These are generally referred to as "executory" or "non-self-executing" treaties. Treaties which require the substantial expenditure of public funds are generally of an executory character since they typically require the passage of budgetary legislation in order to take effect.

The question whether a treaty is self-executing or executory has both an international law and a municipal constitutional law component. The constitutions of some countries, such as the United States, directly incorporate treaty law into the municipal order without separate action by the legislature. In these countries, the right of individuals to invoke self-executing treaty law in the courts is immediately effective without additional action by the legislature. In other countries, such as the United Kingdom, treaties deemed to be self-executing by other countries require parliamentary action before the courts will recognize individual rights. The nature of the municipal constitutional order does not affect the ultimate cognizability in domestic courts of the treaty under international law. A state which fails to promptly take the steps necessary to implement a self-executing treaty places itself in default of its international obligations.

3. Relationship to Municipal Law

The Vienna Convention provides that a state may not interpose its internal law as a defense to the failure to perform its obligations under a treaty. The Convention also provides that a party may not use its own failure to comply with internal legal requirements to invalidate its consent to a treaty unless the violation was manifest and concerned an internal rule of fundamental importance. The rule that a state may not

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15. See id. at 898-900.
16. Vienna Convention, supra note 7, at art. 27.
17. Id. at art. 46.
interpose its internal law to defeat its obligations under a treaty raises the issue whether a state may nevertheless interpose its internal rules for municipal but not international legal purposes. The view that treaties take precedence over municipal law is reflected in the French Constitution.\textsuperscript{18} Under the French Constitution, the municipal and international legal effect of a treaty may only be defeated by the amendment or the denunciation of the treaty.\textsuperscript{19} Another view accepted by federal courts in the United States, but which is not to be found in any express provision of the U.S. Constitution, is that a nation retains the power to modify by municipal legislation the domestic effect of an international treaty (in the United States referred to as the "last-in-time" doctrine) notwithstanding that such modification has no effect on the international plane (in other words, treaties and municipal legislation are \textit{pari passu}).

The \textit{pari passu} rule has become decidedly problematic as it has become more widely accepted that international law may confer rights directly on the individuals residing within a state. In a Separate Opinion in the \textit{Nuclear Tests Case (Australia and France)}\textsuperscript{20} Judge Petren wrote:

\begin{quote}
In the relatively recent past, it was generally considered that the treatment given by a State to its own subjects did not come within the purview of international law. Even the most outrageous violations of human rights committed by a State towards its own nationals could not have formed the subject of an application by another State to an international judicial organ . . . . It is only an evolution subsequent to the Second World War which has made the duty of States to respect the rights of all, including their own nationals, an obligation of international law towards all States members of the international community.\textsuperscript{21}
\end{quote}

If certain treaties—those, for example, dealing with fundamental human rights—are themselves self-executing, or at least reflect customary international law norms which directly create rights in favor of individuals,\textsuperscript{22} then it may be inconsistent with the notion of binding legal obligation to permit municipal legislatures to modify those rights while maintaining the guise of international legal responsibility.

\begin{enumerate}
\item \textsuperscript{18} See \textit{Administration de Douanes v. Societe Cafes Jacque Vabre}, Cour de Cassation (Combined Chamber), 2 C.M.L.R. 336, 368-69 (1975).
\item \textsuperscript{19} \textit{Id.} at 360-62, Submissions of Procureur General.
\item \textsuperscript{20} \textit{I.C.J. Rep.} 253 (1974).
\item \textsuperscript{21} \textit{Id.} at 303.
\item \textsuperscript{22} Kirgis suggests that certain rules of customary international law may be self-executing, stating: "The most obvious and most important of the potentially self-executing rules are many of those protecting basic human rights. They benefit individuals directly, and they are specific enough to be enforced judicially." Frederick L. Kirgis, \textit{Agora: May the President Violate Customary International Law? (con'd): Federal Statutes, Executive Orders and 'Self-Executing Custom'}, 81 AM. J. INT’L L. 371, 372 (1987).
\end{enumerate}
B. The Status of Treaty Law in the U.S. Legal System

1. Article VI and Supreme Court Doctrine

According to the express terms of the Constitution, treaties are the "supreme Law of the Land." It is widely accepted that the Constitution nevertheless takes precedence over a treaty, for example, that a treaty may not be used to deprive a citizen of a constitutional right. Notwithstanding the Supreme Court's holding on this point, the concern that a treaty may be used to deprive a citizen of constitutional rights (or, perhaps, to enhance federal constitutional rights in the face of powers reserved to the States) has been a primary motivation for treaty reservations adopted by the Senate. A treaty is superior to inconsistent State law and to individual State constitutions. The Supreme Court has held that a treaty supersedes a prior inconsistent federal statute and that a subsequent inconsistent federal statute supersedes a treaty, giving rise to the "last-in-time" doctrine.

2. The Doctrine of Self-Executing Treaties

In *Ware v. Hylton*, decided in 1796, the U.S. Supreme Court held that a provision in the Treaty of Peace with Great Britain making secure the rights of British creditors nullified inconsistent law in the state of Virginia without the further requirement of action by the Virginia legislature. The Court rejected the decision of the lower federal court which had reasoned that because legislation would be required to implement the treaty under British law, legislation by the individual states was required to implement the treaty in the United States. Shortly thereafter, in *Foster v. Neilson* and *United States v. Percheman*, Chief Justice Marshall articulated a doctrine of self-executing treaties, in the latter case holding that the treaty by which Spain ceded the Florida territories to the United States directly stabilized certain land grants made by the King of Spain prior to the time of the treaty and required no additional action by the

23. U.S. Const. art. VI, cl. 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
26. See Cherokee Tobacco Case, 78 U.S. (11 Wall.) 616 (1870); Head Money Cases, 112 U.S. 580 (1884); Whitney v. Robertson, 124 U.S. 190 (1888); Chinese Exclusion Case, 130 U.S. 581 (1889).
27. 3 U.S. (3 Dall.) 199 (1796).
U.S. Congress. The Court relied on the express language of the Treaty of 1819 to determine that the United States and Spain intended the treaty to have direct effect. In a recent case, Judge Mikva, writing for the Court of Appeals for the District of Columbia Circuit, said:

This court has noted that, in 'determining whether a treaty is self-executing' in the sense of its creating private enforcement rights, 'courts look to the intent of the signatory parties as manifested by the language of the instrument.'

C. The Treaty-Making Power and the Senate

The President is granted the express power to make treaties with the advice and consent of the Senate, requiring the concurrence of two-thirds of the Senators present. This allocation of power is unique in the American constitutional system in that it is the only area of unicameral lawmaking, excluding participation by the House of Representatives. It appears that the framers of the Constitution decided to exclude the House of Representatives from a share of the treaty power on the grounds that a large body would not be conducive to the secrecy and dispatch required of the treaty process. The Senate does not have the power to compel the President to ratify a treaty or to modify its terms. If the Senate disagrees with the President concerning a treaty, the sole power of the Senate is to refuse to pass a resolution of ratification (or to pass a resolution attaching conditions unacceptable to the President),

28. In Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), Justice Marshall writing for the Court held that the treaty was not self-executing because its terms appeared to call for a legislative act by Congress. Yet, in United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833), Justice Marshall decided that the treaty did not require a legislative act after considering the Spanish language text.


30. U.S. CONST. art. II, § 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."

31. Article I, § 5, of the Constitution provides that a majority of each House of Congress shall constitute a quorum to do business. However, because Senate rules permit voting in the absence of a quorum when the absence of a quorum is not "noticed," there have been occasions on which resolutions of ratification have been passed by as few as three Senators (see Cong. Res. Study, supra note 1, at 116-17).

32. In I.N.S. v. Chadha, 462 U.S. 919, 954 (1983), the Supreme Court listed the constitutional grant of the Senate treaty power as one of four provisions "by which one House may act alone with the unreviewable force of law, not subject to the President's veto." Two of the other powers concerned impeachment and one concerned Presidential appointments. Since the other unicameral powers involve discrete trials or appointment processes, we believe that the treaty power can fairly be characterized as the only unicameral area of lawmaking as generally understood. It is of interest to note that since the President may refuse to ratify a treaty after it has been approved by the Senate, this might be considered a constructive veto power (though not subject to override).
thereby preventing the President from ratifying it. 33

The Constitution provides no unicameral legislative power to the Senate outside of its power to consent to the making of treaties. 34 All bills are passed by the Senate and the House of Representatives and thereafter become law by signature or acquiescence of the President (or are vetoed by the President, which veto may then be overridden and a law enacted by the Senate and House of Representatives acting together each by two-thirds majority). 35 In I.N.S. v. Chadha 36 the Supreme Court held that legislation which reserved to the Senate or House of Representatives the right to veto an Executive branch decision, thereby “altering the legal rights, duties, and relations of persons” 37 was unconstitutional because it conferred a legislative power on one House of Congress and avoided the possibility of a veto by the President.

Since the founding of the republic, it has been accepted practice that the President initiates and conducts the negotiation of treaties, bringing a signed or otherwise final draft to the Senate for its advice and consent. Only once did a President (Washington) personally visit the Senate for negotiating advice, with notoriously poor results. Members of the Senate make suggestions to the President concerning areas in which treaties might be fruitfully explored, are consulted by Executive branch representatives during the negotiating process, 38 and particularly in recent times, members of Congress have not infrequently acted as members of or advisers to the U.S. delegation negotiating a treaty. 39

The U.S. Department of State maintains as a part of its Foreign Affairs Manual instructions to the Foreign Service with regard to the negotiation and conclusion of treaties and other international agreements. These instructions are referred to as the “Circular 175 Proce-
The Procedure has, among other purposes, the intent to insure that the Senate (or Congress as appropriate) is consulted with respect to impending, ongoing and concluded treaty negotiations. The Procedure sets forth criteria for determining whether the advice and consent of the Senate will be sought with respect to a particular treaty, without specifying that any particular factor is determinative. A Foreign Service Officer's request for authorization to negotiate or sign must indicate what arrangements are planned as to congressional consultation and public comment. With respect to negotiations, congressional leaders and committees are to be kept informed and consulted, "including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement." The Procedure requires diligence in complying with the provisions of the Case Act which requires that the text of any international agreement other than a treaty to which the United States is a party be transmitted to the Congress within 60 days after entry into force.

After a treaty has been negotiated by the Executive branch, it is transmitted to the Senate for its advice and consent. In the Senate, treaties are referred to the Foreign Relations Committee which has exclusive

41. Id. § 720.2(d).
42. The Circular 175 Procedure requires that "due consideration is given to the following factors" in addition to those referred to in the Constitution itself:
   a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
   b. Whether the agreement is intended to affect State laws;
   c. Whether the agreement can be given effect without the enactment of subsequent legislation by Congress;
   d. Past U.S. practice as to similar agreements;
   e. The preference of the Congress as to a particular type of agreement;
   f. The degree of formality desired for an agreement;
   g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
   h. The general international practice as to similar agreements. In determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, or the President.
43. Id. § 721.3.
44. Id. § 722.3(c).
45. Id. § 723.1(e).
jurisdiction over treaties. The Foreign Relations Committee holds hearings in which, among other things, it receives testimony from Executive branch witnesses. The Committee then prepares a report on the treaty and votes whether or not to recommend a resolution of ratification to the full Senate. The recommendation of the Committee may contain proposed amendments and conditions, that is, reservations, understandings, declarations or provisos. The Senate then considers the treaty under Rule 30 of the Senate Rules which, however, is usually abbreviated. If the Rule 30 procedure is not abbreviated, then the treaty is first considered for amendment article by article by the Senate first sitting as a Committee of the Whole, and the Senate thereafter sitting as the Senate must again vote on each proposed amendment. After the Senate has voted on amendments, the Senate then proceeds to consider conditions to the resolution of ratification (proposals by the Foreign Relations Committee being considered first), and thereafter to vote on the resolution of ratification itself (which will at the final stage set forth any agreed to amendments and conditions).

If the Rule 30 procedure is abbreviated, the Senate first considers the treaty as a whole and votes on any proposed amendments which are offered. The Senate then considers the resolution of ratification reported by the Foreign Relations Committee (including any proposed conditions) and any additional conditions proposed. The Senate finally votes on the resolution of ratification. The only vote which requires a two-thirds majority of members present is on the resolution of ratification itself. All other votes are by majority.

Following a favorable vote by the Senate, the President may proceed to ratify a treaty, provided that conditions properly attached to the resolution of ratification are fulfilled (for example, by their incorporation in the instrument of ratification). The President then proclaims the treaty.


48. For a detailed discussion of Senate procedures, see Cong. Res. Study, supra, note 1, at 104-118. The Senate may require that a treaty be amended prior to ratification. The Congressional Research Study suggests that in the case of bilateral treaties there is little substantive difference between amendments and reservations and that either amounts to a counter-offer. On the other hand, "[i]n the case of large, multilateral agreements, amendments are seldom realistic." Id. at 109. Nevertheless, the choice between amendment and reservation may become significant in cases where the party requires a plebiscite. See discussion of the treaty with Panama, Riesenfeld, International Agreements, supra note 3, and infra text accompanying notes 236-41.

49. There is no express constitutional or general statutory requirement that a treaty be proclaimed by the President in order to have domestic effect. However, it has been Executive branch custom to issue a proclamation following ratification of treaties which have received the advice and consent of the Senate, but not to issue a proclamation with respect to Executive agreements unless specifically required by statute. The federal courts have not ruled on the significance of the procla-
Because it is impacted by these other areas, discussion of the power of the Senate to attach reservations and understandings to international treaties follows discussion of the powers to execute and interpret.

D. The Powers to Execute and Interpret

The power to execute the laws of the United States is conferred by the Constitution on the President. Since a treaty is the law of the land, it is the President's role to carry out its terms without reliance on his independent foreign affairs powers. However, it is readily apparent that the President's mandate is constitutionally constrained by the role of the Congress as a whole. First, only Congress may authorize the expenditure of public funds, and so to the extent that the execution of a treaty requires such expenditure, the Congress will have a check on the President's execution authority. Second, to the extent that execution of a treaty requires the promulgation of law, only the Congress has the authority to make the laws of the United States. In sum, the treaty execution power is vested in the President, with significant checks and balances in the hands of the Congress.

The power to interpret is directly corollary to the execution power and therefore must, in the first instance, reside with the President. Thus, in the execution of treaties the President will as a matter of course exercise the interpretative power. However, the Supreme Court has the final

_50_ U.S. CONST. art. II, § 1, provides that: "The executive Power shall be vested in a President of the United States of America."

_51_ See _Restate ment_, supra note 4, § 1, reporter’s note 2 and § 326, cmt. a; Coplin v. United States, 6 Ct. Cl. 115, 136 (1984), rev'd on other grounds, 761 F.2d 688 (Fed. Cir.1985), aff'd sub _nom_. O’Connor v. United States, 479 U.S. 27 (1986), stating “the Executive Branch generally has administrative authority over the implementation of international agreements.”

_52_ U.S. CONST. art. I, § 9: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."

_53_ U.S. CONST. art. I, § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Of course, this power does not act as a constraint with respect to self-executing treaties. About proclamation of treaties, see Reiff, _supra_ note 49.

power to interpret treaties under Article III of the Constitution, and public or private claimants desiring to challenge the President's interpretation of the law of the land embodied in a treaty have the right to plead their case in the courts. It may well be that these claimants will be found by the courts to lack a justiciable interest in a particular treaty because, for example, it deals with a foreign affairs function exercisable by the President in his or her discretion. Nevertheless, it is for the courts to decide that an interest is nonjusticiable. The ultimate judicial power with respect to treaties is expressly allocated to the Supreme Court and in the U.S. constitutional system, in which treaties are part of the supreme law of the land, treaty interpretation is manifestly a judicial

in Coplin v. United States, 6 Ct. Cl. at 136, in support of proposition that Executive branch interpretation of treaties is entitled to significant deference as the Executive is responsible for negotiation and administrative implementation of treaties, noting, however, that "deference . . . is not the same as blind acceptance." See also RESTATEMENT, supra note 4, § 326(1).

55. See Jones v. Meehan, 175 U.S. 1 (1899). U.S. CONST. art. III, § 1, provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 2, provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."

The U.S. State Department has so advised foreign governments. See Aide Memoire from Undersecretary of State Phillips to German Ambassador (1933) as quoted by Court of Claims in Coplin, 6 Ct. Cl. at 136, n.20. See also RESTATEMENT, supra note 4, § 326(2).

Courts and the Executive may disagree on the self-executing nature of a treaty, as e.g. in the case of the Vienna Convention on Diplomatic Relations, see United States v. Enger, 472 F. Supp. 490 (D.N.J. 1978). Similar situations exist in the United States and the Federal Republic of Germany regarding the domestic status of the Vienna Conventions on Diplomatic and Consular Relations. The draftsmanship of the Diplomatic Relations Act (22 U.S.C. §§ 254a-254e) is predicated on the view that the Conventions are self-executing, and the provisions of the Convention on Diplomatic Relations regarding privileges and immunities are made applicable to non-parties (22 U.S.C. § 254b). In Germany, the Vienna Conventions on Diplomatic and Consular Relations, ratified pursuant to two "approval laws," are, in so far as the provisions on immunities are concerned, self-executing with respect to the parties to the convention and made applicable to non-parties by virtue of Articles 18 and 19 of the Law on the Organization of Courts. For an interesting case holding that surveillance of a telephone line installed in the Turkish Consulate General in Hamburg violates the directly applicable convention and prevents use of the information thus obtained, see Order of the Supreme Court of Germany in Criminal Matters of 4.4.1990, BGH St. 36, 396 = NJW 1990, 1799; noted in Giegerich, Deutsche Rechtsprechung in völkerrechtlichen Fragen 1990, 52 ZaöRV, 335 at 381 (1992).

56. A claimant may bring an action in state as well as federal court challenging a federal Executive branch interpretation of a treaty, because the state courts generally have concurrent jurisdiction to hear claims involving federal and treaty law. But issues of interpretation regarding federal and treaty law are ultimately subject to review by the Supreme Court. See RESTATEMENT, supra note 4, § 326(2) cmt. d.

57. See Holmes v. Laird, 459 F.2d 1211, 1223 (D.C. Cir. 1972), and especially cases cited at note 26.
function. 58

E. Reservations and Other Conditions of the U.S. Senate

Because the Constitution expressly vests in the Senate the power to give the requisite consent to the President's ratification of treaties 59 it has traditionally been assumed that the Senate has the power to consent with

58. In this article we will not discuss allocation of the power to terminate treaties beyond the following.
The Constitution does not expressly address the termination of treaties. There are three mechanisms apparent, each of which has been used to effect termination:
1. The President acting alone, with or without informal consultation with the Senate or Congress;
2. The President acting with the advice and consent of two-thirds of the Senators present—thereby replicating the treaty-making process; and
3. Termination by the President acting upon joint resolution of Congress.

Following President Carter's notice of intent to terminate the 1954 Mutual Defense Treaty between Taiwan and the United States in conjunction with formal recognition of the Government of the PRC, a number of Senators and members of the House of Representatives brought suit in federal court to enjoin the termination. The District Court issued an injunction holding that termination of a treaty requires authorization either by two-thirds of the Senate or a majority of both Houses of Congress. Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979). The Court of Appeals, sitting en banc, reversed in Goldwater v. Carter, 617 F.2d 697, 708 (D.C. Cir. 1979), holding that in the absence of a role for the Senate or Congress spelled out in the Constitution, or a specific provision in the treaty itself, "[t]hat power [to terminate] consequently devolves upon the President, and there is no basis for a court to imply a restriction on the President's power to terminate not contained in the Constitution, in this treaty, or in any other authoritative source." Interestingly, the Court of Appeals made the suggestion, but did not decide, that the Senate might have restricted the President's authority by the attachment of a condition to its consent to ratification. Id. at 699, 709.

The Supreme Court (without oral argument) vacated the judgment of the Court of Appeals and remanded with instructions to dismiss the complaint, Goldwater v. Carter, 444 U.S. 996 (1979). Justice Brennan dissented and would have affirmed the judgment of the Court of Appeals. Justices Blackmun and White dissented in part and would have heard oral argument on the case. Two concurring opinions were filed (one joined by four Justices and one filed individually) and Justice Marshall concurred in the result without filing or joining an opinion. The opinion for four, written by Justice Rehnquist, considered the case to involve a political question and therefore to be nonjusticiale. Congress was portrayed as possessing the constitutionally allocated resources necessary to protect and assert its interests in a test of will with the President. Justice Powell, writing individually, considered the case not ripe for judicial review because, in his view, neither the Senate nor Congress had taken the formal steps required to challenge the President's authority.

The RESTATEMENT expresses the view that the President may terminate a treaty on his or her own authority as an incident of the power to conduct foreign relations. RESTATEMENT, supra note 4, § 339 cmt. a. However, the RESTATEMENT suggests that the Senate may with binding effect condition its consent to a treaty by requiring the consent of the Senate or Congress to its termination. Id. at cmt. a. McDougal and Reisman have expressed a strong preference for approval of termination by joint Congressional resolution (while recognizing that compelling circumstances may require independent Presidential action). See Michael Reisman & Myres S. McDougal, Who Can Terminate Mutual Defense Treaties?, NAT'L L. J., May 21, 1979, at 19. One of the authors of this article has suggested that the "most logical view is that the power to denounce a treaty is vested in the President by and with the advice and consent of the Senate, so that the department of the government which makes the treaty can terminate it," recognizing that three mechanisms have been used in practice. Stefan A. Riesenfeld, The Power of Congress and the President in International Relations, supra note 1, at 660. But he now believes that the President may act alone, if the treaty provides for termination by denunciation.

59. The Senate does not itself ratify a treaty, but rather passes a resolution of ratification authorizing the President to ratify. Reservations, understandings and declarations are included in the
conditions. Senate practice has denominated qualifications or conditions in at least four ways, although some confusion surrounds the intended effect of the differently labelled conditions. A Report of the Senate Foreign Relations Committee on the Salt II Treaty (which was not ratified) explained three of the conditions as follows:

Reservation—a limitation, qualification, or contradiction of the obligations in a treaty, especially as they relate to the party making the reservation;

Understanding—an interpretation, clarification, or elaboration assumed to be consistent with the obligations of the treaty as submitted;

Declaration—a statement of policy, purpose, or position related to the subject matter of the treaty but not necessarily affecting its provisions.

The fourth label, "proviso," applies to conditions which, in the words of a Congressional Research Service Study:

are not intended to be included in the formal instruments of ratification because they do not involve the other parties to the treaty but relate instead to issues of U.S. law or procedure. In recent years the term ‘proviso’ has been adopted by the Foreign Relations Committee and the Senate to apply to this type of condition, which is placed in a separate section of the Senate's resolution of ratification.

We will consider examples of each of these types of conditions and their legal effect under international and municipal law. However, we will use the label “understanding” to refer generally to both “understandings” and “declarations” since both are intended to be incorporated in an in-

Senate's resolution of ratification and transmitted to the President for inclusion in the instrument of ratification (or where otherwise appropriate).

60. The Senate consented to the Jay Treaty of 1794 only after an amendment it demanded was incorporated in the treaty. 8 Stat. 116 (1794); 1 MALLOY, TREATIES (U.S.) 590, 607 (1910). See William W. Bishop, Jr., Reservations to Treaties, in II RECUEIL DES COURS 245, 260-61 (1961).


62. Cong. Res. Study, supra note 1, at 110-11. Following an expression of dissatisfaction with the Executive's handling of certain Senate declarations relating to a 1976 bilateral treaty with Spain, the Senate Foreign Relations Committee, in reporting a subsequently proposed (but never ratified) SALT II treaty with the Soviet Union, recommended the following three types of conditions:

Category I: provisions that do not directly involve formal notice to or agreement by the Soviet Union.

Category II: provisions that would be formally communicated to the Soviet Union as official statements of the position of the United States Government in ratifying the Treaty, but which do not require their agreement.

Category III: provisions that would require the explicit agreement of the Soviet Union for the Treaty to come into force.

Although these categories have not been reflected in formal U.S. treaty practice, see RESTATEMENT, supra note 4, § 314, reporter's note 1, they are sometimes referred to in Senate Foreign Relations Committee hearings. See The CFE Treaty: Hearings Before the Subcomm. on European Affairs of the Comm. on Foreign Relations, 102d Cong., 1st Sess. 67-68 (1991) (Senator Dodd and Secretary of State Baker).
strument of ratification and neither is intended to modify a legal obligation.

The Senate presently attaches reservations, understandings and other conditions to treaties referred to it for advice and consent as a matter of routine. We surveyed all treaties entered into by the United States (as printed in the official State Department publication United States Treaties and Other International Agreements) from the year 1970 (21 UST 1, TIAS 6813) through the most current published year, 1987 (— UST — , TIAS 11100). Of 221 treaties listed for that period which had been submitted to the Senate for its advice and consent, 33 (or 17.5 percent) were consented to with one or more conditions. Putting aside questions regarding the frequency of the Senate's conditional consent, the practice with respect to the human rights commitments of the United States has become a matter of specific and serious concern, both domestically and internationally.

1. Reservations in International Law

According to the Vienna Convention, a reservation is a unilateral statement in any form made by a party when ratifying, acceding to or adhering to a treaty by which it purports to exclude or modify a legal obligation otherwise imposed by the treaty. A reservation is valid and effective so long as it does not purport to defeat the object and purpose of the treaty, it is not precluded by the terms of the treaty, and it is not objected to in a timely manner by another party to the treaty. An objection by a party to a reservation has the effect of excluding the portion of the treaty as to which the reservation is made and as to which an objection is filed, or in an appropriate case of precluding the entry into force of the treaty as between the reserving and objecting parties. Reservations and objections thereto affect only those parties to whom they are addressed and do not affect the nature of the treaty obligations as between other parties.

The Vienna Convention does not separately address reservations

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63. Of the 4278 international agreements (treaties and other executive agreements) listed for the stated period, only 221 (or 5.2 percent) had been submitted to the Senate for its advice and consent.
64. The fact that relatively few treaties are submitted to the Senate means that as a percentage of all treaty commitments of the United States, the number which incorporate conditions attached by the Senate is comparatively small (approximately .8%).
65. See generally Bishop, supra note 60.
66. Vienna Convention, supra note 7, at art. 2(1)(d).
67. Id. at art. 19.
68. Id. at art. 20.
69. Id. at art. 21.
and objections to multilateral and bilateral treaties, although the context in which such reservations and objections are made is decidedly different. In the bilateral context a reservation must be viewed as virtually the equivalent of an amendment to the treaty because it clearly affects the rights and obligations of the only parties to the treaty and does not leave rights of other parties unaffected. A bilateral treaty which is the subject of both a reservation and an objection should normally not be binding as there would to be an absence of mutuality of consent as to the treaty terms.  

Reservations to international treaties and objections thereto have been the subject of a number of important decisions by international adjudicatory bodies. Prior to the Advisory Opinion of the International Court of Justice with respect to Reservations to the Genocide Convention the law concerning reservations to multilateral treaties was unsettled: some advocating that a state could not adhere to a treaty with a reservation unless that reservation was expressly assented to by all parties to the treaty, and others advocating that adherence with a reservation did not require universal assent, provided that the reservation itself might be excluded by objection or otherwise. The I.C.J. opined that adherence to a treaty with a reservation does not require universal assent, provided that the reservation may be excluded (or adherence defeated) under certain circumstances.

A second important decision was that of the Court of Arbitration in the Delimitation of the Continental Shelf between the United Kingdom and France. In that case the French had filed certain reservations to the Continental Shelf Treaty of 1958 as to which the United Kingdom had entered objections. The panel held that the effect of a reservation and corresponding objection was to preclude the effect as between the parties of only that specific portion of a treaty article as to which the parties had failed to agree, without affecting the rights and obligations of the parties under other parts of the treaty or under unaffected portions of the specific article as to which reservation was made.

A third important statement on the law of reservations is contained

70. See discussion of bilateral treaties, infra text accompanying notes 233-41.
72. The concern of those recommending against a universal assent requirement was that the requirement would preclude widespread adherence to multilateral treaties, see FRANK HORN, RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES 14-21 (1988), and would give an effective veto to each country. See Bishop, supra note 60, at 274-93.
in a dissenting opinion by Judge Lauterpacht in the *Interhandel case*\(^\text{74}\) between Switzerland and the United States. In his dissenting opinion, Judge Lauterpacht considered at length the reservation which the United States attached to its acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ). The United States sought by its reservation to reserve for itself the right to determine what matters fell exclusively within the domestic jurisdiction of the United States and so not to be justiciable by the ICJ. Judge Lauterpacht opined that such a reservation by the United States defeated its acceptance of compulsory jurisdiction by giving it the right to act as judge in its own case. Judge Lauterpacht dismissed the notion of good faith as a restraint on the discretion of the United States by noting the impracticability of ICJ inquiries into the good faith of states.

A recent decision by the European Court of Human Rights in the case of *Belilos v. Switzerland*,\(^\text{75}\) highlights the importance of legal issues surrounding reservations. In this case Mrs. Belilos took issue with a Swiss statement accompanying its adherence to the European Convention on Human Rights (ECHR) which the Swiss government contended preserved its right to employ certain administrative procedures in the determination of minor criminal infractions. The procedure in question involved decisions of fact and law by a Swiss administrative officer formerly connected with the police authorities. The Court first had to consider whether the Swiss statement in question constituted a reservation as a matter of international law in light of the fact that the Swiss had described the statement as an interpretative declaration. The Court held, in conformity with the Vienna Convention, that the title of the Swiss statement was not determinative, and that the Swiss statement was in fact intended to modify Switzerland's obligations under the treaty, thereby constituting a reservation. The Court went on to hold that because the ECHR expressly forbade reservations of a general character, and because the Swiss reservation attempted to preserve all administrative proceedings which permitted eventual recourse on questions of law to judicial bodies, the Swiss reservation was inconsistent with the express terms of the ECHR and therefore invalid. The Swiss reservation was also held to have failed to conform with an express requirement of the ECHR that a list be included of laws intended to be affected by a reservation. The Court applied the European Convention to Switzerland without the invalid reservation. The court's decision to nullify the reservation and apply

\(^{74}\) Switzerland v. United States (*The Interhandel Case*), 1959 I.C.J. Rep. 6.

the treaty to Switzerland in toto was the first such decision by an international tribunal and of considerable significance with respect to the international law of treaties and treaty reservations.76

2. Reservations in the Municipal Law of the United States

A treaty is an international legal instrument governed by international law.77 Treaties are the law of the land in the United States,78 as is customary international law.79 Treaties must therefore be interpreted and applied in accordance with the applicable rules of international law. Justice Stevens, in a dissenting opinion in Trans World Airlines v. Franklin Mint Corp.,80 wrote:

The great object of an international agreement is to define the common ground between sovereign nations. Given the gulf of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters. The frame of reference in interpreting treaties is naturally international, and not domestic. Accordingly, the law of nations is always to be consulted in the interpretation of treaties. The Pizarro, 2 Wheat. 227, 246 (1817). See also Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ('As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning "as understood in the public law of nations"') [citations omitted]; Society for the Propagation of the Gospel in Foreign Parts v. New Haven, 8 Wheat. 464, 490 (1823). Constructions of treaties yielding parochial variations in their implementation are anathema to the raison d'etre of treaties, and hence to the rules of construction applicable to them.

The basic notion that a treaty is an international instrument governed by international law leads us inexorably to the conclusion that a reservation which is not valid under international law has no independent validity in United States law because an invalid reservation is not part of a treaty. The U.S. Senate (acting with the President who must concur in the act of the Senate by incorporating its reservation in an instrument of ratification) does not have a constitutionally mandated power to unicamerally adopt rules applicable to the United States or its citizens merely because the Senate purports to act under the treaty power. It is, in our view, a constitutional requirement that Senate reservations (assented to by the

77. Vienna Convention, supra note 7, at art. 2(1)(a) and RESTATEMENT, supra note 4, at § 301(1).
78. U.S. CONST. art. VI, cl. 2.
79. See The Paquete Habana, 175 U.S. 677 (1900).
President in the ratification process) be a valid part of a treaty instrument under international law in order to have domestic legal effect.

The Supreme Court has recognized the power of the Senate to consent to the making of a bilateral treaty with an amendment or modification. In *Power Authority of New York v. FPC*, the Court of Appeals for the District of Columbia Circuit held that a Senate reservation of purely municipal concern was without legal effect (see discussion infra), but did not question the Senate's underlying power to adopt and attach reservations to its resolutions of ratification. The federal courts do not appear to have had occasion to consider the validity and legal effect of Senate understandings attached to instruments of ratification. In *Holmes v. Laird*, a case involving the NATO Status of Forces Agreement, the Court of Appeals noted that appellant's failure to plead a defect in U.S. government compliance with a "sense of the Senate" resolution included in an instrument of ratification (which concerned Executive branch procedures with respect to criminal prosecutions in foreign contracting states) obviated the need to address the issue. The courts do not appear to have questioned the validity of a U.S. treaty because the instrument of ratification incorporates a Senate understanding.

The Supreme Court has held that a Senate resolution purporting to interpret a treaty adopted after an exchange of instruments of ratification was "absolutely without legal significance on the question" at issue. The Supreme Court also has held that certain amendments which the Senate had attached to its resolution of ratification but which had not been communicated to the other party were not part of an otherwise valid treaty. These decisions suggest a recognition by the Court that Senate pronouncements which do not have international legal significance would likewise lack domestic legal significance.

Since the mid-1950s at least, Professor Henkin advanced the argument that the Senate has a constitutionally-based power, arising out of its express power of advice and consent to the making of treaties, to attach reservations or other conditions to its consent to ratification which may be either without consequence on the international plane or, at least in

83. 459 F.2d 1211 (D.C. Cir. 1972).
84. The Panama Canal Treaties, for example, include understandings. The federal courts have interpreted the treaties on many occasions, but have not questioned the Senate's authority to require the attachment of understandings in its resolution of ratification.
the case of an understanding, contrary to the international meaning of a
 treaty, but which nevertheless must be given effect by U.S. courts. 87 The
 foundation of this view is that if the Senate has the power to withhold its
 consent to the making of a treaty for any reason — good, bad or indiffer-
 ent — then it must have a corollary power to condition its consent, even
 if that basis may in effect grant a power to the Senate not elsewhere
 ascribed to it in the Constitution. 88 Professor Henkin has long suggested
 that there may be some inherent limitations on this Senate power, such as
 to prohibit its use in manifest bad faith, and has recently suggested that
 the Senate may not by an understanding deprive the President of his or
 her constitutional authority. 89 Insofar as we are aware, Professor Henkin
 has never written that the Senate may attach a reservation to a treaty
 contrary to international law and yet cause that reservation to be
 mandatorily applied by U.S. courts. Nevertheless, his view that the Sen-
 ate's power of advice and consent may be practically unlimited from a
 municipal constitutional law perspective might be understood (or per-
 haps rather misunderstood) to justify that result.

 Professor Henkin's 1952 article on the reservation power of the U.S.
 Senate concerned a reservation attached to a treaty with Canada which
 set forth rules for the development of the Niagara water resources. 90 The
 reservation at issue sought to reserve to the Congress as a whole the
 power to decide the manner in which the Niagara resources would be
 developed by the United States, as a purely domestic matter, when in the
 absence of the reservation development would have been governed by
 existing federal legislation. There was consensus among the U.S. and Ca-
 nadian governments, as well as advocates on both sides of the reservation
 issue, that the U.S. reservation dealt with a purely internal matter.

 The first question was whether the reservation was a proper part of
 the treaty under international law, and therefore part of the municipal
 law of the United States, or alternatively invalid under international law
 and therefore not a part of U.S. law. Professor Henkin argued that a
 treaty may well contain provisions relating solely to the domestic
 processes of one of the parties without invalidating the treaty or the sub-

 87. This view with respect to reservations was first and most comprehensively stated in Henkin,
 The Niagara Power Reservation, supra note 3. It is elaborated on in Henkin, Foreign Affairs and the
 Constitution, supra note 1, at 160-61. Professor Henkin's view of the Senate's purported power to
 control treaty interpretation is discussed infra text accompanying notes 181-83.
 88. See, e.g., Henkin, The Niagra Power Reservation, supra note 3, at 1177.
 89. In a recent article, Professor Henkin observed that the Senate by attaching a "constitutional
 principle" as a condition of consent to a treaty does not bind a President to that principle. Henkin,
 Treaties in a Constitutional Democracy, supra note 3, at 417.
ject provision. He reasoned that if a party would only consent to the making of a treaty with a particular clause, it must have considered the matter of some significance to its bargain and therefore a condition of its consent. If the other party agreed to inclusion of the subject provision in the treaty, as a reservation or part of the text, it should be considered a valid part of the instrument under international law. Professor Henkin acknowledged that there may well be some limit on the power of states to include matters unrelated to the subject matter of the treaty under international law, but suggested that this limitation would not affect provisions which, while related to the subject matter of the treaty, were of purely municipal concern to one party.

The Vienna Convention expressly deals with the proper subject matter of a treaty by excluding treaties conflicting with a preemiptory norm of international law (jus cogens)\(^9\) from the scope of acceptable subject matter.\(^9\) The fact that a treaty is defined by the Vienna Convention as an "international agreement concluded between States . . . governed by international law"\(^9\) doubtless also implies additional subject matter limitation, for example, that a treaty deal with a matter of international concern. Nonetheless, the drafters of the Vienna Convention chose not to further specify subject matter limitation, recognizing the flexible nature of the treaty instrument and the continually evolving nature of the international legal system.\(^9\) The controversy concerning the particular status of the Niagara Power reservation as a part of the treaty involves a question of international law which we need not attempt to answer at this juncture.\(^9\)

Professor Henkin's first argument was that the reservation was a valid part of the treaty and was therefore the law of the United States. We agree that, to the extent the reservation was indeed valid under international law, then it was likewise part of the law of the United States binding on the courts.

\(^9\) Vienna Convention, supra note 7, at art. 53.
\(^9\) The Vienna Convention also disfavors treaties procured by the threat or use of force in violation of the principles embodied in the U.N. Charter. Vienna Convention, supra note 7, at art. 52. However, this is not a subject matter limitation, but rather a limitation as to procedure.
\(^9\) Id. at art. 2(1)(a).
\(^9\) See, e.g., Report by Sir Hirsch Lauterpacht, Special Rapporteur, Law of Treaties, Vol II, 1953 Y.B. INT'L L. COMM'N 90, 93-105, observing both with respect to form and substance, that the scope of the definition of a treaty should be broad. See also Draft Articles on the Law of Treaties with Commentaries, Adopted by the International Law Commission at its Eighteenth Session, U.N. Conf. on Law of Treaties, Documents of the Conference, 1st and 2nd Sessions, 1968-69, p. 8, referring to "treaty" as a "generic term covering all forms of international agreement in writing concluded between States."

\(^9\) That question is, of course, whether a reservation relating to the subject matter of a treaty, but solely regulating a matter of domestic concern to one of the parties, may be considered a part of the treaty.
This proposition is reflected in the Restatement, which provides at section 314, Comment d: "If a treaty is ratified or acceded to by the United States with a reservation effective under the principles stated in [sec.] 313, the reservation is part of the treaty and is law of the United States" [emphasis added]. Section 313 sets forth the generally accepted criteria for evaluating the effectiveness of reservations as codified in the Vienna Convention and under customary international law. By expressly recognizing that only reservations effective under principles of international law are part of a treaty and therefore part of the law of the United States, the Restatement would appear, at first blush at least, to support the conclusion that a reservation adopted by the Senate and attached to a treaty does not have an independent validity under U.S. domestic law.

The second question was whether, assuming the Niagara Power reservation was not a valid part of the treaty because not of international concern, the Senate nevertheless possessed an independent power under the Constitution to legislate with domestic effect under the treaty power such as to make the status of the reservation under international law beside the point. Professor Henkin proposed that the Niagara Power reservation was binding within the United States even if it was not a part of the treaty. He contended that the "treaty power contains an important if limited right to legislate domestically to affect domestic rights and interests." He said:

If, as is agreed, the constitutional requirement of Senate concurrence implies a power in the Senate to impose a condition to ratification which constitutes a 'reservation' in a special international law sense, why is the Senate precluded from imposing as a 'reservation' to its consent a condition relating to the domestic consequences of the treaty? If the Senate can withhold consent for no reason, or for any bad reason, perhaps it can give its consent on any condition whatever. For present purposes it is not necessary to decide what would be the effect if an irresponsible Senate sought to extract from the President, or from the Congress, as the price of its consent, conditions unrelated to its role in the treaty process, unrelated to the subject matter of the treaty, or unrelated to its legitimate concern for the consequences of its consent to this treaty. That is not this case. It might be interesting also to consider whether, as an instance, the Senate in its consent to ratification of the Niagara treaty could have imposed the requirement that development be by a public body only or by a private body only. If we accept that one whose consent is essential may exact any price for that consent, it is not utterly certain that the constitutional answer is

96. Continuing: "[T]hat this power entails responsibilities for those who exercise it; that this power and this responsibility imply and should imply a power, where it is deemed necessary, to control or postpone the domestic consequences of a treaty at least until Congress can consider them." Henkin, Niagara Power Reservation, supra note 3, at 1173.
against the power of the Senate to impose either of these conditions. But the case of the Niagara reservation is not so difficult [footnote omitted].

Professor Henkin cited to treaties with Mexico and Austria as to each of which the Senate incorporated a reservation of purely domestic concern in its resolution of ratification, and which thereafter was not incorporated in the treaty. Concurring that in each case the subject reservation did not become part of the treaty, he said:

What is not considered, however, is whether the reservation was an effective condition to the consent of the Senate which could not be disregarded by other branches of the United States Government . . . . There is no indication that the Executive Branch or anyone else believed that the condition could have been disregarded. Especially, no one suggested that it could be disregarded and yet the Senate be considered as having consented to the treaty so that the constitutional requirements were satisfied and the treaty became effective [footnote omitted].

Important to a full appreciation of Professor Henkin's position in the Power Authority case is that he believed that the particular decision by the Senate in that case to suspend its own direct treaty power, in favor of awaiting legislative action by the full Congress, would help to alleviate political pressures underlying the isolationist Bricker movement by demonstrating that the Senate and President would, in appropriate cases, limit their own treaty-making authority. He pressed those who challenged the Senate's power to limit itself to articulate a basis for their concerns, imploring:

The power exercised in this case by the President and the Senate does not impinge on powers which might otherwise be exercised by the states; it does not limit rights which might otherwise be preserved for the individual citizen; it does not encroach on the legislative power of Congress—it would seem to enable the legislative power to operate more effectively. Apart from the accident of one set of circumstances, whose interests are served by denying this right? In the longer run the proposition that the treaty power does not include a power of self-limitation, of inviting the participation of Congress, offers aid and comfort only to those who seek to impose serious limitations on the treaty power.

The Court of Appeals majority in the Power Authority case was not sympathetic to Professor Henkin's reasoning, holding that the Niagara Power reservation was of purely municipal concern, was not a part of the

97. Id. at 1177.
98. Id. at 1180.
99. Id. at 1182.
treaty and was thus not the law of the land. The dissenting judge, on the other hand, reasoned that the reservation was properly the subject of the treaty and that the Senate had the power to regulate purely domestic concerns, citing to Professor Henkin's article in conclusion.

Professor Henkin's theory of the Senate reservation power is illuminated somewhat in his 1972 book *Foreign Affairs and the Constitution* in which he said:

Legal effect has been given, however, to incidental provisions in a treaty (or in Senate reservations consenting to it) which themselves contain no international obligations, for example, a provision that a treaty shall not be self-executing in the United States; or that territory acquired under the treaty shall not be automatically 'incorporated' into the United States but shall await the disposition of Congress. Perhaps such provisions are considered penumbral to the treaty, sharing in its character as law of the land; perhaps the Treaty Power implies ancillary authority to regulate the incidental commitments and consequences of a treaty, and such regulations, whether in the treaty or imposed by the Senate, also have effect as law. Whatever the theory, surely the Constitution does not prevent the treaty-makers from limiting their own authority and the consequences of their own acts in order to cooperate with Congress and enhance its legislative opportunities [footnotes omitted].

The Restatement appears to incorporate Professor Henkin's thesis regarding "non-treaty" reservations, but in doing so recharacterizes the reservation at issue in the *Power Authority* case as a Senate "proviso." The apparent conflict between the rules of international law governing the validity of reservations and the Senate's adoption of an illusory reservation is reconciled in the Restatement by changing the Senate's designation. As a "proviso" the Niagara Power reservation partakes of the ancillary Senate treaty power proposed by Professor Henkin. Restatement section 303, Reporters' Note 4, provides:

A condition imposed by the Senate that does not seek to modify the treaty and is solely of domestic import, is not part of the treaty and hence does not partake of its character as 'supreme Law of the Land.'... It was once assumed, therefore, that a Senate proviso that a

100. The *Power Authority* decision was cited with approval in *Holmes*, 459 F.2d at 1223 n.95, for the proposition that a sense of the Senate resolution set forth in a resolution of ratification and included in the instrument of ratification, but which was "not designed to affect the text or terms of the treaty or the relations of the parties thereunder,"... "did not condition the ratification."

101. *Henkin*, supra note 1, at 160-161. See also id. at 134-136.

102. Of course, if one concludes that the Senate reservation was invalid as a reservation under international law, one may wish to recharacterize it. It is not so clear that the courts should be free to undertake such a venture.

103. Professor Henkin similarly refers to the Niagara Power reservation as a "proviso" in the context of discussing the hypothesis that the Senate's reservation may not have been a valid part of the treaty in *Foreign Affairs and the Constitution*, supra note 1, at 135.
treaty shall not take effect for the United States until Congress adopts implementing legislation could not have the force of law necessary to prevent the agreement from automatically taking effect as law in the United States. See Power Authority of New York v. Federal Power Commission, 247 F.2d 538 (D.C. Cir. 1957), vacated and remanded with instructions to dismiss as moot, 355 U.S. 64, 78 S.Ct. 141, 2L.Ed.2d 107 (1957). The effectiveness of such a Senate proviso, however, does not depend on its becoming law of the land as part of the treaty. Such a proviso is an expression of the Senate's constitutional authority to grant or withhold consent to a treaty, which includes authority to grant consent subject to a condition. The authority to impose the condition implies that it must be given effect in the constitutional system. See Henkin, 'The Treaty Makers and the Law Makers: The Niagara Power Reservation,' 56 Colum. L. Rev. 1151 (1956). 104

In the Restatement, the Niagara Power reservation has assumed the status of a proviso, the opinion of the only federal court to have decided the issue is relegated to the former view, and Professor Henkin's view of the Senate's power has assumed the status of the prevailing view.

Professor Henkin has expressly dealt with reservations which are of purely municipal concern to the United States and which he suggests are of no consequence to the other party to a treaty. He concludes that while these reservations may not be a part of the treaty, they are valid under U.S. law because of an ancillary power of the Senate to be found in the Constitution. We disagree with this conclusion for reasons which we

104. Reporter's note 4 continues:
The Senate has not made a practice of attaching conditions unrelated to the treaty before it. If the Senate were to do so, or were to attach a condition invading the President's constitutional powers—for example, his power of appointment—the condition would be ineffective. The President would then have to decide whether he could assume that the Senate would have given its consent without the condition.

RESTATEMENT, supra note 4, § 314, cmt. e, provides:
The Senate sometimes gives its consent to a treaty on conditions that do not require change in the substance of the treaty but apply to its implementation in the United States. These conditions do not require reservations by the United States to the treaty and are only of domestic significance. See [§] 303, Comment d and Reporters' Note [4].
The text of comment e refers to reporter's note 3, which appears to be a typographical error. § 303, cmt. d, states:
The Senate often has given its consent subject to conditions. Sometimes the Senate consents only on the basis of a particular meaning of the treaty, or on condition that the United States obtain a modification of its terms or enter a reservation on it. See [§] 314. The Senate may also give its consent on conditions which do not require change in the treaty but relate to its domestic application, e.g., that the treaty shall not be self-executing ([§] 114(4)); or that agreements or appointments made in implementation of the treaty shall require the Senate's advice and consent.
There is no accepted doctrine indicating limits on the conditions the Senate may impose. Surely, a condition that has no relation to the treaty would be improper, for example, a requirement that the President dismiss or appoint some cabinet officer. But a condition having plausible relation to the treaty, or to its adoption or implementation, is presumably not improper, and if the President proceeds to make the treaty he is bound by the condition.
shall state momentarily. We emphasize first, however, that Professor Henkin has never expressly suggested that a reservation which is not valid under international law may nevertheless be binding in the United States because of this ancillary power. Thus, for example, he has not said that a Senate reservation which would defeat the object and purpose of a treaty would be valid for domestic purposes. Nor has he addressed the situation in which another party objects to the U.S. reservation, but not to the entry into force of the treaty. The Restatement view, though perhaps confusing, appears to support the conclusion that only a reservation which is valid and effective under rules of international law is part of a treaty and thus the law of the United States. It is essential that this conclusion be clarified.

A reservation to a multilateral treaty may be invalid or ineffective under international law for one of several reasons. It may be invalid as contrary to the object and purpose of the treaty. It may be invalid because prohibited by the express terms of the treaty. It may be ineffective with respect to another party to the treaty because objected to by that party. The question of the international legal effect of the invalidity or ineffectiveness is complex. In the case in which an objection is interposed without opposition to the treaty coming into effect, the Vienna Convention provides that "the provisions to which the reservation relates do not apply as between two States to the extent of the reservations."\textsuperscript{105} The Vienna Convention does not expressly address the result following a finding that a reservation is invalid because it is contrary to the object and purpose of the treaty or its express terms. In some cases the party which attempts to accede with the invalid reservation will not become a party. However, in the \textit{Belilos} case recently decided by the European Court of Human Rights, the court found the Swiss reservation to be prohibited by the terms of the treaty and applied the treaty to Switzerland \textit{in toto}.\textsuperscript{106} Thus, particularly in the context of multilateral human rights treaties, there is precedent for the proposition that a state's consent to all of the obligations imposed by a treaty is not defeated by a legally deficient reservation.

It has been suggested that consideration of the municipal legal effect of an invalid U.S. reservation is moot because if a U.S. reservation is invalid under international law, then the treaty to which the U.S. purports to adhere with the defective reservation does not come into effect.

\textsuperscript{105} Vienna Convention, \textit{supra} note 7, at art. 21(3).
\textsuperscript{106} \textit{Belilos}, 10 Eur. R. Rep. 466.
with respect to the United States. While this is one possibility, it certainly is not the only one, or necessarily the most likely. Since U.S. courts interpret and apply treaties in accordance with principles of international law, they may well be called upon to enforce a multilateral treaty with a reservation originating from the Senate which is deficient as a matter of international law. It is imperative that these courts not believe themselves constrained to apply the deficient reservation because it emanates from the Senate's treaty power. It is likewise important that these courts recognize that international law does not require them to invalidate U.S. adherence to the treaty. The Belilos decision suggests that, in appropriate circumstances, international law permits application of the treaty in toto without the legally deficient reservation.

The fact that the Senate's advice and consent is constitutionally required for adherence to the treaty does not mean that U.S. adherence is defeated because a Senate reservation is held to be legally deficient. If U.S. adherence to the treaty is not invalidated as a matter of international law, it remains a binding obligation of the United States. A defect in the internal U.S. approval process will rarely cause it not to be considered a treaty party. A defective Senate reservation may be viewed as an internal approval defect which does not defeat U.S. adherence, and the reservation should not be given a special status as a matter of U.S. municipal law.

Professor Henkin's second argument in the Niagara Power case was that even if the Niagara Power reservation was not a true reservation as a matter of international law, a Senate reservation with purely domestic effect in the United States is binding on all constitutional organs as a consequence of an ancillary treaty power conferred on the Senate by the Constitution. Addressing this argument requires us, as it did the reporters of the Restatement, to shift terminology from the realm of reservation to other forms of condition. As the Restatement implicitly acknowledges, a condition such as the Niagara Power reservation is not a reservation in the accepted international sense of the term, and the U.S. Senate has adopted other terms, most notably "proviso," to refer to such conditions. However, as we discuss in the following sections, Senate practice with respect to the labelling of conditions is not consistent, and provisos intended to have purely domestic effect also have been denominated "understanding" and "declaration."

107. This suggestion was made by Professor Glennon at a meeting of contributors to the symposium of which this paper is a part, held in Geneva, Switzerland on November 8 and 9, 1991.
We do not believe that the Senate possesses an ancillary domestic legislative power as part of its power of conditional consent. The Constitution specifically allocates the legislative power to Congress in Article I. Recently, the Supreme Court, in the Chadha\textsuperscript{109} case, made it plain that while more creative and efficient legislative mechanisms than those found in that Article may be readily available, they are not constitutionally proper. The broadest grant of legislative authority, the "necessary and proper" clause, is located in Article I. The Article II power of the Senate is limited to the power to consent to the making of treaties. A treaty is a specific legal instrument—a "contract among nations" in the words of the Supreme Court—which pursuant to Article VI of the Constitution is the law of the United States. In the U.S. Constitutional framework a treaty is made the equivalent of domestic legislation. The "last-in-time" doctrine is a judicial expression of this equivalency. The danger to the constitutional framework represented by the suggestion of an ancillary legislative power conferred on the Senate is that it may be used by the Senate to deprive treaties of their self-executing character and thereby deprive individuals of private rights of action under them. The framers of the Constitution intended that treaties be given direct effect in U.S. law when by their terms and context they are self-executing. An ancillary power of the Senate to deny self-execution directly contradicts this intent.

In the following sections of this article we will discuss in some detail the effect which conditions other than reservations have in the U.S. legal framework. The municipal legal effect of such conditions directly depends on their international legal effect. A reservation which is invalid or ineffective as a matter of international law is not part of a treaty and is not the supreme law of the land. The Senate does not have an Article I constitutional power to make law on its own, and the President and the Senate acting together do not have an Article II power to make a law which is not a treaty. Professor Jessup said this plainly forty years ago.\textsuperscript{110}

The position which Professor Henkin first adopted in the context of the Power Authority case\textsuperscript{111} reflects a certain set of concerns which per-
haps were of the utmost importance in the 1950s. In order to dissipate the strength of the Bricker movement, which sought to emasculate the treaty power by denying self-execution to all treaties, Professor Henkin sought to demonstrate that the Senate and President could act with self-restraint and thereby placate the isolationists. Forty years later the international community has made tremendous strides toward the protection of individual rights through treaty. Looking at the case law of the European Court of Human Rights, for example, it is no longer clear that significant benefits might not accrue even to U.S. citizens from the direct application of treaties in the area of human rights (with respect, for example, to protections against cruel and unusual punishment and discrimination, in the promotion of educational opportunities, and so forth). The Bricker constituency is decidedly weakened, but is able to impede progress toward a full participation of the United States in major treaty advances by the attachment of invidious reservations and other conditions to multilateral treaties—the Genocide, Torture, and Civil and Political Rights Conventions being examples. Moreover, as treaties in other areas of particular concern to individuals, such as those dealing with the protection of the environment, become increasingly important, small constituencies in the Senate will hold the power to force the attachment of reservations and other conditions not in the interests of the great majority. It is, in our view, essential that only those conditions recognized as valid and effective by the international community be given legal effect by United States courts.

The power of conditional consent, like the treaty power itself, is labelled and whether express or implied—controls its interpretation for domestic purposes as a matter of constitutional law, stating, *inter alia*:

The interest of every state—the United States in particular—in preserving the integrity of the domestic legal order must prevail against concerns about mere orderliness. The United States Constitution places limits on the President's power. Whatever international law may say about the *international* nature of an obligation undertaken by the United States, those limits [i.e. the conditions imposed by the Senate] apply domestically and must be respected unless Congress legislates to change the obligation* [citing to subsequent discussion concerning international law as law of the United States] [emphasis in original]. *Id.* at 135-36.

Professor Glennon refers to Professor Henkin's testimony at the ABM Treaty hearings in support of the proposition that the substance of the Senate's understanding of a treaty is constitutionally controlling, regardless of its form (*id.* at 140). Although Professor Glennon makes the correct general observation — that only Congressional legislation may domestically supersede an international obligation — he nevertheless assumes that a Senate understanding which may be at variance with an international obligation created by treaty is domestically binding irrespective of its international legal effect. Although not expressly stated, the underlying assumption must be that of Professor Henkin, namely that the Senate has an independent legislative power ancillary to the treaty power. Professor Glennon's writings have not specifically addressed whether the Senate has an ancillary power to adopt reservations contrary to international law and to cause them to be given effect in U.S. courts. His writings clearly support the view that the Senate has an ancillary power to adopt provisos with purely municipal effect.

anti-majoritarian because it places in the hands of one-third plus one of the Senate the power to force the two-thirds majority to agree to conditions to ratification.\footnote{113} A condition may, and often does, reflect the interests of a distinct minority of the Senate—but that minority is permitted to act on behalf of all citizens of the United States in the interests of achieving the necessary votes for treaty ratification.

It may be readily pointed out that the power of conditional consent is no more anti-majoritarian than the treaty power itself. This does not, however, permit the conclusion that it is not independently pernicious. Multilateral treaties, in particular, are negotiated by a broad community of states—they reflect the widest interests of the international community. They are negotiated prior to their submission to the Senate, though often with its consultation. A small group of Senators is not often likely to have a major impact on the text of a multilateral treaty. Even if such a group may have an impact, it is clearly more likely to have its way in the narrow confines of the Senate where its power to block ratification is manifest and where it is in a position to bargain over future Senatorial interests. Thus the power to adopt a reservation or other condition which does not need the advance consent of the other parties to a multilateral treaty is a power far easier to wield than the power to actually modify the terms of a treaty. It is a far greater power if recognized as an independent legislative power by the courts—a legislative power unconstrained by international law. It is true, of course, that one-third plus one of the Senate may elect to block that body’s consent to the ratification of treaties if they are denied a virtually unfettered power to control their domestic effect, a purported power they now attempt to implement by forcing the Senate to qualify its consent to ratification. We suggest that the increasing interest of individuals in the protection and development of their rights may give serious pause to those Senators who would refuse to grant their consent to ratification of treaties but for the attachment of conditions not valid under international law. That remains to be seen. Recognizing the importance of the promotion of individual rights, Presidents may alternatively decide to pursue the approval of treaties in the full Congress, where the majority may ultimately have its say.\footnote{114}

\footnote{113} While the adoption of a reservation itself requires a majority vote, the power of the minority to block the ratification process obviously impacts on the achievement of that majority. This was an important lesson of the failure of the Treaty of Versailles in the Senate.

\footnote{114} See McDougal & Lans, supra note 1, at 404 et seq.; cited as reflecting the prevailing view, Re\textit{statement}, supra note 4, § 303, reporter’s note 8.
3. Understandings in International Law

The term "understanding" refers to various forms of interpretative statements or declarations attached to instruments of ratification, adherence or accession which are not intended to modify the legal obligations of a party. As previously noted in U.S. practice an "understanding" generally refers to a statement by which the government expresses its interpretation of a particular treaty provision and a "declaration" generally refers to a statement by which the government states its position with respect to the applicability or nonapplicability of the rules of a separate treaty or international law to the treaty in question. In international practice, understandings are often referred to as "interpretative statements" or "interpretative declarations." There is, however, a lack of uniformity with respect to the usage of the terms "understanding," "declaration," "proclamation" and similar terms both internationally and in the municipal U.S. context.

Although the Vienna Convention does not expressly address the legal significance of understandings, two provisions certainly illuminate their potential effect. First, a reservation is a unilateral statement in any form purporting to modify a treaty obligation. If an understanding is something other than a reservation, it should not purport to modify a party's treaty obligations. Second, Article 31 of the Vienna Convention, which establishes general rules for interpretation of treaties, provides that treaty terms shall be given their ordinary meaning "in their context" and thereafter provides that the context shall include "any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other party as an instrument related to the treaty." An understanding which is communicated to another treaty party as, for example, in an instrument of ratification, will

115. See generally HORN, supra note 72.
116. This perhaps simplifies the definitional issue, but is in accord with commentaries to the International Law Commission's draft articles as adopted at its 14th session and included in its report to the U.N. General Assembly for what was ultimately the Vienna Convention, which when trying to distinguish reservations and interpretative declarations short of reservations said:

The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.

1962 Y.B. INT'L L. COMM'N 163. Commentaries to the final draft articles of the Vienna Convention referred to "declarations as to their understanding of some matter or as to the interpretation of a particular provision" and said that if such a declaration is not "a mere clarification of the State's position," but varies or excludes the application of the terms of the treaty as adopted, it constitutes a reservation. Official Records, U.N. Conf. on Law of Treaties, 1971 Docs. of the Conf. 10.
therefore form part of the treaty "context" and should be considered as evidence at least of one party's intention.\textsuperscript{117}

There is not firm agreement among scholars as to whether the rules of the Vienna Convention applicable to reservations apply with similar effect to understandings.\textsuperscript{118} The view more widely held by scholars appears to be that the same rules do not apply.\textsuperscript{119} This is particularly important with respect to the question whether the rule that failure to object to a reservation within twelve months following notification constitutes acquiescence is in like manner applicable with respect to understandings.\textsuperscript{120} The prevailing view is that failure to object to an understanding does not constitute acquiescence.\textsuperscript{121}

4. Understandings in the Municipal Law of the United States

Consideration of the legal effect of understandings in the municipal law of the United States must take into account a number of distinct uses of the term or concept. As described in the Senate Foreign Relations Committee report, \textit{supra}, an "understanding" refers to an interpretative statement regarding the text of the treaty, and a "declaration" regards incidental matters intended to be incorporated in an instrument of ratification. These two types of conditions would comport with what we believe to be the generally accepted international meaning of the terms "interpretative statement" or "interpretative declaration." Because these types of understanding are intended for communication to the other treaty party or parties, we will sometimes refer to this type as an "express understanding." The "understanding" of the Senate may also refer to what the Senate may have understood a treaty to mean at the time it gave its consent to ratification based on information and analysis received from the Executive branch (and perhaps also from its own sources of information and analysis)—in current Foreign Relations Committee parlance the "shared understanding" of the Senate and Executive branch.\textsuperscript{122} This understanding may be reflected in a committee report or published

\textsuperscript{117.} This view was expressed by the special rapporteur, Waldcock, responding to comments concerning the International Law Commission's 1962 draft of the Vienna Convention. 1965 Y.B. \textsc{Int'l L. Comm'n} 46-49.

\textsuperscript{118.} Horn, who has extensively surveyed the literature, says: "Although there are some writers who do adhere to the view that interpretative declarations are governed by the same rules as reservations, the majority of writers stress the importance of making a distinction between these two categories of statements [footnote omitted]." \textsc{Horn, supra} note 72, at 244.

\textsuperscript{119.} Id.

\textsuperscript{120.} Id. at 238-44.

\textsuperscript{121.} Id.

\textsuperscript{122.} See Remarks of Senator Biden at Hearings on the Convention Forces in Europe Treaty, \textit{supra} note 62, at 47-48. See discussion \textit{infra} text accompanying notes 150-83.
preratification debate or in the comments of a Senator made during a committee hearing.\textsuperscript{123} Although this understanding may be in writing, because it is not communicated to the other treaty party or parties, we will sometimes refer to this type of understanding as an “implied understanding.” The Supreme Court in \textit{United States v. Stuart},\textsuperscript{124} discussed \textit{infra}, has at least left open the troubling suggestion that an implied Senate understanding may have an international legal effect. Finally, the Senate also incorporates “provisos” in its resolutions of ratification which are not intended for incorporation in the instrument of ratification and which appear most often intended to offer instruction to the Executive branch. As purely internal directives we are not aware of any suggestion that such “provisos” may impact the international legal effect of treaties,\textsuperscript{125} but we will consider the potential for municipal legal effect.

\textbf{a. Express Understandings}

Express understandings are by definition intended to affect the interpretation of treaties by executives and judicial bodies on the international and therefore on the domestic level. Also, by definition, express understandings are not intended to modify the terms of treaties, only to clarify the interpretation of one or more parties. As mentioned above, under the Vienna Convention rules on treaty interpretation, an understanding incorporated in an instrument of ratification is part of the “context” of the treaty’s terms and will be used to assist in ascertaining the meaning of the terms. Thus a party’s express unilateral statement as to its understanding of the terms of a treaty is given weight at least as evidence of that party’s intent as to meaning under international law. United States courts are said to approach the interpretation of treaties in a somewhat different manner than international adjudicatory bodies or the courts of some other states, but this difference is perhaps rather subtle. United States courts generally view treaties as international contracts, which view is consistent with that set forth in the Vienna Convention. United States courts have traditionally attempted to ascertain the intent of the parties to a treaty in order to interpret it, and so often rely on extrinsic evidence

\textsuperscript{123} This is not intended as an exhaustive list of potential sources of Senate understanding because the concept is not well defined. It might be argued to include a Senator's post-ratification testimony as to his or her subjective but unexpressed belief when voting on the resolution of ratification.

\textsuperscript{124} 489 U.S. 353 (1989).

\textsuperscript{125} Depending on one's view of the extent of the Senate's proviso power, it might be argued that the President's failure to comply with the terms of a proviso constitutes a manifest violation of the internal treaty approval process and therefore will permit the United States to escape its treaty obligations under Article 46 of the Vienna Convention.
to supplement express language, perhaps to a greater extent than some other adjudicatory bodies. This difference in approach, in the words of the Restatement Reporters, "should not be exaggerated."\(^{126}\) A few recent statements by the Supreme Court of the rules of treaty interpretation are illustrative of that Court's approach.

In *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa*\(^ {127}\) the Court said:

In interpreting an international treaty, we are mindful that it is 'in the nature of a contract between nations' . . . to which 'general rules of construction apply.' . . . We therefore begin 'with the text of the treaty and the context in which the written words are used.' . . . The treaty's history, 'the negotiations, and the practical construction adopted by the parties' may also be relevant [citations omitted].\(^ {128}\)

In *Volkswagenwerk A.G. v. Schlunk*,\(^ {129}\) the Court said: "Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."

In *Air France v. Saks*,\(^ {130}\) the Court said: "This interpretation . . . is consistent with the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts. In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation."

In *Sumitomo Shoji America, Inc. v. Avagliano*,\(^ {132}\) the Court said:

Interpretation of the Friendship, Commerce and Navigation Treaty between Japan and the United States must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectation of its signatories [citations omitted] (*id.* at 180).

In *Eastern Airlines, Inc. v. Floyd*,\(^ {133}\) the Supreme Court had occasion to interpret the Warsaw Convention, the sole authentic text of which is in French. The opinion for a unanimous Court, written by Justice Marshall, reiterated the general rules of treaty construction often stated by the

\(^{126}\) *Restatement, supra* note 4, § 325, reporter's note 4.


\(^{128}\) *Id.* at 532.


\(^{130}\) 470 U.S. 392 (1985).

\(^{131}\) The Court may, however, have given a clue to its subsequent thinking in *Stuart* when it added: "In part because the 'travaux preparatories' of the Warsaw Convention are published and generally available to litigants, courts frequently refer to these materials to resolve ambiguities in the text." 470 U.S. at 400.

\(^{132}\) 457 U.S. 176 (1982).

Court. The Court stressed on several occasions, moreover, that the critical task in deciding on a proper interpretation of the Convention was to establish "the shared expectations of the parties to the Convention."\textsuperscript{134} The Court considered it appropriate only to rely on French court decisions prior to the conclusion of the Convention (which might have illuminated the then-contemporary meaning of the French text) because court decisions rendered later "do not necessarily reflect the contracting parties' understanding of the [subject] term."\textsuperscript{135} The Court was persuaded that the parties to the Convention did not consider a specific form of recovery to be included within the language subject to interpretation because, at the time the Convention was concluded, that form of remedy was unavailable in many jurisdictions.\textsuperscript{136} Thus, in the Court's view, it was unlikely that the subject remedy was within the parties' shared expectations. Had it been, the Court expected that the parties would have made an unequivocal reference to demonstrate their specific intent.\textsuperscript{137}

Whatever subtle difference there may be between Supreme Court practice and that of other states or international adjudicatory bodies,\textsuperscript{138} it is nonetheless plain that the Court considers the text of a treaty as the starting point for interpretation, that contextual factors (including practice of the parties) are significant and that the negotiating history of the treaty may be used to illuminate its meaning. Context undoubtedly includes the express understandings of the parties under international law and, although not the subject of any decided case, should be part of the interpretive context according to established Supreme Court doctrine as well.

Section 314, comment d, of the Restatement may be somewhat too categorical in its assertion that: "A treaty that is ratified or acceded to by the United States with a statement of understanding becomes effective in domestic law (sec. 111) subject to that understanding."\textsuperscript{139}

We note that the legal effect of understandings in international treaty law is not entirely settled, including the issue whether failure to file an objection constitutes acquiescence.\textsuperscript{140} Because an understanding may

\begin{itemize}
  \item \textsuperscript{134} Eastern Airlines, Inc. v. Floyd, 111 S.Ct. 1489, 1494 (1991).
  \item \textsuperscript{135} \textit{Id.} at 1495.
  \item \textsuperscript{136} \textit{Id.} at 1498.
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} To place this subtle difference in the context of the Vienna Convention, we might say that the Convention suggests recourse to negotiating history only when context (matters included in related agreements and instruments, etc.) leaves an ambiguity. The Supreme Court may allow in negotiating history to establish the meaning of terms as an element of context.
  \item \textsuperscript{139} Section 111 restates, \textit{inter alia}, the proposition that international treaties are part of the law of the land.
  \item \textsuperscript{140} See discussion \textit{supra} text accompanying notes 116-21. The \textit{RESTATEMENT} provides:
\end{itemize}
not in all circumstances settle the meaning of a treaty term under in-
ternational law (in the clearest case in the situation in which another party 
files an objection to it), we do not believe that any party’s unilateral un-
derstanding is determinative until it is examined in its context. In the 
bilateral treaty setting an understanding incorporated by one party in an 
instrument of ratification may be considered binding if the assent of the 
other party may be inferred from its acceptance of the instrument.141 In 
the multilateral setting a number of factors may need to be considered, 
including whether objections have been filed and whether state practice 
with respect to understandings requires an objection to be filed to conclu-
sively evidence disagreement.142

If a foreign state files an objection to a U.S. understanding it is un-
likely that the U.S. understanding would be considered determinative by 
an international adjudicator and a U.S. court should consider the effect 
of the absence of mutual assent as well. We agree with the Restatement 
to the extent that a court in the United States must consider an express 
understanding by the Senate (concurred in by the President by inclusion 
in the instrument of ratification) in the context of interpreting a treaty. 
Moreover, as a statement of the combined views of the political branches 
of the United States government, we believe that under established 
Supreme Court doctrine such views are to be accorded “great weight.” 
The Supreme Court has consistently held that the views of the Executive 
branch with respect to the interpretation of a treaty are entitled to “great 
weight”143 and the concurrent views of both the Senate and Executive

In relation to a multilateral agreement, a declaration of understanding may have complex 
consequences. If it is acceptable to all contracting parties, they need only acquiesce. If, 
however, some contracting parties share or accept the understanding but others do not, 
there may be a dispute as to what the agreement means, and whether the declaration is in 
effect a reservation. In the absence of an authoritative means for resolving that dispute, the 
declaration, even if treated as a reservation, might create an agreement at least between the 
declaring state and those who agree with that understanding. See Subsection (2)(c). How-
ever, some contracting parties may treat it as a reservation and object to it as such, and 
there will remain a dispute between the two groups as to what the agreement means.

Id. § 313, cmt. g.

141. This conclusion appears logically to follow from the generally accepted analogy between 
bilateral treaties and contracts. However, there may be contexts even in the bilateral setting in which 
an understanding included in an instrument of ratification would not be considered binding as when, 
for example, the representative of the party to which the understanding is tendered indicates an 
absence of concurrence yet nevertheless states a readiness to allow the treaty to enter into force. See discussion infra text accompanying note 235.

142. See discussion supra text accompanying notes 118-21. The Vienna Convention specifically 
provides that a reservation which does not defeat the object and purpose of a treaty or is not pre-
cluded by its terms is deemed accepted unless objected to within one year of its notification. Vienna 
Convention, supra note 7, art. 20(5). The Convention is silent on other forms of condition. Whether 
silence constitutes assent to an interpretive statement is unsettled.

143. See Kolovrat v. Oregon, 366 U.S. 187 (1961); Factor v. Laubenheimer, 290 U.S. 276, 294-
95 (1933).
should perhaps carry even greater weight. However, we suggest that United States courts must determine for themselves whether a particular express understanding in fact controls the meaning of a treaty by examining that understanding in its context. If an understanding has been objected to, is inconsistent with the object and purpose of a treaty, or is manifestly contrary to the terms of the treaty, then these and other contextual factors must be considered. The combined view of the political branches may be close to determinative, but since this view is not part of the express terms of the treaty and is not independent domestic legislation with the force of law, it remains for the courts under Article III of the Constitution to determine the meaning of the treaty in accordance with applicable rules of construction.

Of particular concern to us are recent efforts of the Senate to declare the non-self-executing nature of various treaties. The United States upon its ratification, accession to, or adherence to a treaty has a customarily recognized right to state its understanding or interpretation of the treaty. Thus, the Senate has the power, in conjunction with the President, to incorporate in an instrument relating to the treaty a statement regarding the U.S. understanding as to whether the treaty or a particular provision thereof is self-executing. A declaration or interpretive statement is not a reservation. It does not purport to exclude or modify treaty terms. Under the more widely held view, an interpretive declaration does not become binding upon parties to a treaty which fail to object to it. An understanding, interpretative statement, or declaration is a unilateral matter.

Whether or not a treaty is self-executing is not a unilateral question. Whether a treaty requires municipal implementing legislation and is intended to confer rights directly on individuals is a question of the mutual intent of the parties to the treaty, to be determined by the language of the treaty and other indicia of intent. This principle was recognized and adopted by the U.S. Supreme Court in the earliest days of U.S constitutional history. Justice Marshall's opinions in *Foster v. Neilson* and *United States v. Percheman* articulated a doctrine of self-executing treaties which made plain that the paramount consideration for the Court in deciding whether a provision in the Treaty of 1819 with Spain

145. 27 U.S. (2 Pet.) 253 (1829).
146. 32 U.S. (7 Pet.) 51 (1833).
confirming existing land grants was self-executing was the mutual intent of the governments of Spain and the United States in making the treaty, to be determined by examining its express language. In Percheman, Justice Marshall held the subject provision of the treaty to be self-executing despite a series of congressional acts subsequent to the treaty that were directed at the confirmation of land title claims. Had the Court considered Senate or Congressional intent with respect to the treaty paramount, it may well have concluded that the treaty was non-self-executing. Moreover, in Ware v. Hylton, the Supreme Court previously had rejected the argument that because Great Britain required municipal legislation to implement a treaty, the treaty as a matter of mutuality of obligation must be non-self-executing as to the United States. The principle that questions of self-execution are to be determined by examining the mutual intent of the parties to a treaty is thus firmly imbedded in the U.S. constitutional framework.

It may well be that U.S. courts in the process of interpreting treaties should give great weight to Executive/Senate statements of intent in the their making. However, to borrow an expression from the Court of Claims, great weight does not demand blind obedience. The courts must interpret and apply treaties in accordance with applicable rules of international law, and these rules must be used to determine whether a treaty is self-executing.

b. Implied Understandings

As noted previously, a controversy has arisen in the United States concerning the effect which the Senate's internal understanding of a treaty as developed during the advice and consent process, and as reflected in sources such as Foreign Relations Committee Reports, published preratification debates and comments made by Executive branch representatives and Senators during hearings, may have on the interpretive process. Several questions are raised with respect to the Executive and the Judicial branches and the international community. Does the so-called "shared understanding" of the Senate and the Executive bind the

147. Id. See also supra note 28.
148. 3 U.S. (3 Dall.) 199 (1796).
149. See Coplin v. United States, 6 Ct. Cl. at 136, where the Court of Claims uses somewhat different language with respect to the weight of Executive branch views in treaty interpretation.
150. This is not to suggest that the Senate and President may never attach a reservation to an otherwise self-executing treaty provision so as to make it non-self-executing. A reservation concerning non-self-execution must, of course, be valid in accordance with the international law rules governing reservations. Unlike a declaration, understanding or interpretative statement, a reservation purports to modify or exclude the terms of a treaty.
Executive in the interpretation of a treaty? Does this shared understanding bind the courts? Does this shared understanding have any implications for other treaty parties?

The Senate does not have the power to bind the President to a particular treaty interpretation except through the mechanism of attaching a reservation, which becomes an integral part of the treaty instrument, or an express understanding which becomes part of the formal interpretative context as an instrument relating to the treaty. In default of these mechanisms, to the extent that the President changes his or her interpretative view in good faith following ratification, we believe that any complaint by the Senate is of a purely political nature and not legally enforceable. The executive power, which includes the power to interpret in the process of application, is in the first instance expressly delegated to the President by Article II, section 1, clause 1 of the Constitution. The final power of interpretation is vested in the Supreme Court by Article III. The Senate does not possess an executive interpretative power of its own and so cannot force the President to interpret a treaty in a particular way other than through a reservation or express understanding. We note that Congress ultimately has the power to repeal the domestic effect of a treaty by subsequent legislation and so to mitigate the damage a President may do through exercise of the power to interpret a treaty.

An implied or shared understanding is not binding on the courts. It is neither part of a treaty instrument nor legislation. The views of the Senate may be consulted as an aid to treaty interpretation to determine the intent of the United States. However, an implied Senate understanding does not have as great a weight as evidence of the understanding of the treaty negotiators as reflected in the treaty negotiating history, nor does it have as great a weight as the performance of the treaty parties. Beyond the plain terms of a treaty, the essential inquiry for the courts is what the parties to the treaty intended it to mean. By analogy to basic contract law, this meaning is best ascertained by the outward manifesta-

151. An express understanding will bind the President domestically to the same extent it will bind the President internationally. The extent to which an express understanding binds the party making it as a matter of international law is not entirely clear. It has been suggested that the estoppel doctrine may play a role, at least if parties on notice of the understanding appear to have accepted it. See HORN, supra note 72, at 236-44. The Senate does not have the power to bind the President to a particular treaty interpretation through the attachment of an express understanding beyond the limits of the binding character of the understanding under international law.

An implied or shared understanding between the President and the Senate as to the meaning of a treaty may have a legal effect as between the two political branches to the extent that the President and his representatives may be subject to charges of perjury or similar misconduct in the event they deliberately mislead the Senate as to the meaning of a treaty during the advice and consent process.

152. Note that the understanding of Executive branch treaty negotiators is not binding on the courts either, but may be given great weight.
tions of assent by the parties and by their performance. The Vienna Convention recognizes this priority by assigning the greatest weight to instruments connected with the treaty and performance. The unexpressed understanding of either party is of lesser weight because it is not a part of the basis of the bargain.

At most, the Senate's implied understanding of a treaty may affect its internationally accepted meaning if the other party or parties have actual notice of the Senate's understanding, an opportunity to object, and if it would have been reasonably convenient and appropriate for such an objection to be made. In most instances, particularly in the multilateral treaty context, these criteria will not be met. The suggestion that parties to treaties with the United States should be held responsible for the Senate's implied understandings must be considered in the light of imposing a reciprocal duty on the United States. The impracticability and harmful effects of an international legal rule which would hold the United States responsible for knowledge of the treaty approval processes of its treaty partners is readily apparent.

The problem of implied Senate understandings came to the fore in the relatively recent ABM Treaty reinterpretation dispute. President Nixon had entered into a treaty with the Soviet Union which limited the rights of the parties to undertake both the construction of anti-ballistic missile systems and research and testing of new missile defense systems. More than a decade later, at the time he wished to obtain congressional funding for futuristic "Star Wars" research, President Reagan advised the Congress that he interpreted the ABM Treaty to prohibit the deployment of futuristic missile defense systems, but to permit their research and testing. A number of Senators objected, claiming that when President Nixon's representatives presented and explained the prospective ABM Treaty to them for their advice and consent, these representatives had advised the Senate that the treaty would prohibit the researching and testing of futuristic systems.

President Reagan and his advisors claimed first that the classified negotiating history of the treaty supported their interpretation. Second, they claimed that the Executive possessed an inherent authority to interpret a treaty in the course of its performance, even if an Executive interpretation differed from one proffered to the Senate during the advice and consent process, unless the Executive's initially proffered interpretation

met certain conditions regarding Executive intent in providing the interpretation and Senate reliance on that interpretation. Members of the Senate argued that the President was bound to stand by his own legislative record because the Senate acted in reliance on that record. The Senate Foreign Relations Committee eventually held several days of hearings on the reinterpretation issue. This particular controversy did not, however, reach the courts. In the final analysis, the President's continued Star Wars funding was restricted on the basis of an interpretation of the ABM Treaty satisfactory to Congress.

Illustrating the Senate's concern on this subject, when it subsequently consented to ratification of the INF Treaty in 1988, the following "condition" was included in its resolution:

(1) Provided, that the Senate's advice and consent to ratification of the INF Treaty is subject to the condition, based on the treaty Clauses of the Constitution, that — (A) the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification . . . .

More recently, on July 11, 1991, at the opening of Foreign Relations Committee hearings on the proposed Conventional Forces in Europe Treaty, Senators Biden and Helms pressed Secretary of State Baker for a commitment that the Senate would be entitled to regard Executive branch testimony as authoritatively interpreting the treaty and would be entitled to rely on that interpretation vis-d-vis the Executive branch. Secretary Baker responded that Executive branch testimony can and should be treated as authoritative. He deferred answering the second question for consultation with his lawyers, and subsequently responded for the record that the "administration will in no way depart from the interpretations of the CFE Treaty that we are presenting to the Senate." The Senate's subsequent resolution of ratification with respect to the CFE Treaty included a declaration affirming that the "constitutionally-based principles of treaty interpretation" contained in the so-called


157. Senator Biden threatened that if such commitments were not forthcoming, the Committee would be forced to undertake a line by line review of the treaty and add its own express conditions. *Hearings on CFE Treaty, supra* note 62, at 47-48.

158. Testimony of Secretary of State James Baker, *id.* at 47-49.
"Biden condition" to the INF Treaty are applicable to all treaties.\textsuperscript{159}

In the aftermath of the ABM treaty reinterpretation dispute the Supreme Court did, however, have occasion to opine on the role of Senate preratification history in the treaty interpretation process in \textit{United States v. Stuart}.\textsuperscript{160} In \textit{Stuart}, Canadian citizens were under investigation by their tax authority which sought information with respect to certain bank accounts held by them in the United States. Pursuant to a tax treaty between Canada and the United States, the Canadian revenue authorities sought assistance from the U.S. Internal Revenue Service which issued a summons for the bank records. The Canadian citizens sought to quash the summons on the grounds that U.S. law precludes the issuance of a summons by the IRS when a Justice Department referral for possible criminal prosecution is in effect, and because Canadian authorities were involved in a criminal investigation. The IRS claimed that observance of the U.S. rule on the IRS issuance of a summons was not required under the terms of the treaty with Canada and that Senate preratification history of the treaty did not support such a requirement.\textsuperscript{161} In holding for the United States, the Court interpreted the treaty not to require the application of U.S. procedural restrictions, partially in reliance on Senate preratification floor debate (which did not in fact illuminate the issue). In so holding, the Court not only said that reliance on Senate preratification history as an aid to interpretation was appropriate, but went on to add the remarkable proposition that the public record of Senate treaty consideration would be a better indicator of a treaty's meaning than its negotiating history because the negotiating history is rarely a matter of public record when it is considered by the Senate.

Three Justices felt strongly enough about the Court's statement on the role of Senate preratification debates to file separate concurring opinions on the issue. Justice Kennedy, writing for himself and Justice O'Connor, emphasized that the Court had no reason to reach the issue since it held that the meaning of the treaty was manifest from the language of the document. Justice Scalia, in a strongly worded concurring opinion, was sharply critical of the Court's dictum that Senate preratification debate is a better interpretative source than the treaty negotiating


\textsuperscript{160} 489 U.S. 353 (1989).

\textsuperscript{161} It is not quite clear from the majority and concurring opinions whether the Solicitor General referred to the preratification history as an affirmative argument in favor of the United States, or referred to it merely to rebut the defendant's assertion that the legislative history supported it. See \textit{id.} at 367 n.7.
history, stating it “is rather like determining the meaning of a bilateral contract between two corporations on the basis of what the Board of Directors of one of them thought it meant when authorizing the Chief Executive Officer to conclude it.” Justice Scalia noted that “it can hardly escape the Court’s attention that the role of Senate understanding in the treaty ratification process has recently been the subject of dispute between the Senate and the Executive” and referred to several newspaper articles concerning the ABM Treaty dispute.

Justice Scalia’s concurring opinion itself provoked a response in the American Journal of International Law from Professor Detlev Vagts, who had collaborated in the preparation of a portion of the Restatement of which Justice Scalia had been critical in his opinion. Justice Scalia had referred to two provisions in the Restatement. One states that indication that the Senate ascribed a particular meaning to a treaty is relevant to interpretation by the courts in much the same way that legislative history is relevant to statutory interpretation. The other states that U.S. courts are required to take into account United States materials relating to the formation of an international agreement, which may include domestic legislative materials such as committee reports and debates in determining the meaning of a treaty. Justice Scalia opined that these provisions must be regarded as proposals for change rather than restatement of existing doctrine and that the commentators had not referred to a single United States court case that employed the referenced practice. Professor Vagts pointed out that the Supreme Court itself had on a number of occasions consulted legislative materials as an aid to treaty interpretation, in fact quite recently. Professor Vagts did not, however,

162. The Court said:
A treaty's negotiating history, which Justice Scalia suggests would be a better interpretive guide than preratification materials . . . would in fact be a worse indicator of a treaty's meaning, for that history is rarely a matter of public record available to the Senate when it decides to grant or withhold its consent.

Id. at 368 n.7.

163. 489 U.S. at 374 (Scalia, J., concurring).

164. Id. at 376.


166. Restatement, supra note 4, § 314, cmt. d.

167. It is interesting to note that Justice Scalia's opinion indicates that the Restatement would "permit" the courts to refer to the legislative record, 489 U.S. at 375, while at least at § 325 reporter's note 5, the courts are said to be "required" to take into account such materials. Presumably had he focused on the mandatory aspect of the Restatement view, Justice Scalia would have been even more concerned. We do not suggest that reference to legislative materials is impermissible.

168. Restatement, supra note 4, § 325, reporter's note 5.

169. 489 U.S. at 375-76.
address the majority opinion proposition that legislative materials are "better" evidence than negotiating history, nor does the Restatement.

The Supreme Court's dictum in *Stuart* is troubling for two reasons. The first is its focus on the Senate's approval process as the primary point where a treaty's meaning might become fixed. Whether or not the testimony is public, when an Executive branch representative testifies before the Senate Foreign Relations Committee this testimony is not subject to questioning or rebuttal by representatives of the foreign government or governments which are also participating in the negotiations. It is the testimony of the federal government to the federal government and not necessarily the testimony of the individual closest to the actual negotiations. Even if in the bilateral treaty context the other treaty party might be expected to be aware of such testimony — and this is not always realistic — it is quite unreasonable to assume that parties to a multilateral treaty will pay attention to Senate testimony. It is illogical to conclude that such testimony or committee reports could be the best supplementary evidence of a treaty's meaning. More important, perhaps, is the extent to which the Supreme Court appears to have disregarded its own well settled jurisprudence on treaty interpretation in its *Stuart* dictum.

We previously set forth several of the Supreme Court's statements of its rules for treaty interpretation, all of which are compatible with the rules laid out in the Vienna Convention. In virtually all of the cases we cited, the Court in fact referred to a part of the Senate legislative record in the course of interpreting the treaty, but in the context of citing to the testimony of an Executive branch official concerning its negotiating history or legal issues relating to it. In no case we are aware of does the Court use reference to legislative history to defeat the plain meaning of a treaty or a meaning it otherwise might have established by reference to negotiating history or practice. *Sumitomo Shoji* is the lead case cited in *Stuart* for principles of interpretation. In that case, after it considers the express language of the treaty, the Court refers to the interpretations which the foreign ministries of both parties placed on that language, saying that such interpretations must be given great weight and that "we must, absent extraordinarily strong contrary evidence, defer to that inter-

170. See *supra* text accompanying notes 127-37. The Vienna Convention prescribes rules for the interpretation of treaties at articles 31-33. It provides that the terms of a treaty will be given their ordinary meaning in their context and in light of the object and purpose of the treaty. The context includes related agreements and instruments made and accepted in connection with it. Subsequent agreements, practice and relevant international law rules are also taken into account. Special meanings will be given to terms when it is established that the parties so intended. When application of the foregoing rules leaves an ambiguity, recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion.
footnoting to this comment: “We express no view, of course, as to the interpretation of other Friendship, Commerce and Navigation Treaties which, although similarly worded, may have different negotiating histories” [emphasis added]. Repeating what the Court said in *Schlunk*: "Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.” After so stating, the Court then proceeded to an extensive review of the treaty negotiating history.

In *Trans World Airlines v. Franklin Mint Corp.*, the Court said:

> We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention’s existence ... in determining whether the Executive Branch’s domestic implementation of the Convention is consistent with the Convention’s terms, our task is to construe a ‘contract’ among nations. The conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored [citations omitted].

In *Eastern Airlines, Inc. v. Floyd*, the Court repeatedly emphasized that its critical interpretative task was to establish the shared expectations of the parties to the Warsaw Convention, not the expectations of any single party to it.

In *Immigration and Naturalization Service v. Stevic*, the Court referred to a mutual understanding of the President and the Senate that the U.N. Protocol Relating to the Status of Refugees “was largely consistent with existing law” when accession was approved by the Senate. The Court referred both to remarks in Committee and on the Senate floor. Those references have little, however, to do with interpreting the Protocol itself, the language of which the Court readily decided did not require a specific result in the case. The question before the Court in *Stevic* was

172. *Id.* at 185 n.12. The Court also cited to an article written by a State Department official who was responsible for drafting the form of the treaty at issue to shed light on its purpose. *Id.* at 181 n.6.
174. *Id.* at 700.
175. The majority opinion cites to a Foreign Relations Committee Report for testimony by an Executive branch member of the negotiating delegation on a point relating to clarifying the timing of a form of notification, which is in addition to a cite on the same point in the official negotiating record. *Id.* at 703.
177. *Id.* at 259-60.
180. *Id.* at 417-18.
whether Congress intended to incorporate a particular standard based on the Protocol when it subsequently amended the domestic statute concerning the status of refugees, which the Court held it did not. The reference to the Senate understanding in this case therefore relates primarily to the intention of Congress in enacting subsequent legislation, and only peripherally to the interpretation of a treaty.

The forgoing references to the case law of the Court are intended to demonstrate that the dictum of the Court in *Stuart* is probably not a reliable indication of the Supreme Court's own rules on treaty interpretation. The Court has manifestly followed a practice which is consistent with the Vienna Convention and customary international law by interpreting treaties in accord with the intent of the parties, and not with the understanding of one House of the U.S. Congress.

We believe that it is important to avoid the adoption of rules on treaty interpretation in the United States which are inconsistent with the rules of the Vienna Convention or customary international law. The integrity of the international treaty process and of the international legal system is dependent on the use of reasonably consistent rules of interpretation by judicial bodies, whether international or municipal. While recognizing the profound desirability of adherence to the Vienna Convention principles, Professor Henkin yet contends that U.S. practice with respect to express and implied Senate understandings may, pending ratification of the Convention, properly lead the municipal courts to interpret treaties in a manner inconsistent with Vienna Convention principles. In Senate testimony regarding interpretation of the ABM Treaty, Professor Henkin discussed his perspective on the role of express and implied Senate understandings in a way which makes clear his view as to the potential bifurcation of domestic and international legal effects of such understandings:

All are agreed that if the Senate makes its understanding [of the meaning of a treaty] explicit, that understanding is binding. But an understanding that is not made explicit may nevertheless be clear and is equally binding.

181. He states in the ABM Treaty hearings:

I think Senator Helms might be understood as casting aspersions on the Vienna Convention on the Law of Treaties because the Senate has not yet given consent to its ratification.

I wanted to say, for the record, that the Vienna Convention on the Law of Treaties is not controversial, certainly not controversial on the subject we are addressing today; that its content is accepted as customary law; that the restatement has built its entire treatment of the law of treaties on that convention. Therefore, I do not want anybody leaving these hearings to think there is something wrong with the Vienna Convention.

*Hearings, supra* note 153, at 100.
The second point is that the interpretation of any treaty, unlike an interpretation of the Constitution and unlike interpretation of a statute, is an international question . . . . In some circumstances what a treaty would be held to mean internationally is not necessarily the same as what the Senate consented to. That may be. Therefore, talk about a 'meeting of the minds' of the parties is beside the point. The point is that, whatever an international body might make of it, for constitutional purposes, the Senate's clear understanding as to what a treaty means in an essential respect is constitutionally binding on all constitutional organs.182

With all due respect, we must strongly disagree that the Senate has the constitutional power attributed to it by Professor Henkin. There is no basis in the Constitution whatsoever for concluding that the Senate has the power to control the interpretation of a treaty such that a court must reach a result which is inconsistent with that which would be reached through the sound application of rules of construction acceptable under international law — rules which, the Stuart dictum aside, the Supreme Court has consistently adhered to. The Senate does not have an "ancillary" treaty power which permits it to compel such a result.

It seems apparent that a general acceptance by the international community of the proposition of the Supreme Court majority in the Stuart case — that domestic legislative debates are better evidence of the meaning of a treaty than its negotiating record — is ill-suited to promoting stability in the international legal system. Under the theory espoused in dictum by the majority, each state party to a treaty would be entitled to interpret treaty provisions in accord with its domestic priorities, in disregard of the common understanding of the treaty negotiators. The Restatement does not encourage this result and should not be cited in

182. Hearings, supra note 153, at 90. This testimony is reflected in the Restatement at various places. Section 325, cmt. a, states:

Customary international law has not developed rules and modes of interpretation having the definiteness and precision to which this section aspires. Therefore, unless the Vienna Convention comes into force for the United States, this section does not strictly govern interpretation by the United States or by courts in the United States.

Restatement, supra note 4, § 325 cmt. a. Comment g to section 325 notes that the interpretative rules provided for in that section are somewhat different than those applied by United States courts and states that:

In most cases, the United States approach would lead to the same result, but an international court using the approach called for by this section might find the United States interpretation erroneous and United States action pursuant to that interpretation a violation of the agreement.

Restatement, supra note 4, § 325 cmt. g. Reporter's note 4 to section 325 states:

The international law on the interpretation of international agreements is binding on the United States, and is part of the law of the United States. Insofar as this section reflects customary law, or if the United States adheres to the Vienna Convention, courts in the United States are required to apply those rules of interpretation even if the United States jurisprudence of interpretation might have led to a different result.

Restatement, supra note 4, § 325, reporter's note 4.
support of this proposition. At most, the Restatement merely records what is perhaps an unfortunate present fact that would be largely alleviated by U.S. adherence to the Vienna Convention. The Restatement's suggestion that U.S. practice "requires" reference to legislative materials in fact may be somewhat misleading, particularly when now read in conjunction with the Stuart dictum. While Supreme Court practice has countenanced such reference, it has not used such reference to trump treaty negotiating history.\textsuperscript{183}

c. Provisos

A third type of Senate condition or understanding is, especially recently, referred to as a "proviso" which, according to the Congressional Research Service Study, "includes those [conditions] which are not intended to be included in the formal instruments of ratification because they do not involve the other parties to the treaty but instead relate to issues of U.S. law or procedure."\textsuperscript{184} However, this terminology is not consistently applied. Although provisos may typically involve directions of different kinds aimed at the Executive branch, the Senate has, for ex-

\textsuperscript{183} Another recent Supreme Court decision of some interest with respect to sources of interpretation is O'Connor v. United States, 479 U.S. 27 (1986). This case was taken by the Supreme Court to resolve a conflict between the Federal Circuit Courts on the interpretation of an Executive Agreement implementing the Panama Canal Treaty. At issue was whether the agreement relieved U.S. citizen employees of the Panama Canal Commission from the payment of U.S. income taxes (in addition to relieving them from the payment of Panamanian taxes).

The U.S. Court of Claims (a federal court of the first instance), among other courts, had ruled in favor of the taxpayers on the plain meaning of the agreement, further holding that attempts by the Executive branch to establish the meaning after the fact by its own version of the negotiating history were not persuasive. The Court of Claims had urged the Executive to seek a clarification from Panama as to its interpretation during the proceedings, but this request had been rejected by the Justice Department. During the course of the appeal to the Federal Circuit Court, the State Department in fact obtained a note from the Government of Panama concurring in the U.S. interpretation that the exemption from taxes did not concern U.S. income taxes. The Federal Circuit relied on this note, in conjunction with the Executive branch interpretation, as conclusive evidence of the meaning of the provision in question.

The Court of Appeals for the Eleventh Circuit had meanwhile decided in favor of the taxpayers, again on the clear language of the treaty, and again unpersuaded by Executive branch after the fact attempts to establish a meaningful negotiating history. The Court of Claims and the Eleventh Circuit both diminished the significance of preratification testimony by an Executive branch representative before the Senate Foreign Relations Committee (which supported the government's position) as having little weight.

In the final analysis, Justice Scalia writing for a unanimous Supreme Court held that the plain language of the treaty clearly favored the government and so ruled against the taxpayers. In the view of the Supreme Court, the language of the treaty was so plain that supplementary interpretative sources did not need to be consulted, and so declined to rule on the import of the note from the Panamanian Government, the Senate testimony or various other Executive branch interpretive sources. It is a mystery that a provision which was sufficiently ambiguous to be given a contrary meaning by the Court of Claims and the Eleventh Circuit Court of Appeals could have been understood to have so plain a meaning by a unanimous Supreme Court.

\textsuperscript{184} Cong. Res. Study, supra note 1, at 110.
ample, recently adopted, with respect to the Torture Convention, a condition labelled a "proviso" which is a hybrid condition involving elements of reservation affecting other treaty parties, intended for communication to them but not intended for inclusion in an instrument of ratification. The Senate has also, for example with respect to the NATO Status of Forces Agreement, added understandings aimed squarely at U.S. administrative procedures not affecting the other parties to a treaty, yet caused the inclusion of such conditions in an instrument of ratification.

Because it is accepted that the Senate may condition its approval of the ratification of a treaty with conditions that purport to modify or interpret it, that is, reservations or express understandings, specific instructions to the President as to the intended placement of such conditions with respect to the treaty instruments (should the President choose to accept them and proceed with ratification) are appropriate. On the other hand, the Senate does not have the power to modify the constitutional allocation of power between itself and the President by purporting to effect such modification in a resolution of ratification. It perhaps need not be pointed out that the object of the Bricker movement was to effect such a modification. Therefore, a statement to the effect that the President must interpret a treaty in accordance with a particular constitutional mechanism (as is the purported effect of the condition to ratification of the INF and CFE Treaties, discussed supra), or that the courts must do so, is manifestly ineffective. Although the proper allocation of the power to terminate treaties is in dispute, the Senate does not have the power to resolve the issue through the adoption of a proviso — even if such a proviso is accepted by the President. The President and the Senate acting together may not alter the constitutional framework.

185. See, e.g., infra text accompanying notes 219-25, discussion of proviso included in resolution with respect to approval of Torture Convention.

186. See Holmes v. Laird, 459 F.2d 1211, 1224 (D.C. Cir. 1972), at which the court identifies issue of legal effect but does not address because not raised by appellant.

187. This proposition itself was the subject of recent controversy in respect to the President's decision regarding a military basing agreement with Spain to attach certain Senate declarations in an appendix to the treaty rather than in the instrument of ratification itself as intended by the Senate. See GLENNON, supra note 1, at 124-25.

188. The constitutional allocation of powers, of course, may be modified only by an amendment to the Constitution.

189. Professor Henkin agrees that the Senate cannot bind the President to a constitutional principle. Henkin, Treaties in a Constitutional Democracy, supra note 3, at 417.

190. See Goldwater v. Carter, 444 U.S. 997 (1979), and discussion supra note 58.

(though the President and Senate may reach political accommodations which may be nearly as effective).

Similarly, the Senate may not enact internal legislation through the mechanism of the proviso. Domestic legislation is a matter for the Congress as a whole (acting with the President or over a veto) pursuant to the unambiguous terms of Article I of the Constitution. It should be noted that the Senate might subject the President's ratification of a treaty to a stated condition precedent, as, for example, the enactment of legislation. In no case, however, a treaty qua treaty may have domestic effect prior to being internationally operative.

A "proviso" to the Torture Convention resolution of ratification provides that the President will communicate certain conditions of the United States with respect to the internal effect of the treaty prior to ratification (which conditions are not to be included in the U.S. instrument of ratification). The conditions to be communicated are the same as those which were included as a reservation to the Genocide Convention. Although this condition is labelled a "proviso," it obviously has a significant bearing on other parties to the treaty because it says, in essence, that the United States considers its internal law superior to the treaty and will not apply the treaty in the event of a conflict. Since the treaty deals, inter alia, with the rights of individuals in the United States, the proviso must be construed to affect the rights of other treaty parties.

This proviso is particularly troubling both as a matter of international law and domestic United States law. On the international plane, what is to be made of a condition that is clearly communicated but not included in a treaty instrument? A reservation is a statement in any form purporting to modify a legal obligation made at the time of signing, ratifying, or acceding to a treaty. Is the statement communicated in accordance with the proviso in fact a reservation? Must other states object to preserve their rights? On the municipal front, are courts to construe the proviso as a true reservation? If yes, is it a reservation invalid as a matter of substantive international law that they must not apply? Should the President consent to communicating a condition so likely to generate confusion within the international and domestic legal communities on a matter of such great import?

192. Id. at 951.
194. See discussion infra text accompanying notes 220-25.
5. Reservations and Understandings to the Genocide Convention

While the United States was an original signatory to the Convention on the Prevention and Punishment of Genocide\(^9\) in 1948, the United States did not ratify the treaty until 1988. The reasons for the delay are complex and touch upon a variety of domestic and international issues.\(^{196}\) The following observations may be made with some confidence: (1) the causes for the delay principally involved Senate rather than Executive branch concerns; (2) in the face of Senate resistance, no President was willing to make ratification of the Genocide Convention a political priority; and (3) early efforts at ratification roughly coincided with efforts by a substantial number of Senators to enhance the role of the Senate in the treaty-making process and to correspondingly diminish the role of the Executive (that is, the Bricker proposals) making the President's position particularly difficult.\(^{197}\)

Aside from these points, long-running Senate opposition to ratification of the Genocide Convention appeared to hinge on three points. First, the Genocide Convention might interfere with the protections afforded to American citizens by the U.S. Constitution.\(^ {198}\) Second, the Genocide Convention (and other such conventions) would weaken the position of the states vis-à-vis the federal government on questions of individual rights.\(^ {199}\) Third, the United States takes its international legal obligations more seriously than other states and might be put into a position wherein it would be held (and agree to be held) legally accountable for its actions when other states would not be so held.\(^ {200}\) It was frequently stated in the Senate that ratification by the United States of the

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197. It has been argued that antagonism toward human rights treaties was the primary motivation behind the Bricker movement. See Natalie H. Kaufman & David Whiteman, Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment, 10 HUM. RTS. Q. 309 (1988). President Eisenhower, through Secretary of State Dulles, made a commitment not to pursue the ratification of the Genocide Convention in order to defuse the Bricker movement. Weissbrodt, supra note 3, at 38 n.45.


199. See Weissbrodt, supra note 3; Kaufman & Whiteman, supra note 197, at 323-24.

200. The Bricker constituency argued that ratification of human rights covenants by Soviet bloc states did not appear to improve their human rights records, but that ratification by the United States would open it up to politically motivated charges of non-compliance. In addition, a recurring theme of opposition to the Genocide Convention involved a somewhat amorphous threat of an increasing role for international organizations in the domestic political arena. See Kaufman & Whiteman, supra note 197, at 324-27.
Genocide Convention would constitute a goodwill gesture designed to show support for an international cause because United States citizens are protected by the U.S. Constitution and, in any event, the crime of genocide would be unthinkable in the United States.201

a. Reservations to the Genocide Convention

In tribute to the retirement of Senator William Proxmire, who, for a period of twenty years, made a speech in favor of ratification on the floor of the Senate every legislative day, the Senate in 1988 passed a resolution of ratification with respect to the Genocide Convention. This resolution of ratification incorporated two reservations, five understandings, and a declaration.202 The first reservation purports to exclude the United States from the compulsory jurisdiction of the International Court of Justice (provided for in article IX of the Convention). The second reservation provides: "That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

The reservation excluding the compulsory jurisdiction of the ICJ for disputes concerning the interpretation or application of the treaty with respect to the United States reflects a persistent distrust of binding international dispute settlement procedures in the Senate as described by Judge Lauterpacht in his Interhandel dissent. This distrust is not uniquely American and it may of course be pointed out that until the unfortunate Nicaragua incident the United States had accepted the compulsory jurisdiction of the ICJ (even if arguably defectively). The Genocide Convention is silent as to reservations. A number of states have entered reservations with respect to article IX thereby purporting to exclude compulsory jurisdiction and a number of states have likewise objected to these reservations. Since the Convention does not expressly preclude reservations (or reservations to article IX) some of the objections may be based on the belief that compulsory jurisdiction is essential to the object and purpose of the treaty.203 The question of the compatibility of the compulsory jurisdiction reservation with the object and pur-


203. For an express statement of the basis of the objection as going to the object and purpose of the treaty, see objection of the Netherlands, United Nations Secretariat infra at note 208.
pose of the Convention is one as to which we do not express an opinion. We point out, however, that determination of the object and purpose of the Convention is a problem of international law and not a problem of the municipal law of any party to the Convention.

The second reservation of the United States is far more problematic both as a matter of international law and as a matter of the municipal law of the United States.

(i) International Aspects

As a matter of international law, the United States has purported to reserve to itself the discretion to determine whether and when its obligations under the Genocide Convention are inconsistent with and are thereby superseded by its municipal Constitution. In the absence of an express reservation, the international law rule is as stated in article 27 of the Vienna Convention: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

By its express reservation, the United States purports to exclude the operation of the rule of customary international law codified in the Vienna Convention that a state may not interpose its internal law in order to defeat a treaty obligation. Few reservations could more clearly strike to the object and purpose of a Convention intended to, inter alia, protect the residents of state parties from crimes committed by their own government than a reservation which sets up the internal constitutional law of a state party as a barrier to their protection. If the Genocide Convention had been in force at the time, the Nazi exterminations in Europe would presumably have escaped its application had the National Socialist government decided to enact constitutional changes declaring certain racial, religious, and ethnic classes unprotected as a matter of constitutional law. While such a hypothetical represents the extreme case for the abuse of such a reservation, it is certainly possible to postulate less dramatic inroads by municipal governments into the protections afforded by the Convention. The apparent effect of universal application of the U.S.

204. Eight of the seventeen members of the Senate Committee on Foreign Relations adopted "Additional Views" with respect to the proposed reservations and understandings which are not a part of the main report. These Senators objected to the inclusion of the reservation to Article IX on the grounds that to do so would preclude the United States from using the Convention "as a valuable weapon for the advancement of human rights around the world." Genocide Convention, Report of the Committee on Foreign Relations, together with Additional and Supplemental Views, 99th Cong., 1st Sess. 29-30 (1985) [hereinafter Additional Senate Views].

205. Of course this is not intended to suggest that genocide would not remain a crime under customary international law.
reservation would be to make each state party to the treaty independently responsible for determining the level of protection afforded by it.

Equally disconcerting is the notion that the United States purports to have sole discretion to determine the applicability of its Constitution, thereby appointing itself a judge in its own case. It is unnecessary to repeat here the points made by Judge Lauterpacht in his dissenting opinion in the Interhandel case, except to note that permitting a state to determine the applicability of its own constitution to defeat the effect of a treaty would be far more problematic than permitting it the right to determine what is an internal matter (as considered in Interhandel) because there is little that is transparent to outside observers in the matter of constitutional interpretation.

We believe that the second U.S. reservation to the Genocide Convention is incompatible with the object and purpose of the treaty as a matter of international law. The effect of its invalidity either may be that the United States is not to be considered a party to the Convention, or that the treaty remains in force with respect to the United States but without giving effect to the reservation.

206. Interhandel Case (Switzerland v. United States), supra note 74, at 95 (Dissenting Opinion of Sir Hirsch Lauterpacht).

207. The Additional Senate Views, supra note 204, at 30-31, reflect an appreciation of and objection to the problems raised by the constitutional supremacy reservation.

208. According to the Senate Foreign Relations Committee Report on the Torture Convention, twelve Western European nations have filed objections with respect to the constitutional supremacy reservation to the Genocide Convention S. REP. NO. 101-30, 101st Cong., 2d. Sess. (1990). The most recently published U.N. Multilateral Treaty Index shows nine European states having entered objections with respect to the U.S. reservations to the Genocide Convention (Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Spain, Sweden and the United Kingdom). Greece has objected to all reservations, present and future (not specific to the United States) United Nations Secretariat, Multilateral Treaties Deposited with Secretary-General (Status as at 31 Dec. 1989). These objections take different forms. Several states object to the reservation purporting to exclude the compulsory jurisdiction of the ICJ. The Netherlands, in particular, concludes that on the basis of the article IX reservation it does not consider the United States a party to the Convention. All nine objecting states refer to the reservation purporting to assert the supremacy of the U.S. Constitution over the Convention. Spain simply proffered its own interpretation of the U.S. reservation with which it would apparently be satisfied. Others expressed the view either that the U.S. reservation creates uncertainty as to the extent of U.S. obligations under the Convention (Italy, the Netherlands and the United Kingdom) or that the reservation is inconsistent with the rule of international law that a state may not invoke its internal law as justification for failure to perform a treaty (Denmark, Finland, Ireland, the Netherlands, Norway and Sweden). Only Sweden expressly stated that it does not consider the U.S. reservation as an obstacle to the treaty coming into force between the two countries. No state expressly stated that the second reservation defeats the entry into force of the treaty as between itself and the United States.

The Vienna Convention does not directly address the situation resulting when a party makes a general reservation (i.e., one which does not address itself to a particular treaty article) and other parties object to that reservation. Presumably, the offending reservation is ineffective as between the reserving and objecting parties, but the state entering the reservation may not have been willing to accept its treaty obligations without the general reservation intact. A reserving state in this position may be forced to withdraw its consent to be bound or otherwise be presumed to accept its treaty
(ii) Municipal Aspects

The municipal status of the Genocide Convention under United States law is also problematic. If the treaty is in force under international law, but without the invalid reservation, then the treaty is in force as the law of the land in the United States, likewise without the invalid reservation. This follows from the principles of U.S. constitutional law which we previously stated: namely, that the treaty is the law of the land and that the Senate does not have an independent legislative power to enact a binding reservation which is not a part of the treaty instrument. On the other hand, if the treaty is not in force for the United States as a matter of international law, then it similarly is not in force as the municipal law of the United States because a treaty to which the United States is not a party is not the law of the land. There is no constitutional basis on which a court could conclude that a treaty which is not in force for the United States as a matter of international law possesses an independent validity under domestic law. However, because Congress as a whole adopted the Genocide Convention Implementation Act of 1988 (the Proxmire Act) prior to ratification of the treaty, which Act establishes the federal crime of genocide, the substance of the Convention is largely in force in the municipal law of the United States regardless of the status of the treaty.

b. Understandings to the Genocide Convention

(i) International Aspects

The U.S. understandings to the Genocide Convention touch upon the unresolved issue whether interpretative statements are subject to the same Vienna Convention rules as reservations, particularly whether silence on the part of the other parties to the treaty constitutes assent to the stated interpretations. As stated previously, the more widely accepted view is that the Vienna Convention rules do not apply directly and silence should not be taken as acquiescence. If the understandings obligations without their purported limitation. Recall that in the Belilos case, 10 Eur. R. Rep. 466, supra note 75, the European Court of Human Rights excluded the prohibited general reservation and applied the treaty to Switzerland in toto.

209. This does not include the situation in which a domestic court might find that the rules embodied in a treaty had an independent basis as customary international law.

210. Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. §§ 1091-93 (1988)). The enactment of this implementing legislation was the subject of a Senate declaration with respect to approval of ratification, requiring the President to refrain from depositing the instrument of ratification prior to the enactment of “the implementing legislation referred to in Article V” of the Convention.

211. See discussion supra text accompanying notes 118-21.

212. See HORN, supra note 72.
are not binding internationally, then they express the views of the U.S. government with respect to the manner it interprets the treaty and go to assist in establishing the context for interpretation of the treaty as a matter of international law. 213 The declaration of the Senate that the President shall not ratify the treaty until municipal implementing legislation is enacted is in the nature of a “proviso” as it is not intended to affect other parties to the treaty. 214

(ii) Municipal Aspects

Based on the principles of constitutional law we previously discussed, municipal courts in the United States are not bound to interpret the Genocide Convention in the manner stated in the Senate understandings except as such understandings validly form part of the context of the treaty. The Senate understandings constitute part of the context of the treaty for purposes of interpretation in United States courts as they would for purposes of interpretation in an international judicial forum. However, it must be pointed out that Congress enacted legislation implementing the Genocide Convention prior to its ratification by the United States. This legislation, which was adopted by the Congress pursuant to Article I of the Constitution, 215 controls interpretation of the treaty in United States courts irrespective of its international interpretation. 216

213. Recall that understandings are not intended to effect the obligations of the parties pursuant to the treaty. The U.S. might be estopped from denying the validity of an interpretation by another party made in reliance on the express U.S. understandings.

214. There was one possible international effect. Had the Congress failed to enact legislation and had the President nevertheless proceeded to ratify, it might have been argued that the President’s action was manifestly contrary to U.S. constitutional requirements and thus that U.S. adherence was defective.


216. Since the legislation was enacted prior in time to the ratification of the treaty, the question might be raised whether subsequent ratification of a self-executing treaty supersedes any inconsistencies in the legislation pursuant to the “last-in-time” doctrine. Although such a suggestion is plausible, because the intent of the legislature in such case would almost certainly be that the legislation be deemed to control the treaty for domestic purposes, application of the “last-in-time” doctrine in such case would unproductively elevate form over substance (and simply cause Congress in the future to expressly provide that the legislation takes effect immediately upon ratification). In any event, U.S. courts will use their best efforts to reconcile the terms of a federal statute and a treaty; see, e.g., Cook v. United States, 288 U.S. 102 (1933); whatever the sequence of their effectiveness. Note that the Senate’s resolution of ratification with respect to the International Convention for the Unification of Certain Rules relating to Bills of Lading, signed at Brussels, Aug. 25, 1924, included an understanding providing that in the event of a conflict between that convention and the previously enacted Carriage of Goods by Sea Act, the “provisions of said Act shall prevail,” 51 U.S. Stat. 233, TS No. 931, 2 Bevans 430. There is some judicial support for the proposition that those parts of a treaty which require criminal penalties must be implemented by legislation and therefore may not be self-executing as a matter of constitutional principle. See The Bello Corrunes 19 U.S. (6 Wheat.) 152 (1821); Dainese v. Hale, 91 U.S. 13 (1875). See also Riesenfeld, The Power of Congress and the President in International Relations, supra note 1, at 651 n.30.
The Senate declaration to the Genocide Convention regarding the requirement for pre-ratification implementing legislation is, under the terminology of the Congressional Research Study, a "proviso" because it was not intended to affect the other treaty parties and was not included in an instrument of ratification. Because this proviso related solely to the time at which the President would be authorized to deposit the instrument of ratification, this would appear to be a valid exercise of the Senate power of consent: it is not in the nature of purported modification of the treaty instrument, it does not purport to bind the President or the courts to any interpretation of the treaty or manner of its execution, and it does not purport to effect a change in the constitutional allocation of powers.

3. The Torture Convention (Reservations, Understandings, Declarations, and a Proviso)

To some extent the lessons of the Genocide Convention were reflected in the Senate in contemplation of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Although the Senate resolution of ratification contains two reservations, five understandings, and two declarations, a condition identical to the second reservation to the Genocide Convention (asserting the supremacy of the U.S. Constitution) was relegated to a "proviso." The proviso stipulated that the President would not deposit the instrument of ratification of the United States, "until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The resolution of ratification stated that the proviso was not to be included in the U.S. instrument of ratification.

217. We have not been able to find a documentary source indicating the Senate's intent as to whether the proviso was to be included in the instrument of ratification.
220. Id. at S17,492.
221. The proviso to the Torture Convention, as earlier discussed, is a hybrid condition in that it is not intended to be included in an instrument of ratification, but directly affects the interests of other parties to the treaty. The Senate would appear to have the power to require the President to communicate the text of the proviso as a condition precedent to ratification because the Senate is issuing instructions with respect to the placement of the condition—that is, outside the instrument of
The texts of the preratification debate and the Senate Foreign Relations Committee Report recommending consent to ratification make plain that the ill effects of the second reservation to the Genocide Convention were known by the Senate prior to ratification of the Torture Convention. 222 The President agreed to the terms of the proviso only in response to pressure from a conservative Senator, Jesse Helms. Senator Helms argued on the floor of the Senate that the hierarchical status of treaties and the Constitution is uncertain, that he would be "derelict in [his] duties as a U.S. Senator sworn to uphold the Constitution were I to disregard the potential conflict between what the Constitution actually says and those who say what the Constitution says" and that, if the Constitution is in fact superior to treaty law, then his proviso (which he would prefer as a reservation) is superfluous at worst. 223 Senator Moynihan, on the other hand, pointed to the damage already done by the second reservation to the Genocide Convention and noted its growing appeal to states seeking to avoid international obligations. Senator Moynihan said:

I remain concerned that this statement [the proviso] will create a political and diplomatic problem for the United States and provide a rhetorical device which nations using torture can employ to defend their actions. This will not, as I have stated, be a sound legal defense to their conduct. Nonetheless, it will inevitably and unfortunately be used. 224

While the Vienna Convention stipulates that a treaty must be in written form, it makes no such requirement of a reservation. A reservation is a "unilateral statement, however phrased or named" which must be made "when signing, ratifying, accepting, approving or acceding to a treaty." 225 It is not entirely clear that a statement conveyed by the President prior to ratification may not purport to modify a legal obligation. Senator Moynihan’s concerns about the adverse use of Senator Helm’s proviso therefore may not be so ill-founded.

Notwithstanding the apparent step forward represented by relegation of the general constitutional supremacy clause to a "proviso," the first U.S. reservation to the Torture Convention includes reference to the supremacy of certain specific provisions of the U.S. Constitution which ratification. This does not, however, influence the substantive validity of the condition under domestic or international law.

223. 126 Cong. Rec. at S17,486-87.
224. Id. at S17,490. See also letter from eight Senators opposing proviso printed in record of preratification debate. Id.
225. Vienna Convention, supra note 7, Article 2(d).
are nearly as troublesome as the more general reservation.\textsuperscript{226} Absent an in-depth study of American constitutional jurisprudence (and even after such a study), another state party to the Torture Convention would find determining the scope of the United States' obligations under the treaty quite a difficult task. To the extent that states filed objections to the second Genocide Convention reservation on the ground that the scope of the U.S. obligation was indeterminate, there is only marginal cause for these states to refrain from objecting to the first Torture Convention reservation. To the extent that states objected that the U.S. had reserved the right to interpose its internal law to defeat the application of the treaty in derogation of well-known principals of international law, the objections remain applicable.\textsuperscript{227} The fact that the United States has not expressly reserved for itself the discretion to determine the meaning of its Constitution in this particular reservation is of course a step forward.\textsuperscript{228}

Our analysis of the international and municipal legal effects of the Genocide Convention reservation with respect to constitutional supremacy applies here \textit{mutatis mutandis}. Reservations which purport to assert the supremacy of internal U.S. law are inconsistent with the object and purpose of the treaty and should be invalid as a matter of both international and municipal law. The status of the treaty with respect to the United States is uncertain. We note, however, that because of the more frequent practice of torture (as compared to genocide) issues concerning application of the Torture Convention are far more likely to find themselves before the municipal courts of the United States.

The second U.S. reservation to the Torture Convention excludes the compulsory jurisdiction of the ICJ for the settlement of disputes. This reservation is expressly permitted under the terms of the treaty\textsuperscript{229} and is therefore valid as a matter of international and municipal law.

\textsuperscript{226} The first U.S. reservation provides that the terms "cruel, inhuman, degrading treatment or punishment" as used in the Convention are limited to the reach of those terms under the prohibitions of the fifth, eighth, and/or fourteenth amendments to the U.S. Constitution. It is important to note that not all of the referenced terms are actually used in the Constitution (i.e., "inhuman," "degrading," and "treatment" are not used) and that the limits of even the express terms (i.e., "cruel" and "punishment") are judicially constructed.

\textsuperscript{227} The Torture Convention reservation with respect to limiting the definition of cruel, inhuman or degrading treatment appears to reflect in large measure Reagan Administration concerns that the European Commission on Human Rights had interpreted those terms to encompass treatment which would not be prohibited under the U.S. Constitution. See \textit{Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra} note 222, at 8; \textit{Convention Against Torture: Hearings before the Senate Comm. on Foreign Relations, 101st Cong., 2d Sess.}, at 5 (1990) (statement of Hon. Abraham D. Sofaer, Legal Adviser, Dept. of State).

\textsuperscript{228} Note, however, that the right of the United States to make a unilateral determination is included in the message to be conveyed by the President pursuant to the proviso.

\textsuperscript{229} See \textit{Torture Convention, supra} note 218, at art. 30(1) and 30(2).
The U.S. understandings to the Torture Convention reflect a caution which is difficult to reconcile with America's self-perception as a leading proponent of human rights. We will not dissect each of the interpretative constraints, but merely note that most are designed to raise the threshold of malicious behavior necessary to constitute a violation of the terms of the treaty. The fundamental question is whether the Senate's understandings are binding on the courts of the United States. As noted with respect to the Genocide Convention understandings, it is the more widely held view that as a matter of international law silence by other state parties with respect to interpretative statements does not constitute agreement to them. The understandings should therefore constitute part of the interpretative context of the treaty both from an international and municipal legal standpoint.

The Senate has purported to address the question of the self-executing nature of the Torture Convention in the first of two "declarations" included in the resolution of ratification which appear intended for inclusion in the instrument of ratification. The declaration provides: "That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing." Because Articles 1 thorough 16 create specific rights in favor of individuals, and because the Torture Convention does not otherwise suggest the necessity for the enactment of subsequent legislation to bring its protections into force, it is likely that the Convention will be deemed self-executing, at least in part, by an international judicial body or municipal court in the United States. If the condition is considered an interpretative statement and is incompatible with the internationally accepted meaning of the treaty, the declaration should be disregarded by municipal courts in the United States. Because the Senate declaration purports to modify the otherwise self-executing character of at least part of the treaty, it might also be construed as a reservation to U.S. adherence. Because the condition is self-styled by the Senate as a declaration, it is not at all clear that other state parties to the treaty would be required to file objections to it in order to preserve a right to object at a later time. They may nevertheless do so. There is also the question whether the condition, if properly characterized as a reser-

230. Supra note 219.
231. Note that Article 2 of the Convention provides that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction," Article 4 provides that states will ensure that all acts of torture constitute criminal offenses under their law, and Article 19 provides for the submission of reports to the Committee established in Part II on the measures states have taken to give effect to their undertakings under the Convention. None of these provisions suggest that the enactment of implementing legislation is a condition precedent to the assertion of the rights of individuals.
vation, may defeat the object and purpose of the treaty. In interpreting the Torture Convention, U.S. courts must examine for themselves the extent to which the treaty is intended to be self-executing as a matter of international law, whether the Senate declaration is compatible with this intent, whether other state parties to the treaty object to the declaration, and the extent to which the declaration may defeat the object and purpose of the treaty. 232

F. The Separate Case of Bilateral Treaties

1. International Law with Respect to Reservations and Understandings to Bilateral Treaties

Although the Vienna Convention does not expressly distinguish between reservations with respect to bilateral and multilateral treaties, 233 the context in which such reservations are made is quite different and there appears to be a general consensus that different rules are applicable. 234 The law of contract is invoked by analogy and a reservation to a bilateral treaty is considered a counter-offer requiring the assent of the other party to the treaty. Failure to assent constitutes a rejection of the counter-offer and no treaty comes into force, although (continuing the analogy to the law of contract) acceptance of the counter-offer may arise by implication from acquiescence. 235

Although the issue appears largely unaddressed, express understandings with respect to bilateral treaties may not be strictly subject to the rules of offer and acceptance because understandings purport not to affect the obligations of the parties. For example, one party might ex-

232. Although the Senate resolution of ratification does not contain a condition requiring the enactment of implementing legislation prior to ratification, the State Department stated in a letter to a member of Senate Foreign Relations Committee that it would not deposit the instrument until legislation had been enacted (see Letter from J. Mullins, Asst. Sec'y, Legis. Affairs, to Senator Pressler dated April 4, 1990, reprinted in S. EXEC. DOC. No. 30, supra note 222, at 39-40). Were the U.S. to fail to adopt necessary implementing legislation in a timely manner following ratification, then refusal to allow individuals to assert its protections might defeat the object and purpose of the treaty. Note, however, that the Senate Foreign Relations Committee Report on the Convention, in discussing the declaration denying self-execution, states that the majority of U.S. obligations are already covered by existing law and that "additional implementing legislation will be needed only with respect to article 5, dealing with areas of criminal jurisdiction" S. EXEC. DOC. No. 30, supra note 222, at 10.


234. See Bishop, supra note 60, at 266-71; HIRSCH LAUTERPACHT, 1 OPPENHEIM'S INTERNATIONAL LAW 914 (8th ed. 1955); RESTATEMENT, supra note 4, § 313, cmt. f.

235. LAUTERPACHT, supra note 234, at 914.
pressly offer its interpretation of the treaty and the other party expressly respond by stating that it does not agree with that interpretation, but both may nevertheless agree to permit the treaty to enter into force and be judged according to its terms and context. This would not appear to undermine the integrity of the treaty because the parties have at least implicitly agreed that the proffered understanding does not purport to modify the terms of the treaty. In most cases, however, the parties will expressly accept or reject an understanding with binding effect.

2. Municipal U.S. Law with Respect to Reservations and Understandings to Bilateral Treaties

A reservation purports to modify the obligations of the parties to a treaty and therefore, in the bilateral context, creates, at least with respect to the affected provisions, a different treaty. Since the Senate is required by Article II of the Constitution to consent to the making of a treaty, the Senate generally should give its consent before the President may accept a reservation proposed by another treaty party. However, if the Senate has previously consented to ratification, and a reservation by the other party to the treaty is thereafter brought to the attention of the Senate Foreign Relations Committee, and there is no request by that Committee to reconsider the treaty, the consent of the Senate to the reservation might be implied from its prior consent. That, at least, is the suggestion arising from the practice followed with respect to the Panama Canal Treaties.

3. The Panama Canal Treaties

U.S. ratification of the Panama Canal Treaties raised the issue of whether the Senate must give its express consent to reservations and understandings accompanying the instrument of ratification of the second party to a bilateral treaty. The Senate resolution of ratification with respect to the Neutrality Treaty included amendments, conditions, reservations, and understandings, and expressly included an understanding that

236. **Restatement, supra** note 4, § 313, cmt. f.
237. **Glennon, supra** note 1, at 124-25, refers to a “little-noticed” incident in 1976 involving the Spanish Bases Treaty. In its advice and consent to that treaty, the Senate had included a five part declaration expressing support for democratic reforms. The Spanish parliament objected to inclusion of the declaration in the instrument of ratification, and after consultation with the Foreign Relations Committee, the State Department included the declaration in an annex to the treaty incorporated by reference in the instrument of ratification. The State Department advised the Committee that this procedure was the equivalent of incorporation in the instrument of ratification. Although the State Department position appears unassailable, Glennon indicates that this episode encouraged greater specificity on the part of the Senate with respect to the intended placement of its conditions and influenced the Senate's actions with respect to the Panama Canal Treaties.
they should be incorporated in the U.S. instrument of ratification.\textsuperscript{238} One item designated as a “condition” to the Neutrality Treaty purported to give the United States the right to use military force in Panama to maintain the operation of the canal and another “condition” in effect provided that the Treaty would not be construed to preclude an additional agreement(s) for the stationing of U.S. military forces in Panama after December 31, 1999. Panama thereafter added certain understandings and a declaration to its instrument of ratification to the Neutrality Treaty which included reference to the necessity for observing the principles of the U.N. Charter and principles of mutual respect (including the declaration that it would oppose intervention in its internal affairs). Although Panama’s proposed instrument of ratification was made available to the Senate leadership and the Foreign Relations Committee prior to the exchange of instruments of ratification, Panama’s understandings and declaration were not expressly assented to by the Senate in a resolution of ratification.

Since the Senate statements to which Panama responded were labeled “conditions,” it is not immediately apparent what effect the Senate intended these provisions to have with respect to United States legal obligations under the Neutrality Treaty. However, to the extent that the Senate reserved the right to intervene militarily in Panama, and this right was not otherwise expressly set forth in the Treaty, this condition affects Panamanian interests of fundamental importance, arguably modifies the terms of the treaty by enlarging U.S. rights, and perhaps constitutes a reservation. Similarly, the intended legal effect of Panama’s response is not clear, but because it purports to preserve its right to oppose the use of force by the United States under certain conditions, it affects a matter of fundamental importance to the United States, arguably modifies the terms of the treaty by enlarging Panamanian rights, and might be construed as a reservation.\textsuperscript{239}

As a matter of international law, the fact that the United States and Panama exchanged instruments of ratification which included their re-

\textsuperscript{238} See Neutrality Treaty, Sept. 7, 1977, U.S.-Pan., 33 UST 11 [hereinafter Neutrality Treaty]; Proclamation by the President of the United States, reprinted in Neutrality Treaty, id. at 3, setting forth the text of the President’s Proclamation with the text of the Senate Resolution subject to the statements designated as amendments, conditions, reservations and understandings. For Senate resolution of ratification, see 124 CONG. REC. S7187, 95th Cong., 2d Sess.(1978). See generally Riesenfeld, \textit{International Agreements}, supra note 3, at 459-62.

\textsuperscript{239} This is not to suggest that the U.S. and Panamanian statements may not appropriately be characterized as interpretations consistent with the treaty. The U.S. may argue that the right to use force in Panama is inherent in the right to defend the neutrality of the canal. Panama may argue that it merely asserted its right to defend against other uses of force—such as force used to effect a change in its internal political structure.
spective conditions should conclusively establish the validity of each party’s consent. The U.S. may not defeat its own consent by arguing an internal procedural defect because it is most unlikely that the potential defect could be deemed “manifest” in this case.240 Moreover, because the Senate had notice of the Panamanian statements before and after the exchange of instruments of ratification, it would appear to have implicitly acquiesced to them. Because the validity of the assent of the parties to a treaty is a question of international law, the conclusion that the Neutrality Treaty is valid as a matter of international law establishes that the Treaty is valid as a matter of U.S. law.241

G. The Treaty-Making Power of the U.S. Congress

The “advice and consent” process provided for in Article II of the U.S. Constitution is not the exclusive procedure for the making of treaties, nor is it the most frequently used procedure. The President acting under his or her own constitutional authority may enter into sole Executive Agreements without reference to Congress. The President’s independent authority derives from the general executive authority under Article II, section 1;242 the Commander in Chief power under Article II, section 2, clause 1; the authority to receive Ambassadors under Article II, section 3, and; the obligation to “take care that the laws be faithfully executed” under Article II, section 3.243 Although most Executive Agreements “have involved military or foreign relations matters having no direct impact on private interests in the United States,”244 a number of such agreements have involved the settlement of private claims against

240. Article 46 of the Vienna Convention provides that in order for a state to invoke failure to comply with a provision of its internal law to defeat its consent to a treaty, the violation must be “manifest” and concern a rule of “fundamental importance.” The U.S. Department of State has contended that since the Panamanian statements were not true reservations they need not have been brought to the Senate for consent. See Riesenfeld, International Agreements, supra note 3, at 461.

241. An interesting example of a Senate reservation to a bilateral treaty involved the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany, which included a provision which granted national treatment to professional service providers of each party. In 1953, an Agreement was concluded concerning application of the 1923 Treaty which would have rendered fully operative the provision on professional activity. When the Senate gave its consent to ratification of the 1953 Agreement, it did so subject to a reservation severely limiting the right of German nationals to engage in professional activities in the United States. Germany consented to the reservation. Similar reservations were made by the Senate in the same period in consenting to the ratification of FCN treaties with Denmark, Greece, Israel and Japan. See M. Whiteman, 14 Digest of International Law 159-61 (1970).

242. The Supreme Court has recognized that the power to represent the nation in the conduct of foreign affairs is inherent in the President’s executive authority (see United States v. Curtis Wright Export Corp., 299 U.S. 304 (1936)).

243. See, e.g., Restatement, supra note 4, § 303, cmt. g and reporter’s note 11; Circular 175, supra note 40, § 721.2(b)(3).

244. Restatement, supra note 4, § 303, reporter’s note 11.
foreign governments and have resulted in Supreme Court decisions affirming presidential authority. The Supreme Court recently observed, in Weinberger v. Rossi, that sole Executive Agreements “may in appropriate circumstances have an effect similar to treaties in some areas of domestic law.” Of course, many Executive Agreements are entered into under specific or general statutory authority (see discussion of Congressional-Executive Agreements infra). Those entered into by the President under independent constitutional authority therefore are sometimes referred to as “sole” Executive Agreements. The President may also enter into Executive Agreements under authority established by another treaty.

Because sole Executive Agreements are not subject to preratification approval by the Senate or Congress, no issues are raised with respect to the attachment of conditions to their approval. Pursuant to the Case Act, such agreements must be transmitted by the President to Congress following entry into force.

The most significant evolution of constitutional practice involving the treaty-making process in the United States relates to Congressional approval of treaties. McDougal and Lans demonstrated convincingly in the 1940s that within the U.S. constitutional structure the power to conclude treaties with the “advice and consent” of the Senate provided for in Article II is permissive rather than exclusive, and that the President and Congress (most particularly pursuant to the Article I, section 8, legislative powers of the Congress) together possess an entirely coextensive treaty-making power. This is now the prevailing view. The Congressional-Executive agreement process involves the passage by Congress of a joint resolution or legislation authorizing or approving the President's conclusion of an international agreement, in some cases accompanied

247. Id. at 30 n.6. While this statement suggests that such agreements may be self-executing and override federal statutes antedating them, the issue is not one which has been squarely faced by the Supreme Court.
248. See RESTATEMENT, supra note 4, § 303(3).
249. Supra note 45.
250. McDougal & Lans, supra note 1. McDougal and Lans did not specifically address the issue with which we are principally concerned in this article, i.e., the effect of Senate conditions in international and domestic law, although the process by which ratification of the Treaty of Versailles was blocked in the U.S. Senate, which involved the attachment of amendments and reservations unacceptable to President Wilson through the efforts of an obstructionist minority, was at the forefront of their concerns. Id. at 651-56.
251. See RESTATEMENT, supra note 4, § 303, reporter's note 8.
252. RESTATEMENT, supra note 4, § 303(2). See also id. § 303 at reporter's note 8.
by the enactment of domestic implementing legislation. Although the following figures do not reflect whether the referenced Executive Agreements were made under the President’s sole authority, or explicit or implicit statutory authority, between 1932 and 1982 the United States entered into 608 treaties pursuant to the advice and consent of the Senate and 9,548 Executive Agreements. 253 As of January 1, 1983, the United States was a party to 966 treaties and 6,571 Executive (including Congressional-Executive) Agreements in force. 254 It should be noted that human rights 255 and arms control 256 treaties have not yet been the subject of the congressional approval process.

Because Congress has the express constitutional authority to regulate commerce with foreign nations, 257 the Congressional-Executive Agreement as an instrument to undertake commitments with respect to international trade has particular constitutional appeal. 258 Most recently, international trade agreements have become the subject of the so-called “fast track” procedure which is a form of bicameral congressional approval. 259 In the fast track procedure, the Congress agrees to impose limitations on itself in exchange for commitments by the President. In notifying the Congress of an intention to negotiate an international trade agreement under the fast track procedure, the President commits the Executive branch to consultation with Congress concerning the agreement and implementing legislation. In exchange, the Congress commits to certain internal rules changes that are designed to guarantee an expeditious consideration of a completed agreement and any proposed implementing legislation when presented to it, and it agrees to vote the agreement and legislation up or down without amendment. 260 Recent experience suggests that the fast track procedure may enhance congressional input into

253. See Cong. Res. Study, supra note 1, at 37. According to the Study:
[one study found that 88.3 percent of international agreements reached between 1946 and 1972 were based at least partly on statutory authority; 6.2 percent were treaties [i.e. received Senate consent], and 5.5 percent were based solely on executive authority.]"  
Id. at 39-40.
254. Id. at 39.
255. Although, with respect to human rights, Congress authorized the President to accept membership in the International Labor Organization. Ch. 676, 48 Stat. 1182 (1934), See RESTATEMENT, supra note 4, § 303, reporter's note 8.
256. Although, according to the Congressional Research Study, the Senate "has endorsed their possible use for arms control agreements." Cong. Res. Study, supra note 1, at 18.
257. U.S. CONST. art. I, § 8, cl. 3.
258. Nothing in the Constitution precludes use of the Senate advice and consent process (as was long traditional in the conclusion of treaties of Friendship, Commerce and Navigation).
260. Congress expressly reserves the right to change the internal rules defining the fast track procedure at any time. Trade Act of 1974, supra note 259, § 151(a)(2) at 2001.
From the standpoint of the President, the congressional treaty approval process has an obvious appeal. The President should generally find it easier to obtain the approval of a majority of both houses of Congress than the approval of two-thirds of the Senate. While the Senate, on the other hand, may be quite reluctant to permit encroachment on its foreign affairs prerogative, some of the concerns of the Founding Fathers, who deprived the House of Representatives of an Article II treaty-making role, are certainly less viable than they were in 1789. Concerns regarding the speed at which the House might act are much less compelling in light of transportation and telecommunications advances. The need for secrecy in certain sensitive matters may remain a valid concern — on the theory that the greater number of persons privy to a secret, the greater its likelihood of public disclosure — and this may provide an arguable basis for continuing Senate primacy in certain arms control matters. On the other hand, in areas in which individual rights are at stake it appears more consistent with the theory of democratic government and majoritarian rule underlying the Constitution to place the treaty approval power in the hands of the Congress as a whole, rather than in the hands of one-third-plus one of the Senate, where it is effectively placed when this minority of the Senate is granted the power to disapprove of treaty ratification. This is particularly so as treaties increasingly impact on individual rights across a broad spectrum of interests.

Congressional conditions to the approval of treaties appear to be rare. One notable instance of conditional approval involved the United Nations Headquarters Agreement. In a joint resolution authorizing the President to bring the Agreement into effect, Congress included a provision potentially providing the United States with a basis for limiting the access of aliens. The terms of the joint resolution were brought to the attention of the General Assembly by the Secretary-General, but there

261. For example, with regard to the proposed North American Free Trade Area Agreement, Congress has played an active role regarding arrangements with respect to the environment. See Frederick M. Abbott, International Trade Rules, World Market Conditions and Environmental Effects, in 2 Yearbook of International Environmental Law 227-29 (Günther Handl ed., 1991).

262. Since World War II, the President and the majority of Congress have typically been of different political parties, making it particularly difficult for the President to assure a two-thirds vote of approval in the Senate.

263. Of course this observation is not novel. See McDougal & Lans, supra note 1, at 665-75.


265. Id., Annex 2, § 6 at 767-68.
was no action by the General Assembly accepting or taking note of it.\textsuperscript{266} In the exchange of notes bringing the agreement into effect, the United States declared that its consent was subject to the terms of the joint resolution.\textsuperscript{267} The joint resolution has been a source of controversy between the United States and United Nations ever since.\textsuperscript{268}

The fact that the resolution with respect to the Headquarters Agreement was adopted by Congress as a whole rather than the Senate is of no consequence as a matter of international law. If the condition is a valid part of the treaty it should condition the obligations of the parties.\textsuperscript{269} However, the municipal legal effect of this condition — and similar conditions adopted by joint congressional resolution or legislation — may well be altered by its legislative character. Unlike a Senate reservation or understanding, a joint resolution of Congress with respect to a treaty has all of the relevant characteristics of domestic legislation. Because such a joint resolution is the equivalent of legislation it should be given legal effect by United States courts irrespective of its status under international law.

As noted previously, one characteristic of the so-called "fast track" procedure now used for the approval and implementation of trade-related treaties is that Congress approves in advance to vote on approval of the treaty and implementing legislation without consideration of amendments.\textsuperscript{270} Starting with the Trade Agreements Act of 1979, which approved the GATT Tokyo Round accords, and continuing with the acts approving and implementing the U.S.-Israel and U.S.-Canada Free Trade Area Agreements, there are included provisions which deny the creation of private rights of action under the agreements (except as explicitly provided for). These provisions therefore purport to deny self-executing character to the respective trade agreements. For example, the Trade Agreements Act of 1979 which approved the Tokyo Round Codes provides:

\textbf{UNSPECIFIED PRIVATE REMEDIES NOT CREATED.}—Neither the entry into force with respect to the United States of any agreement approved . . . , nor the enactment of this Act, shall be construed as creating any private right of action or remedy for which provision is

\begin{itemize}
  \item \textsuperscript{266} Restatement, supra note 4, § 468, reporter's note 7.
  \item \textsuperscript{267} Id.
  \item \textsuperscript{268} Id. On interplay of Headquarters Agreement and Joint Resolution, see W. Michael Reisman, Editorial Comments: The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion, 83 Am. J. Int'l L. 519 (1989).
  \item \textsuperscript{269} Whether the joint resolution is a valid part of the treaty and, if not, whether the treaty itself is validly in force are complex questions as to which we do not express an opinion.
  \item \textsuperscript{270} See Trade Act of 1974, supra note 259, § 151(d) at 2002.
\end{itemize}
not explicitly made under this Act or the laws of the United States.271

The self-executing character of the GATT and the Tokyo Round Codes is the subject of much discussion. Although the European Court of Justice has held that the GATT is not self-executing because of the general nature of its drafting and the reciprocal nation to nation nature of its obligations,272 it recently construed and applied the terms of the GATT in a case involving private enforcement of trade rights under the so-called New Instrument.273 In the European Community, at least, the self-executing character of the GATT is now debatable. In the United States the matter has not been squarely addressed by the courts.274 The Tokyo Round Codes are drafted in more specific terms than the GATT itself and an argument for considering them to be self-executing is perhaps stronger than with respect to the GATT itself. There are no court decisions with respect to the self-executing nature of the United States-Israel and United States-Canada Free Trade Area Agreements. However, the two Free Trade Area Agreements are bilateral and specifically drafted and it is therefore not unlikely that a court, in the absence of controlling legislation, might find one or both of these agreements to be self-executing, at least in part.

271. Treaty Agreements Act of 1979, Pub. L. No. 96-39, § 3(f), 93 Stat. 144. Professor Hudec has noted that the language of the 1979 Act suggests by negative inference that private rights may be created by the agreements under pre-existing legislation, but concludes "it is doubtful, however, that these drafting difficulties will ever persuade a court to characterize the Tokyo Round Codes as self-executing." ROBERT E. HUDEC, THE LEGAL STATUS OF GATT IN THE DOMESTIC LAW OF THE UNITED STATES IN THE EUROPEAN COMMUNITY AND GATT 187, 230 (Meinhard Hilf et al. eds., 1986).

The Act approving and implementing the Israel-United States Free Trade Area Agreement provides (under a section entitled "Relationship of the Agreement to United States Law"): PRIVATE REMEDIES NOT CREATED.— Neither the entry into force of the Agreement with respect to the United States, nor the enactment of this Act, shall be construed as creating any private right of action or remedy for which provision is not explicitly made under this Act or under the laws of the United States.


The Act approving and implementing the Canada-United States Free Trade Agreement provides:

EFFECT OF AGREEMENT WITH RESPECT TO PRIVATE REMEDIES.— No person other than the United States shall—
(1) have any cause of action or defense under the Agreement or by virtue of congressional approval thereof, or
(2) challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with the agreement.


274. See generally HUDEC, supra note 271, at 200-02.
The constitutional status of a congressional act defining the self-executing nature of treaty rights is distinguishable from a unicameral declaration by the Senate to the same effect contained in a resolution of ratification. A treaty to which legislation pertains is not itself modified by congressional action so its self-executing nature as a matter of international law is not affected. Congress does not have the power to alter the international meaning of a treaty by legislation. However, under Supreme Court doctrine the legislature does have the right to enact and make effective subsequent inconsistent legislation, whether or not such legislation may put the United States in default of its international legal obligations.

The critical distinction between a Senate declaration as to the self-executing character of a treaty and a congressional act to the same effect lies in its constitutional character. The Senate may not legislate outside the confines of the treaty instrument. A declaration inconsistent with the treaty is ineffective as a matter of international and municipal law. Congress, on the other hand, may legislate with domestic effect without respect to international legal consequences. Therefore, an act of Congress defining the self-executing character of a treaty should be given municipal legal effect regardless of its effect on the international plane.275

III. Treaty-Making, Conditional Consent and the Democratic State

Although treaties played a very important role in international relations in 1789, there can be little doubt that they play a far more important role at the close of the twentieth century. We live in a world in which global interdependence is so manifest as not to require elaboration. The shaping of ideas and opinions through instantaneous global telecommunications, the dependence of states on international trade for the production and distribution of goods and services, the understanding that individual state decisions to control or not control environmental emissions impact neighboring and distant states, and the continuing global proliferation of instruments of violence and the ramifications of this trend for peace and security all indicate the importance of the role of international treaties in governing this sphere of interdependence.

The global transition from the relative independence of sovereign states to the fundamental dependence of states must also have its ramifications for domestic legal processes. At the close of the twentieth cen-

275. This analysis rests on the Supreme Court's interpretation of the Constitution to the effect that treaties and federal statutes are pari passu.
tury, international decisions more immediately and directly impact individuals than international decisions of the eighteenth century. In eighteenth century Europe the decisions by monarchs to make or break alliances, to wage war or make peace and to open or close their borders to trade were certainly of great moment to the common citizen. The impact of such decisions, however, was often slow to be felt. The regulations of the European Communities Council and Commission, on the other hand, may have an immediate and direct effect on individuals. Similarly, an amendment to the General Agreement on Tariffs and Trade may open a local market to intense foreign competition in a matter of months rather than years and give rise to a major restructuring of the local business environment. A decision of the European Court of Human Rights may quickly find itself the subject of the attention of American legal scholars while a decision of the U.S. Supreme Court will as likely find itself the subject of discussion by European scholars.

The question naturally arises whether the treaty power may require internal adaptations to reflect the increasingly significant impact of treaties on municipal legal systems and the increasingly direct and immediate impact on individual rights and obligations. Framed differently, the question naturally arises whether the center of gravity of the treaty power rests now more in the legislative rather than the executive arena. Does the treaty-making power require increasing "democratization?"

In respect to the United States, McDougal and Lans convincingly demonstrated in the 1940s that the majoritarian principles underlying the American Constitution strongly favored congressional participation in the treaty-making process. McDougal and Lans saw that individual citizens in the post-World War II setting demanded international policies which continued the wartime alliances that ultimately prevailed over the dark forces seeking global domination of the human spirit. This demand manifested itself in overwhelming public support for the creation of the United Nations structure which effectively precluded xenophobic resistance in the Senate to adherence to the U.N. Charter such as had manifested itself with respect to the Treaty of Versailles. The international framework has now evolved further and politicians, scholars, interest groups, and others are demanding greater international recognition of the rights of individuals. In the face of this demand, it is apparent that a minority of the U.S. Senate has been forced to shift from a role in which it seeks to block the approval of major treaties guaranteeing individual rights to a less visible role in which it seeks to undermine the creation and enforcement of such rights through the process of attaching conditions to the approval of treaties. Perhaps the best solution to this problem
lies in the process by which the President seeks direct congressional approval of treaties. In this process, conditions to treaty obligations will be adopted only by the majority will of both Houses of Congress. If, however, a majority of the Senate insists on maintaining a foreign affairs prerogative and forces treaty approval into the Senate, it is essential that the courts of the United States consider carefully the constitutional basis for conditions imposed on such approval. We suggest that the power of the Senate to give effect to conditions to treaties is constrained by international law and the Constitution. Only a condition which is valid and effective under international law may become part of the law of the land because a condition does not have a legal identity outside the context of the treaty. The Senate does not have an ancillary constitutional power to enact domestic legislation under the guise of the treaty power.