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THE ROLE OF THE ARGENTINE CONGRESS IN THE TREATY-MAKING PROCESS

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I. INTRODUCTION

The Argentine Constitution is one of the oldest in the Americas. It was adopted in 1853 and amended in 1860, 1866, 1898, and 1958.

In 1949, during Perón's first presidency, another constitution was adopted. But after the revolution that overthrew Perón in 1955, the old 1853 Constitution was reinstated. Therefore, this 1853 Constitution with the subsequent amendments mentioned earlier is the present Constitution of the Argentine Republic.

The adoption of the 1853 Constitution was the product of a long process. Several attempts to adopt a constitution for the country were made beginning in 1810, the date of the uprising against Spain, but they failed or the instruments adopted survived for only a short period.

The main issue was whether the country would be organized under a unitarian or a federal system. Revolutions, civil wars, and a long dictatorship did not permit a definitive solution to the dilemma until 1853.

Finally, in that year, the country decided to adopt the federal system. But the solution was a painful one, because the Province of Buenos Aires, economically and politically by far the most important, rejected the new constitution and decided to break off and establish itself as a separate State. The main problem concerned whether the federal government or the Buenos Aires provincial government was to be the beneficiary of the revenues of the Customs House of the port of Buenos Aires. Buenos Aires was Argentina's only port for imports and exports at that time. Federal jurisdiction would cause the Buenos Aires provincial government to lose its main source of income.

The division of the country into the Argentine Confederation and the State of Buenos Aires, the official names of the two entities, lasted until 1860. After two wars, the country was finally reunited. The forces of Buenos Aires won the final battle, and the province accepted the Constitution but with important amendments, such as provision for uniform export and import duties for the whole country. The 1853 Constitution

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with the 1860 amendments is the constitution under which the country is ruled today. Subsequent amendments were of minor importance.

The Argentine Constitution was inspired by the U.S. Constitution due to two principle reasons. First, Argentina wanted to be a republic; although today this aspiration will seem rather obvious, in 1853 there were not many republics and the most important neighbor, Brazil, was an empire. Second, Argentina finally decided upon a federal structure. It was only natural that the U.S. Constitution would be the model, adapted as it was to the political and legal modalities of a distinctive political pattern. Similarly, since the Argentine Constitution was based on the U.S. Constitution, the decisions of the U.S. Supreme Court on many constitutional matters have had a great influence on the judgments of the Argentine Tribunals, on analogous matters.

The Argentine Constitution is a short document of 110 articles. According to Article 1, it adopts "for its government the federal, republican, representative form." The word "democracy" does not appear in this old Constitution. It is divided into two parts. The first part enshrines "Declarations, Rights and Guarantees," and the second concerns the "Authorities of the Nation." These authorities are the "Federal Government" and the "Provincial Governments." The Federal Government is divided into the three traditional branches of Government: the legislative, executive, and judicial powers.

II. TREATIES AND THE PROVINCIAL GOVERNMENTS

Before turning to the main subject of this paper, i.e., parliamentary participation in the treaty making power, it is necessary, in order to clarify the situation, to refer to the provisions of the Constitution as to the powers of the Provincial Governments to enter into treaties.

It is very clear from several articles of the Constitution, which we will mention later, that the power to enter into treaties with foreign powers belongs to the Federal Government, not the Provinces.

However, Article 107 provides that the Provincial Governments could enter into treaties in some cases. It states: "The Provinces may, with the knowledge of the Federal Government, enter into partial treaties for purposes of administration of justice, of economic interests and work of common utility; . . ."

This rule is written in a positive form, in that it establishes what the Provinces can do; the next article, couched in negative language sets forth what the Provinces cannot do, because these powers are reserved to the Federal Government. Article 108 says: "The Provinces do not exer-

cise the power delegated to the Nation. They may not enter into partial treaties of a political character; . . .”

These provisions are not clearly written, and have accordingly given rise to some controversy. At a first reading a major question will immediately arise, namely what is meant by “partial treaties?”

From the legislative history of these articles and from the structure of the Constitution, it can be deduced that partial treaties are treaties signed between Provinces. The foreign relations of the Republic are conducted by the Federal Government. Articles 107 and 108 relate exclusively to interprovince relations, and they cannot be extended to the relationship between the Provinces and foreign States. However, some Provinces have, albeit very seldom, entered into treaties with neighboring countries without knowledge of the Federal Government. Such treaties should be considered null and void, for the Provinces do not have the right to enter into such engagements.

III. TREATIES AND THE FEDERAL GOVERNMENT

It is clear from the Constitution that the Provincial Governments have delegated to the Federal Government the power to conclude treaties with foreign States. All provisions related to this prerogative are included under the Title “Federal Government.”

Moreover, Article 27, confirms, beyond doubt, that the Federal Government has not only the power, but the obligation to strengthen relations with other foreign powers by means of treaties. It says: “The Federal Government is bound to strengthen its relations of peace and commerce with foreign powers, by means of treaties that are in conformity with the principles of public law laid down by this Constitution.”

A. *The Executive Power*

Within the Federal Government the President concludes and signs treaties. Article 86, paragraph 14, provides the following:

The President of the Nation has the following powers: . . . ¶ 14. He concludes and signs treaties of peace, of commerce, of navigation, of alliance, of boundaries, and of neutrality, concordats and other arrangements required for the maintenance of good relations with foreign powers; he receives their ministers and admits their consuls.

The expression “concludes” needs to be clarified. In languages that have their primary origin in Latin, such as Spanish and French, the verb “concluir” or “conclure” signifies in its first meaning “to finish something,” coming from “concluder,” i.e., to shut up, close, end. When this verb is utilized in international law in these languages, it means “opera-

tions ou ensemble d'opérations par lesquelles un accord est réalisé et mis en forme juridique."¹ Jules Basdevant, former President of the International Court of Justice, summarizes the procedure of concluding treaties as follows: "La procédure traditionnelle de conclusion des traités comporte la négociation, la signature, la ratification, l'échange des ratifications."²

However, the verb "concludes" cannot be interpreted as having such a wide meaning in the Argentine Constitution. If this were the case, the Federal Congress would have no role at all in the internal treaty-making process and everything would be under the aegis of the Executive, whereas such is not the case under the Constitution. Therefore, the word "conclude" has to be interpreted as "negotiate" and "sign" the treaty, the first phase of the treaty-making process.

Consequently, according to Article 86, paragraph 14, the President negotiates and signs the treaties with foreign powers. Moreover, it can be deduced from these functions that the Executive also has the exclusive power to initiate the negotiations. Congress could, through a resolution, ask the President to initiate negotiations, but the actual decision belongs to him alone. Moreover, Congress cannot interfere in the negotiations phase of a treaty. Congress has no power to act on a treaty, before the treaty is submitted for its approval.

Of course, although it is only seldom done, the Executive could at any time inform Congress about the conduct of the negotiations or integrate the negotiation teams with members of Parliament. The power to negotiate and sign, however, belongs solely to the President.

In conclusion, Congress or members of Congress could have some influence in the negotiating process, but the power, it has to be repeated, belongs to the President.

In recent Argentine experience there has been an instance where, conversely, after signing a treaty, the Executive tried to influence Congress in order to secure approval of the treaty. That was in the "Beagle Channel" case. In 1984, as a result of the successful mediation of the Holy See, Argentina and Chile finally agreed, *inter alia*, on a final solution to the long-standing Beagle Channel area dispute. The final instrument agreed to in Rome had to be submitted for Congressional approval. The governing party of President Alfonsín had a comfortable majority in the Chamber of Deputies, but it was in a minority in the Senate which is composed of two Senators from each Province. To obtain the Senate's

1. Dictionnaire de la terminologie du droit international 141 (1960).

2. *Id.*

approval the support of some of the Senators belonging to local provincial parties was needed.

In order to put the pressure of public opinion behind the Treaty, the Government organized a non-binding referendum. This is the first and only time that a referendum of this type, or of any type, has been organized by the Federal Government in Argentina. The public supported the treaty by a substantial majority.

When the Treaty came to the vote in the Senate, on 14 March 1985, it was approved by 23 to 22 votes.³ Without the referendum this result could perhaps have been different. This is an example of how the Executive tried successfully, by calling upon the pressure of public opinion, to use its influence in order to ensure congressional approval of a treaty.

B. *The Legislative Power*

Pursuant to Article 36 of the Constitution, the Argentine Congress is composed of two Chambers, one consisting of Deputies of the Nation and the other of Senators of the Provinces and the Capital. Under the Constitution both Chambers intervene in the treaty-making process. Chapter IV of the Section devoted to the Legislative Power, entitled "Powers of Congress," includes only one very long article, with 28 paragraphs. Article 67, paragraph 19, devoted to treaties, provides: "The Congress shall have power . . . to approve or reject treaties concluded with other nations and concordats with the Holy See . . ."

This provision is of main interest to us in this short study. Other paragraphs of Article 67 also refer to the functions of Congress in relation to specific types of agreements. Of these, the following should be mentioned.

Paragraph 14 provides that it is for Congress "to settle permanently the boundaries of the national territory"; therefore Congress has an obligation to participate in the approval of international boundaries. The limits of the Republic have been fixed by two legal means: treaties and arbitral awards. Treaties of this kind have received the approval of Congress. As for arbitral awards, they are based on arbitral treaties approved by Congress; in some cases the *compromis* have not been submitted to Congress because they took place under general treaties of arbitration which made it unnecessary to refer back to Congress. That was, for example, the case of the "Rio Encuentro" arbitration of 1968 which under a 1902 Treaty between Argentina and Chile appointed the

3. DIARIO DE SESIONES DE LA H.C. DE SENADORES, SESIÓN 13-14 MARZO 1985, ANTECEDENTES, DOCUMENTOS Y TEXTOS 676.

United Kingdom as arbitrator. The same happened in the "Laguna del Desierto" case, also between Argentina and Chile, under a recent treaty of Peace and Amity of 1984; the arbitral procedure has just begun with the approval of a *compromis* that has not been submitted to Congress.

Paragraph 12 of Article 67 establishes that it is for Congress "[t]o regulate maritime and land trade with foreign nations"; it includes the power to approve the treaties necessary to that end.

Paragraph 21 of Article 67 confers upon Congress the power "[t]o authorize the Executive Power to declare war or to make peace." The exercise of this power could make it necessary to enter into treaties of alliance or peace. The same could be said in relation to paragraph 25 dealing with the permission granted foreign troops to enter into the national territory and the permission granted to leave it.

The legislative procedure by which Congress shall approve treaties is not specifically mentioned in Article 67, or in any other article of the Constitution. In practice, Congress approves treaties by means of laws. These laws are sanctioned by the ordinary procedure which applies to other laws, established in Chapter V of this part of the Constitution devoted to the Legislative Power, which is entitled "Enactment and Approval of Laws."

There are no regulations in the internal rules of either Chamber as to the approval of treaties. The text of a treaty is approved by each Chamber as a whole, not article by article as is the case with regular laws. Then, the law approving the treaty is published in the Journal of Congress.

The law approved by Congress is promulgated by a decree by the Executive Power and published in the Official Bulletin. Then, the exchange of the instruments of ratification takes place and the treaty enters into force. The President can, of course, totally or partially veto the law approving a treaty.

1. Can Congress Modify a Treaty that the Executive has Submitted for Approval?

As in other countries with similar constitutional systems this is a question over which the Argentine doctrine is divided.

The majority of legal scholars are inclined towards a textual interpretation of Article 67, paragraph 19, which they note, provides that Congress' powers in this respect are limited to the approval or rejection of treaties. The majority also bases its position, apart from the textual interpretation, on the argument that if the possibility of modifying the

treaty is recognized, that will entail reopening the negotiations with the other party to the treaty. Gonzales Calderón points out that Congress has a limited power that it cannot exceed, and he adds:

Congress receives the instrument in finished form and approves or disapproves it. Amendments, however, are not possible here, because their incorporation would require the previous consent of the other power. Every modification that Congress would try to introduce in a treaty concluded by the Executive Power would amount to a new diplomatic negotiation and, of course, to a new treaty.⁴

Augustín de Vedia also states that Congress cannot introduce amendments "because of the international bilateral character of the treaty," adding:

It is clear that if it is rejected, there will be new opinions that could serve as the basis for a renegotiation, if the Executive Power deems it opportune. Only occasionally has Congress expressly mentioned the points of disagreement and the necessary amendment.⁵

These two authors represent the doctrine of the first part of this century. Recently other prestigious jurists such as Bidart Campos have arrived at a similar opinion. He states that "[t]he introduction of amendments or the partial rejection could break the unity of the *complex act* of the entering into force of a treaty."⁶

On the other hand, equally prestigious jurists are of the opinion that Congress has the power to modify treaties submitted by the Executive Power. As a Federal Deputy, Joaquín V. González, one of the most eminent constitutionalists and statesmen of the beginning of the century, defended this doctrine in 1909 and 1911, on the occasion of the parliamentary discussion of a General Treaty of Arbitration celebrated with Italy in the first case, and with the United Kingdom in the second. He thought that the opposing points of view were more arguments of effect than of merit because they were based on the idea that the rejection would be a rebuff to the other State and would cause the negotiations to regress back to the starting point.⁷

On 29 and 30 August 1946, at the time of the discussions in the Chamber of Deputies over approval of the Act of Chapultepec⁸ and the Charter of the United Nations, the representatives Alberto Candiotti and

4. JUAN A. GONZALES CALDERÓN, CURSO DE DERECHO CONSTITUCIONAL 258 (3d ed. 1960).

5. AGUSTÍN DE VEDIA, DERECHOS CONSTITUCIONAL Y ADMINISTRATIVO 340 (1963).

6. GERMAN BIDART CAMPOS, 1 EL DERECHO CONSTITUCIONAL DEL PODER 338-39 (1967).

7. JOAQUÍN V. GONZÁLEZ, JURISPRUDENCIA Y POLÍTICA 252-57 (1914). This author changed the point of view he had previously developed in his MANUAL.

8. DEPARTAMENTO JURÍDICO UNIÓN PANAMERICANA, CONFERENCIAS INTERNACIONALES AMERICANAS SEGUNDO SUPLEMENTO, 1945-1954; at 12-75 (1956) (*approved* Mar., 1945).

Arturo Frondizi, (the latter became President of the Republic in 1958), defended the thesis that Congress could propose modifications to treaties submitted for its approval. The same happened during the 14 April 1961 meeting on the Antarctic Treaty discussions; Deputies A. Pozzio and E. Sanmartino, who belonged to the opposition party, also maintained that Congress has the power to propose amendments.

Jorge R. Vanossi, a learned constitutionalist of a younger generation, takes a different doctrinal position in his well-known book "Régimen Constitucional de los Tratados." He begins with the idea that the question of admission or rejection of the power of Congress to modify treaties should be viewed as a problem of effect or consequence rather than as one which places in question the legislative power to do so. The doubts on this point are not expressly resolved in the Constitution, and only a literal interpretation could lead to a negative reply. However, he holds, if Congress can do the maximum, i.e., approve or reject, it can also do the minimum, i.e., modify. Apart from these considerations based on internal law, what would happen externally, he says, has to be considered, should Congress suggest a change the agreement of the other party would be necessary, i.e., the treaty would have to be renegotiated. If the accord is bilateral and the other State does not agree with the change, there will be no treaty; if it is a multilateral treaty the modification should be considered as a reservation. Vanossi adds: "The constitution does not solve which power should prevail in case of discrepancy as to approval of a treaty; but it is clear that without the approval of Congress there is no treaty, even if it has been signed by the President."⁹

In practice there have been some instances, although these are very rare, when Congress has approved treaties with modifications. In the case of the Boundary Treaty with Bolivia which was signed in 1889, Congress made a modification in 1893 at the time of approval; the treaty was renegotiated in 1894 and was finally approved in 1902. This was not the first time that Congress had modified a treaty.¹⁰

But recently, since the beginning of the century, this practice has ceased. Congress has seen fit to interpret some important treaties. In the

9. JORGE R. VANOSI, *RÉGIMEN CONSTITUCIONAL DE LOS TRATADOS* 171-72 (1961).

10. During the years following the reunification of the country after 1860, this practice was followed in Law 150, the Treaty of Extradition with Bolivia, Law 344, the Treaty of Extradition with Italy, Law 458, the Treaty of Extradition with Brazil, Law 567, the Treaty of Commerce and Navigation with Peru, Law 764, the Consular Convention with Peru, Law 1076, the Treaty on Shipping Tonnage with Sweden-Norway, Law 3106, the Treaty of Extradition with Chile, Law 3167, the Convention with Italy on the Most Favored Nation Clause, Law 3950, the Treaty of Extradition with Portugal, Law 4027, the Treaty of Extradition with Brazil, Law 4044, the Treaty of Arbitration with Uruguay, Law 4045, the Treaty of Arbitration with Paraguay, and Law 4090, the Treaty of Arbitration with Bolivia.

case of Argentina's adhesion to the Pact of the League of Nations pursuant to Law 11722, Congress instructed the Executive to communicate to the Secretariat of the League that the Monroe Doctrine, mentioned in Article 21, was not a regional accord as stated therein.

In 1985, at the time of approval of the Treaty of Peace and Amity between Argentina and Chile, which was signed in 1984 and put an end to the Beagle Channel dispute, the Senate introduced an interpretative declaration in relation to certain maps.

An amendment can, at times, have its source in the Congress of the other party to a treaty. In this case, the approval of the treaty by the Argentine Congress signifies its consent to the amendment. This happened in 1898 when Congress approved, by Law 3759, the Extradition Treaty with the United States with "the modifications introduced by the Senate of that Nation."

On the other hand, denunciation of a treaty has in practice been undertaken by the President without the participation of Congress. Exceptionally, in 1866, Congress authorized the President to denounce a treaty with Portugal. Vanossi objects to this practice, holding that it is equivalent to an admission that the Executive can derogate from a "supreme law of the Nation" (Article 31 of the Constitution) without the participation of the Legislative Power.

IV. DE FACTO GOVERNMENTS

In the period between 1930 and 1983, there have been several *de facto* governments in Argentina, the product of military *coups d'etat*. Some of them remained in power for long periods during which they ratified a number of important international treaties. The problem is whether these *de facto* governments had the power to enter into international agreements and if so what are the validity and scope of the international obligations assumed by irregular governments.

Towards the end of the Second World War, in March 1945, a *de facto* government established in 1943 decided by Decree No. 6945 to adhere to the Act of Chapultepec and to declare war on Germany and Japan. It based this decision on the power of Congress to declare war under Article 67, paragraph 21 of the Constitution, under Article 86, paragraph 18, which grants the President the power to declare war, and on the "case-law (jurisprudence) of the Supreme Court." Similarly on 8 September 1945, by Decree No. 21195, the government ratified the Charter of the United Nations, with the proviso that Congress, which of course did not exist at the time, should be informed in due time. Once

Congress was established, both the adhesion to the Act of Chapultepec and the ratification of the Charter were approved by Laws No. 12837 and 12838.

The aforementioned case law of the Supreme Court refers to the position taken by the Court in the 1930s when it ruled that the *de facto* government could exercise legislative powers in case of "urgency and necessity" where it was "indispensable for the functioning of the State and the purposes of the Revolution" (case *Municipalidad de la Ciudad de Buenos Aires c/Carlos M. Mayer*, Fallo 201:249). The judgment added that the legislative rules adopted under the *de facto* government should be submitted to the Congress for approval.

Before the Charter of the United Nations was submitted to Congress for approval in 1945, during the period of the *de facto* government, the Supreme Court had an opportunity to pronounce on the validity of the prior ratification. The Court decided, based on the previous case, that "the Treaty of San Francisco is actually in force in the territory of the Republic."

In the 1950s and 1960s, the Supreme Court changed the position it had taken in the 1930s. According to the new doctrine, the so-called "decree-laws" of a *de facto* government did not need the subsequent approval of Congress (case *Egidio Ziella c/Smiriglio Hermanos*, Fallo 209:26). This doctrine applies to the "decree-laws" whereby treaties were ratified. In actual practice no approval of Congress has been sought.

V. CONCLUSION

The Argentine practice as to the role of Congress in the treaty-making process has changed according to the political circumstances of a given moment. But if we compare the position of Congress in the last century against that of today, and we take into account the expansion of the legislative competence of *de facto* governments, it is crystal clear that the powers of the Executive, whether *de jure* or *de facto*, have been strengthened in the last decades. Conversely, the role of the Argentine Congress in the treaty-making process has been limited to the power to approve and reject treaties in periods of constitutional governments.