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# NOTES

## MATTERS OF DOMESTIC CONCERN: A POTENTIAL JUDICIAL LIMITATION ON THE TREATY- MAKING POWER?

With the expansion in the scope of international agreements in recent years has come an increased controversy concerning the extent of the treaty-making power in the United States. Perhaps the most widely known debate has been set off by the proposals to limit the treaty power by Constitutional amendment.<sup>1</sup> Other arguments have arisen regarding the extent of the obligations assumed under the United Nations Charter and by the qualified acceptance of the compulsory jurisdiction of the International Court of Justice. Many of these discussions have been based upon political considerations, but the Constitutional argument has also been widely employed. The contention that there is a constitutional limitation on the treaty-making power of the United States apart from the requirement of the proper form<sup>2</sup> has recently received judicial support from the District of Columbia Circuit Court of Appeals.<sup>3</sup>

In that case it was held that a Senate reservation providing that no project for the redevelopment of the United States' share of waters on the Niagara River, made available for power purposes by the current treaty with Canada, could be undertaken until specifically authorized by an act of Congress, concerned a purely domestic matter and was not a part of the treaty. Thus, it was ineffective as an amendment to the prior act of Congress which had given control over the development of water

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1. Widely publicized have been the proposed Bricker amendments, the most recent of which would limit treaties by the provisions of the Constitution and deny them legislative effect without Congressional action, unless the Senate affirmatively provides to the contrary. See Oliver, *Treaties, the Senate, and the Constitution: Some Current Problems* (ed. comment), 51 AM. J. INT'L L. 606 (1957). For an article supporting the adoption of the Bricker amendment, see Finch, *The Need to Restrain the Treaty-Making Power of the United States within Constitutional Limits*, 48 AM. J. INT'L L. 57 (1954). For a contrary argument, see Sutherland, *Restricting the Treaty-Making Power*, 65 HAR. L. REV. 1305 (1952). Similar proposals have been made by the American Bar Association, state legislatures, and several congressmen. See *Ibid.* The House of Representatives has also proposed an amendment providing for the ratification of treaties by and with the advice of both houses of Congress. See Kefauver, *The House of Representatives Should Participate in Treaty Making*, 19 TENN. L. REV. 44 (1945).

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." U.S. CONST. art. II, § 2, cl. 2.

3. *Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir.), *vacated as moot*, 355 U.S. 64 (1957).

power on streams over which Congress had authority to the Federal Power Commission. The reservation was considered as only "an expression of the Senate's desires."<sup>4</sup> The court posed the problem whether matters of domestic concern could be constitutionally dealt with by treaty, but did not rest its decision upon this ground. It intimated, however, that if a treaty were entered into about a purely domestic matter, it would not be binding upon the courts as the supreme law of the land because it would be an unconstitutional exercise of that power.<sup>5</sup>

Judge Bastian, dissenting, vigorously attacked the majority's contention that the reservation could be disregarded and the rest of the treaty enforced:

If the Senate conditioned its advice and consent to the treaty upon inclusion of the language in question and upon its being given an operative effect—if the Senate did so condition its consent—if the condition was a sine qua non to its consent and to ratification—if but for its condition being given effect the Senate would not have consented to the treaty—then regardless of what the language in question is called it must be given effect.<sup>6</sup>

He concluded that if the reservation were invalid as a purely domestic matter, the court would have to declare the treaty as a whole void.<sup>7</sup> This reasoning seems more cogent, especially since the reservation was not clearly severable from the remainder of the treaty.

However, Judge Bastian did not take issue with the dictum in the majority opinion that the treaty-making power may constitutionally be used only to control matters essentially affecting international affairs, and that the courts would enforce this mandate. He based his dissent on the belief that, viewed in context, the content of the reservation was sufficiently related to the traditionally sanctioned subject-matter of the treaty to be valid if inspired by considerations of international policies. He seems to envision a "scope" of the treaty-making power in which all provisions of a valid treaty are the supreme law of the land, even though if viewed in isolation some are addressed to matters of purely domestic concern.<sup>8</sup>

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4. *Id.* at 543.

5. *Ibid.*

6. *Id.* at 546.

7. Judge Bastian gently chides the court for their reluctance to hand down the first decision invalidating a treaty of the United States. *Id.* at 548.

8. *Ibid.*

The questions presented, then, are the soundness of the view that the validity of a treaty may depend upon its subject, and the possible development of this position as a judicially enforced limitation on the treaty-making power. The idea that there is a judicial restraint upon the subject-matter of treaties has never before been seriously considered in United States courts. It may have been germinated as a reaction to current "one world" ideas and the increasing proposals for international agreements on subjects which historically have been considered outside the scope of international concern. Or perhaps it is an ancient conviction, the expression of which has only recently become necessary as the treaty-power has been expanded to new limits and a Constitutional check upon it has not been forthcoming from the courts.

In order to place this discussion in its proper context, it is necessary briefly to review the domestic effect of an admittedly valid treaty as provided in the Constitution, and developed over the years by judicial decisions. The Constitution provides that treaties made under the authority of the United States shall be the supreme law of the land.<sup>9</sup> Thus, if a treaty is self executing, its terms will be enforced in the national courts without enabling legislation of any kind.<sup>10</sup> In addition, the states are expressly forbidden to enter any treaty, alliance, or confederation, or to enter an agreement or compact with another state or foreign power without the consent of Congress.<sup>11</sup> The whole treaty-making power, then, rests in the national government. If the national government cannot negotiate a particular type of treaty, the United States as a whole may not do so.

It is well settled that if a valid treaty conflicts with an act of Congress, the later in time will prevail.<sup>12</sup> The effect of this doctrine is limited to some extent by the reluctance of courts to find a conflict between

9. U.S. CONST. art. VI, cl. 2.

10. The House of Representatives has always asserted its prerogative not to appropriate the necessary money, if an appropriation is needed to put the treaty into effect. But it seems that there is at least a moral obligation to do so, and the House has never refused. See CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 418 (1953); Tucker, *The Treaty-Making Power Under the Constitution of the Confederate States of America*, 1 VA. L. REV. 596 (1914); Wright, *Treaties and the Separation of Powers*, 12 AM. J. INT'L L. 64 (1918).

11. U.S. CONST. art. I, § 10, cl. 1. However, local state laws may have an incidental or indirect effect in foreign countries without being invalid. Thus in *Clark v. Allen*, 331 U.S. 503 (1947), a California statute forbidding aliens to inherit property unless United States' citizens could so inherit in the country of the alien was held constitutional, not being a regulation of foreign affairs.

12. See *Cook v. United States*, 288 U.S. 102 (1933); *The Cherokee Tobacco Case* 78 U.S. (11Wall.) 616 (1870); *Edye v. Robertson*, 112 U.S. 580 (1884) (dicta); *John T. Bill Co. v. United States*, 27 C.C.P.A. (Patents) 26, 104 F.2d 67 (1939) (dicta); 30 OPS. ATT'Y GEN. 351 (1915); CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 420 (1953).

a treaty and an act of Congress. The courts do not favor repeal by implication, and will not apply the last-in-time doctrine unless there is a clear conflict.<sup>13</sup>

If a valid treaty conflicts with a state statute, whether prior or subsequent, the treaty prevails. The Constitution expressly provides that acts of Congress and treaties are supreme over the acts of state legislatures.<sup>14</sup> Judicially, this was settled by the Supreme Court in 1796, and has never been questioned.<sup>15</sup> However, the courts may also construe the treaties to prevent incongruity and to narrow their scope.<sup>16</sup>

For a time there was a wide difference of opinion as to whether Congress could pass legislation to give effect to the provisions of a valid treaty under the "necessary and proper" clause if the legislation would invade areas otherwise reserved to the states by the tenth amendment. There were dicta in early cases to the effect that federal jurisdiction could not be enlarged by the treaty power,<sup>17</sup> and many scholars and statesmen entered the argument.<sup>18</sup> The controversy was finally settled in 1920, in the famous case of *Missouri v. Holland*.<sup>19</sup> Mr. Justice Holmes, delivering the opinion of the court, said that Congress may legislate in an area normally reserved to the states when exercising that power to effectuate a valid treaty which related to a national interest of great magnitude.<sup>20</sup> Thus, the power to implement the provisions of a valid treaty by domestic legislation has been delegated to the United States.<sup>21</sup>

13. *Clark v. Allen*, 331 U.S. 503 (1947); *United States v. Lee Yen Tai*, 185 U.S. 213 (1901); *Frost v. Wenie*, 157 U.S. 46 (1895); *Chew Heong v. United States*, 112 U.S. 536 (1884).

14. U.S. CONST. art. VI, cl. 2.

15. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). See also *Asakura v. Seattle*, 265 U.S. 332 (1924).

16. See *Todak v. Union State Bank*, 281 U.S. 449 (1930) (treaty intended to prevent discrimination against aliens, not to give aliens rights which citizens do not have); *Sullivan v. Kidd*, 254 U.S. 433 (1921) (treaty with Great Britain does not operate to supersede a state law in favor of a citizen of Canada in the absence of Canadian adherence to the treaty); *Prevost v. Greenaux* 60 U.S. (19 How.) 1 (1857) (treaty does not supersede state laws when treaty by its terms is subject to state laws); *In Re Hansen's Estate*, 281 N.Y.S. 617, 155 Misc. 712 (Surr. Ct. 1935) (local procedure to enforce rights given by the treaty must be followed).

17. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836).

18. See, e.g., CRANDALL, *TREATIES* 247 (2d ed. 1916); Leake, *The Limitations Upon the Treaty-Making Power*, 1 VA. L. REG. (n.s.) 503 (1915) (criticizing this position taken by Henry St. George Tucker); Root, *Address to First Annual Meeting of the American Society of International Law*, 1 AM. J. INT'L L. 273, 279 (1907).

19. 252 U.S. 416 (1920).

20. See also *Reid v. Covert*, 354 U.S. 1 (1957). "To the extent that the United States can validly make treaties, the people and the states have delegated their power to the National Government and the Tenth Amendment is no barrier." *Id.* at 18 (separate opinion by Black, J., Warren, Ch. J., and Douglas and Brennan, JJ.).

21. The Federal Constitutional Court of West Germany recently reached a contrary conclusion. It held that a treaty did not give the federal government power, in

The net result of these developments is that a valid treaty can abrogate prior acts of Congress, acts of state legislatures whether prior or subsequent, and can enable Congress to legislate in areas normally reserved to the states if "necessary and proper" to effectuate the provisions of a treaty.<sup>22</sup> No treaty, and no provision of a treaty, has ever been declared unconstitutional.<sup>23</sup> As the treaty-making power has expanded toward its outer-most limits, each proposed check has been found to be illusory. Yet few have contended that the treaty-making power is unlimited.

Two widely held views today propose a limitation upon the subject matter of a treaty. The first of these convictions is that the treaty-making power is limited by the provisions of the Constitution. It cannot go so far as to authorize what the Constitution forbids. Having granted the power, the Constitution defines and limits it.<sup>24</sup> Secondly, it is contended that the treaty-making power cannot be used to affect a purely domestic matter, and that the courts should intervene and declare such agreements void. Advocates of these positions can concede the "formal" validity of a particular treaty and direct their attack against its "essential" validity.<sup>25</sup> This approach brings into focus the widely debated conflict between the constitutional obligations of national courts and international law.

Theoretically, international law is supreme over national law, just as in the United States, federal law, within its area of operation, is superior to the laws of the states.<sup>26</sup> After the signatory states have become bound

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implementing a treaty, over subjects otherwise belonging to the states. The states could be made to conform only upon an affirmative showing of a violation of the principle of "federal fidelity." Das Konkordatsurteil Sonderdruck des urteils vom 26 März, 1957, 35 CAN. B. REV. 842.

22. See CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944). "The concept of Dual Federalism . . . is of no importance whatever in the sphere of international relations—in this sphere the government of the United States is a government of centralized, plenary power, in the exercise whereof it is in no respect limited by the coexistence of the States or by their acknowledged powers. Likewise, the principle of the Separation of Powers has been read out of the Constitution as a factor capable of embarrassing the conduct of foreign relations of the United States. . . ." *Id.* at 29.

23. CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 428 (1953).

24. See Anderson, *Extent and Limitations on the Treaty-Making Power*, 1 AM. J. INT'L L. 632 (1907); Mikell, *The Extent of the Treaty-Making Power of the President and the Senate of the United States*, 57 U. PA. L. REV. 435 (1909).

25. These terms have been used by G. G. Fitzmaurice, Special Rapporteur, in the proposed *Code on the Law of Treaties* being prepared by the International Law Commission. Formal validity refers to the manner of framing and adopting the treaty, while essential validity refers to the substance of treaties, the capacity of the parties, the effect of fraud, error, and duress, and the legality of the object. In addition, temporal validity is concerned with duration, termination, revision, and modification of treaties. U.N. Doc. No. A/CN.4/107 (1957).

26. See Potter, *Relative Authority of International Law and National Law in the United States*, 19 AM. J. INT'L L. 315 (1925).

to the treaty according to their own internal procedures,<sup>27</sup> their obligation continues until terminated according to principles of international law. Thus, although United States courts will declare that a later inconsistent act of Congress terminates the domestic effect of a prior treaty, the international obligation of the treaty is not abrogated and will be enforced before an international body.<sup>28</sup> On the other hand, national judges are sworn to uphold the national constitutions and laws, and will apply existing national, rather than international, law to the cases before them. A conflict has arisen in respect to the temporal validity of treaties and one is threatening in the case of essential validity.

The question then becomes, should national courts, using national law, attempt to control the essential validity of treaties as they now control formal validity, a course sanctioned by international law, and to a certain extent temporal validity, a course not sanctioned by international law? In order to answer this question legal precedents in the United States must be examined along with the position of international law. Practical as well as theoretical difficulties must be noted. Especially relevant are the derivation and legal significance of the terms "domestic jurisdiction" or "domestic concern" and "proper subject of international concern," which appears to be the dichotomy to be set up in national judicial determination of the essential validity of treaties.<sup>29</sup>

The concept of "domestic jurisdiction" has received its impetus from use in twentieth century multi-party treaties setting up world organizations, which potentially can compel the obedience of the member states. It has been used as a defensive measure to avoid subjection to these organizations, and seems to have become a substitute for "the somewhat battered idols of sovereignty, state equality, and the like."<sup>30</sup> It has been used by the United States in reservations to compulsory arbitration treaties; it was included in the Covenant of the League of Nations; and it presently limits the authority of the United Nations, and the compulsory jurisdiction of the International Court of Justice by reservation

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27. The proposed *Code on the Law of Treaties* provides that the treaty-making power is the act of the executive authority of the state, but each state can determine for itself the constitutional processes necessary to place the executive authority in a position to exercise this power. See U.N. Doc. No. A/CN.4/101 (1956).

28. See *Edye v. Robertson*, 112 U.S. 580 (1884); Wright, *Treaties as Law in National Courts with Especial Reference to the United States*, 32 IND. L.J. 1 (1956); but see Mikell, *The Extent of the Treaty-Making Power of the President and the Senate of the United States*, 57 U. PA. L. REV. 435 (1909).

29. *Compare Power Authority of New York v. Federal Power Commission*, 247 F.2d 538, 540 (D.C. Cir. 1957) with *Asakura v. Seattle*, 265 U.S. 332, 341 (1924).

30. Brierly, *Matters of Domestic Jurisdiction*, 6 BRIT. Y.B. INT'L L. 8 (1925).

in the articles of adhesion.<sup>31</sup> Thus of necessity, the term "domestic jurisdiction" is relevant in dealing with these organizations.

The limitation in the United Nations Charter is found in Article II, paragraph 7:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>32</sup>

The pertinent questions thus become: What are matters essentially within the domestic jurisdiction of a state, and who says what these matters are?

It is difficult to define the limits of domestic jurisdiction as used in Article II. Some commentators contend that if treaties are made about a particular subject, ipso facto, it is no longer an essentially domestic matter. Thus, ". . . the question is not the nature of a disputed matter but whether customary or contractual international law has left the matter solely within domestic jurisdiction, or has subjected states to international obligations in the matter."<sup>33</sup> A contrary argument may be framed from the fact that the United States Senate in approving the Lodge amendments to the Treaty of Versailles reserved the domestic jurisdiction of the United States, and listed seven examples, upon all of which subjects treaties had been concluded.<sup>34</sup>

A statement that every matter that has been dealt with by treaty is now a matter without the essentially domestic jurisdiction of a state would be too broad for defining the meaning of Article II, paragraph 7. Such

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31. See Goodrich, *The United Nations and Domestic Jurisdiction*, 3 INT'L ORG. 14 (1949).

32. U.N. CHARTER art. 2, para. 7. In the *Covenant of the League of Nations*, matters which by international law were solely within the domestic jurisdiction of a party were excepted, and the Dumbarton Oaks Proposals for the Charter included these same provisions. The exclusion of the former provision and the substitution of "essentially" for "solely" apparently were not made to effect a change in interpretation from the Covenant. See Gross, *Impact of the United Nations Upon Domestic Jurisdiction*, 18 DEP'T STATE BULL. 259 (1948). John Foster Dulles has said that "by international law" was deleted because of its constantly changing content, which caused it to escape definition. See Jones, *Domestic Jurisdiction—From the Covenant to the Charter*, 46 ILL. L. REV. 219, 240 (1951).

33. Kelson, *Limitations on the Functions of the United Nations*, 55 YALE L.J. 997, 999 (1946).

34. These were immigration, labor, coastwise traffic, commerce, the suppression of the traffic in women and children, and in opium and other dangerous drugs. See Pruess, *The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT'L L. 720, 723 (1946).



matters as the admission of aliens and tariffs traditionally have been classified as domestic in the context of world organization, although they have been the subject of treaty. The true minimum test seems to be what has been considered "domestic" in world organizations, not in voluntary international agreements. The difficulty lies in choosing a criterion. Resort may be had to the League of Nations, but activities under the Covenant must not set the ultimate limits on the sphere of world organization. The United Nations' expansion should not be limited by past experiences. New problems should be dealt with on an *ad hoc* basis. And, as Lauterpacht has said, ". . . a matter is no longer essentially within the domestic jurisdiction of a state if it has become a matter of international concern to the extent of becoming an actual or potential danger to the peace of the world."<sup>35</sup>

Since the area of domestic jurisdiction shrinks as international relations become more complex and international cooperation more necessary, there is naturally much uncertainty as to its scope at any given time. Thus, the organ whose function it is to settle disputes as to this matter can to some degree expand or contract the content of domestic jurisdiction. Yet the Charter itself does not designate any body to decide what is "essentially within the domestic jurisdiction of any state" under Article II, paragraph 7.

The United Nations has refused to refer this question to the International Court of Justice.<sup>36</sup> Being used as a substitute for "sovereignty," it may not be a legal term, but a political one which involves questions of policy more than law. The Court would have to keep the term flexible to permit new matters to be settled by international agreement as the scope of international law broadened. Also, the International Court of Justice could only render advisory opinions on this matter, because many states, in accepting its compulsory jurisdiction, excepted matters of domestic jurisdiction as determined by those members from the purview of their adherence.<sup>37</sup> Thus, if a state argued that a particular matter was domestic under Article II, paragraph 7 of the Charter, it would make the same contention in the International Court of Justice and not be bound by the court's decision.

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35. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 177 (1950).

36. See Goodrich, *The United Nations and Domestic Jurisdiction*, 3 INT'L ORG. 14 (1949); Jones, *Domestic Jurisdiction—From the Covenant to the Charter*, 46 ILL. L. REV. 219 (1951).

37. See 1 U.N. TREATY SERIES 9, regis. No. 3 (1946).

Some have contended that each state should determine for itself what it considers matters essentially within its domestic jurisdiction.<sup>38</sup> This interpretation would greatly weaken the power of the United Nations, and strengthen the idea that each member state is completely sovereign. It has not been accepted in the United Nations.

In practice, the respective organs of the United Nations have themselves decided disputed questions of interpretation of the Charter, including whether a problem coming before them is a matter essentially within the domestic jurisdiction of a state. Thus, the Security Council rejected the contention that changes in the government of Czechoslovakia allegedly brought about by Soviet influence were essentially domestic, and asserted jurisdiction. The United States' representative joined in stating that it was for the Security Council, not Czechoslovakia or any other member, to determine whether the matter was essentially within the domestic jurisdiction of Czechoslovakia.<sup>39</sup> This position is supported by the general principle of international law that "a body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction."<sup>40</sup>

Thus, "domestic jurisdiction" as used in Article II, paragraph 7, is ambiguous at best. Its content changes as more matters are dealt with internationally, and it has no precise legal definition. It is noteworthy that even in the United Nations, where domestic jurisdiction is a term which appears in its Charter, the task of defining its meaning has not been delegated to a judicial organ. This suggests the inherent weakness of "domestic jurisdiction" or "domestic concern" as a standard in a court of law.

In accepting the compulsory jurisdiction of the International Court of Justice, the United States Senate by the Connally amendment excepted "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."<sup>41</sup> Thus the United States can withdraw any matter which it considers essentially domestic. The interpretation of this phrase presents the same problems as its counterpart in Article II,

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38. See Moskowitz, *Is the United Nations Bill of Human Rights Dangerous?*, 35 A.B.A.J. 283, 288 (1949) (Reply by Frank E. Holman, past president of Am. Bar. Assn.); Gross, *The Charter of the United Nations and the Lodge Reservations*, 41 AM. J. INT'L L. 531 (1947).

39. U.N. SECURITY COUNCIL OFF. REC., 3rd year, 56th meeting 32 (1948).

40. See Jones, *Domestic Jurisdiction—From the Covenant to the Charter*, 46 ILL. L. REV. 219, 268 (1951). See also Kelsen, *Limitations on the Functions of the United Nations*, 55 YALE L.J. 997, 998 (1946) (power to determine when a disputed matter is solely within domestic jurisdiction implies the power to settle the dispute). This has been labelled "revolutionary thesis" by Frank E. Holman. See note 38 *supra*.

41. 1 U.N. TREATY SERIES 9, regis. No. 3 (1946).

paragraph 7. It was suggested in Senate debate on the amendment that the United States courts would decide what matters are essentially domestic under the power to interpret treaties.<sup>42</sup> This view is open to at least two objections. In the first place, domestic jurisdiction may not be a legal term, but rather one based upon political expediency and policy. Secondly, since the United States courts do not render advisory opinions, it is difficult to see how a case or controversy would arise to present this particular question to the courts. Since only states can be parties before the International Court of Justice,<sup>43</sup> any dispute as to the extent of its compulsory jurisdiction would involve independent states. The United States courts would not enter the argument. It seems that this decision will have to come from a political organ of our government.

Viewed in the context of international organization the concept of domestic jurisdiction has been employed as a substitute for sovereignty to limit their coercive authority. There is no indication that it is meant as a check upon voluntary agreements among nations, or even that it is a legally significant term. The position of a single country as to its meaning may shift as it joins in asserting the authority of the United Nations, or defends against intervention in its own affairs. Moreover, the content given to domestic jurisdiction seems to reflect one's opinion about the relative merits of effective international organization, and complete national sovereignty.<sup>44</sup>

The term which seems destined to constitute the other side of the dichotomy in a national judicial determination of the essential validity of treaties, all proper subjects of international concern, has a rather venerable background. Statements to the effect that a treaty, to be valid, must cover a subject of genuine international concern have appeared in judicial opinions through out the history of the United States. However, the point has never been seriously argued and has been used merely to emphasize the extent of the treaty-making power, *i.e.*, that the treaty in question meets this requirement.<sup>45</sup> Since domestic concern and proper subject of international concern are actually different sides of the same

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42. 92 CONG. REC. 10697 (1943).

43. STAT. INT'L CT. JUST. art. 34, para. 1.

44. Cf. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 56 (1944) (when total war is the price of total sovereignty, the price is too high).

45. See, *e.g.*, *Santovincenzo v. Eagan*, 284 U.S. 30, 40 (1931) (treaty power broad enough to cover all subjects that properly pertain to our foreign relations); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924) (treaty power extends to all proper subjects of negotiation between our country and other nations); *In Re Ross*, 140 U.S. 453, 463 (1891); *Geoffrey v. Riggs*, 133 U.S. 258, 266 (1890); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 197 (1876) (treaty power ample to cover all the usual subjects of diplomacy); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242 (1872) (treaty power extends to all objects usually regarded as the proper subject of negotiation and treaty).

coin, their utility as standards to test the essential validity of treaties may be examined together.

The immediate problem is one of content. The same problems of vagueness and uncertainty as to meaning at any particular time are present as is the case with Article II, paragraph 7 of the United Nations Charter. What is a matter of purely domestic concern? Or conversely, what are matters of international concern? The Constitution does not state over which subjects the treaty power may operate. The treaty power was initially considered a commercial power, and matters not directly or indirectly concerned with commerce were considered not proper subjects for treaties.<sup>46</sup> However, it is not contended that the subjects which constitutionally can be dealt with by treaty have been frozen by past agreements. If this were the case, international cooperation would be unable to develop beyond the most primitive forms.

The test cannot be based solely upon what has been considered domestic jurisdiction by the United States in dealing with world organizations. As has been pointed out, the admission of aliens and tariffs have traditionally been considered domestic in this context. But the United States has entered numerous treaties concerning these subjects.<sup>47</sup> Treaties have also been entered into by the United States permitting aliens to hold and inherit property in the United States,<sup>48</sup> providing for the equal protection of aliens,<sup>49</sup> providing for the punishment of United States citizens abroad by Consular courts,<sup>50</sup> and for the protection of migratory birds.<sup>51</sup> It could be contended that some of these subjects would fall within the realm of "domestic jurisdiction" in a world organization.

What is a proper subject of international concern in dealing with voluntary treaties seems to depend upon the development of international law. Just as the limits of "domestic jurisdiction" in world organizations are set by what has been done and what is being done in these bodies, the limits of domestic jurisdiction relative to treaties are defined by

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46. See Bruce, *Federal Treaties and the State Police Power*, 54 AM. L. REG. 699 (1906).

47. See, e.g., Treaty With China on Immigration, July 28, 1868, 16 STAT. 739, T.S. No. 48; Treaty With Sweden and Norway on Naturalization, May 26, 1869, 17 STAT. 809, T.S. No. 350; Treaty With Uruguay on Naturalization, Aug. 10, 1908, 36 STAT. 2165, T.S. No. 527.

48. E.g., Treaty With Sweden and Norway on Commerce and Friendship, Sept. 4, 1816, 8 STAT. 232, T.S. No. 347; Treaty With Persia on Commerce and Friendship, Dec. 13, 1856, 11 STAT. 709, T.S. No. 273.

49. E.g., Treaty With Japan on Commerce and Navigation, Feb. 21, 1911, 37 STAT. 1504, T.S. No. 558.

50. E.g., Treaty With Japan on Commerce and Consuls, June 17, 1857, 11 STAT. 723, T.S. No. 184.

51. Treaty With Great Britain on Migratory Birds, Aug. 16, 1916, 39 STAT. 1702, T.S. No. 628.

what nations are doing by voluntary agreement. The fact that nations are making treaties about the subject, seems to rebut the argument that it is solely a matter of domestic concern. Ipso facto, that particular subject becomes a matter of international concern. This reasoning was used by United States courts as early as 1840, although in more restrictive language:

The power to make treaties is given by the Constitution in general terms; without any description of the objects intended to be embraced by it; and consequently it was designed to include all those subjects which, in the ordinary intercourse of nations, had usually been made subjects of negotiations and treaty, and which are consistent with the nature of our institutions and the distribution of powers between the general and state governments.<sup>52</sup>

However, use of the practice of nations to ascertain the meaning of proper subject of international concern is not without difficulties. Its constantly changing content causes it to escape definition. What is solely domestic today might be of international concern tomorrow. Moreover, as new areas become the subject of treaty, there will be no international precedent to consider. The courts could decide each case on an *ad hoc* basis without laying down general principles or definitions. However the propriety of entering into a treaty on a particular subject is largely a practical one determined by political expediency and the prevailing public demand for such a treaty. Are the courts proper bodies for determining these forces and attitudes?

The concept of sovereignty places another obstacle in the path of a national judicial determination of the essential validity of treaties in terms of the proper subject of international concern—purely domestic concern dichotomy. The term domestic jurisdiction as used in world organizations is a stalwart of national sovereignty, but its effect in limiting voluntary international agreements detracts from this principle. If other nations are making treaties about a particular subject and the United States is unable to do so because its courts consider the subject a domestic matter, the United States' sovereignty would not be as extensive as that of other nations.<sup>53</sup> The power to make international agreements is one of the attributes of sovereignty, and if this power is so limited,

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52. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (Taney). See also *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872); *United States v. Reese*, 27 Fed. Cas. 742, No. 16,137 (C.C.W.D. Ark. 1879).

53. Secretary of State Cushing called this a "political impossibility." 8 Ops. ATT'Y GEN. 411, 415 (1857).

sovereignty itself must be imperfect. This idea has also received notice in the Supreme Court:

As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.<sup>54</sup>

Corwin says that there is no apparent limitation in the choice of matters concerning which the United States may treat with other governments.<sup>55</sup>

A third difficulty in a national judicial determination of essential validity in terms of "domestic concern" stems from the position of the United States as a member of the community of nations. It has been argued that the treaty-making power arises from international law and *a priori* is plenary and unlimited in terms of subject matter. An attempt by a state to cut down the scope of this power by constitutional limitations would not be honored by international law.<sup>56</sup> In practice, a refusal to enter a particular treaty is not more definite if based on constitutional, rather than policy reasons. The net result is the same. But if the treaty is entered into and later challenged on constitutional grounds, or if there is a previous commitment to enter into the treaty, the distinction becomes vital. If the choice of the subject matter of a treaty is merely one of policy and expediency, the political organs of government are the final authority; but if a constitutional check is recognized, the Constitution as interpreted by the courts is the last word. In the latter situations, inability to enter the treaty because of national constitutional limitations would not be recognized before an international tribunal, nor would constitutional incapacity be a valid ground for terminating a treaty.<sup>57</sup>

It has been pointed out that use of the terms domestic concern and international concern as legal standards to test the essential validity of treaties is laden with difficulties. Even if the problems with international law were overlooked, or justified on a national self-determination basis, those concerning the content of these terms would still be present. What, then, are the alternatives to a constitutional test based on domestic matter or proper subject of international concern?

54. *Machenzie v. Hare*, 239 U.S. 299, 311 (1915). See also *People v. Gerke*, 5 Cal. 381, 383 (1855) (power of treaty given without restraining it to particular objects in as plenipotentiary a form as held by any sovereign in any other society).

55. CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 318 (1953).

56. Potter, *Inhibitions Upon the Treaty-Making Power of the United States*, 28 AM. J. INT'L L. 456, 472 (1934).

57. U.N. Doc. No. A/CN.4/107 (1957).

The most obvious solution would be to declare that what are proper subjects of negotiation and treaty is a political question. This course would not necessitate an overruling of precedent. For, although the courts have stated that certain subjects meet the international concern test,<sup>58</sup> there has never been a direct holding that it is for the courts ultimately to decide whether a matter is proper for international agreement. In fact, although the courts have asserted the power to review the formal validity of treaties,<sup>59</sup> no court has ever declared a treaty void on this ground.<sup>60</sup>

The political question position is also supported by the long-standing precept that the courts will not embarrass the government in the conduct of foreign affairs. This ideal has been carried out with rather remarkable consistency. Specifically, courts have not questioned the wisdom of terminating a treaty,<sup>61</sup> the reasons behind the treaty,<sup>62</sup> whether a state of war exists, or what governments should be recognized as sovereign.<sup>63</sup> Even when a court has declared a treaty superseded by a subsequent act of Congress, it was following the political organs' judgment. A recent Supreme Court declaration of this attitude of nonintervention is found in *Chicago & Southern Air Lines Inc. v. Waterman Steamship Corp.*,<sup>64</sup> in which the court said, through Mr. Justice Jackson:

But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they

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58. See, e.g., *Santovincenzo v. Eagan*, 204 U.S. 30, 40 (1931) (disposition of property of aliens who die in the United States within the scope of the treaty power); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924) (treaties for the protection of citizens of one country residing in the territory of another numerous); *Missouri v. Holland*, 252 U.S. 416 (1920); *Geoffrey v. Riggs*, 133 U.S. 258, 316 (1890) (manner in which alien can inherit land proper subject of treaty).

59. See *Jones v. Walker*, 13 Fed. Cas. 1059, No. 7507 (C.C. Va.) (district and date not given).

60. Perhaps a counterpart to the "enrolled bill rule," which is used by some courts to avoid looking behind the enrolled bill to determine if statutes were properly passed, is probable in a judicial determination of formal validity.

61. See CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 426 (1953).

62. See, e.g., *United States v. Minnesota*, 270 U.S. 181, 201 (1926); *Downes v. Bidwell*, 182 U.S. 244, 312 (1901).

63. See Magnusson, *Our Membership in the United Nations and the Federal Treaty Power Under the Constitution*, 34 VA. L. REV. 137 (1948).

64. 333 U.S. 103 (1948).

advance, or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.<sup>65</sup>

Similarly, John Locke long ago said that the treaty power "must necessarily be left to the prudence and wisdom of those in whose hands it is to be managed for the public good."<sup>66</sup> A declaration that a treaty entered into by the United States is unconstitutional because it concerns purely domestic matters would violate this long standing precept.

It should be noted that a judicial hands-off policy in regard to the subject matter of treaties does not mean that every type of international agreement should be entered into. There is a distinction between political expediency and constitutional power. The former is more flexible, and must of necessity reflect the demands of public opinion. If political expediency and public opinion should so dictate, the treaty-making power of the United States is constitutionally broad enough to embrace treaties on any subject.

Another course would be to resort to international law to test and enforce essential validity. Since treaties are primarily creatures of international law, principles regarding their essential validity should come from international, rather than from national law. The International Law Commission has been engaged in codifying the Law of Treaties for several years.<sup>67</sup> When this proposed code is completed, it will help to make the sometimes obscure standards of international law more concrete.

The most obvious requirements of international law in respect to essential validity are that the treaty be free from fraud, mistake and duress.<sup>68</sup> There may still be some question in the case of duress, especially when a vanquished nation is in effect compelled to sign an unfavorable treaty of peace.<sup>69</sup> There is also a lack of agreement as to whether a treaty tainted with fraud, mistake or duress is void or merely voidable.<sup>70</sup>

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65. *Id.* at 111.

66. LOCKE, WORKS 425 (1801 ed.).

67. At first a *Convention on the Law of Treaties* was begun. U.N. Doc. No. A/CN.4/23 (1950). Later it was decided that the undertaking should take the form of a code. Two parts of the first chapter, which deals with the validity of treaties, have already been completed. They concern formal validity and temporal validity. The part on essential validity has not yet been reported. Distinguished rapporteurs on these projects have been James L. Brierly, Sir Hersch Lauterpacht, and G. G. Fitzmaurice. See U.N. Doc. No. A/CN.4/101 (1956); U.N. Doc. No. A/CN.4/107 (1957).

68. See 5 HACKWORTH, INTERNATIONAL LAW 158 (1943).

69. *Ibid.*

70. *Id.* at 159.



If a treaty is complete and regular on its face, national constitutional limitations will not be recognized in international law as grounds for terminating the treaty.<sup>71</sup> In 1931, Secretary of State Stimson implied that the United States recognizes this principle. In answer to a letter from Nicaraguan President Moncada, in which the latter expressed doubt as to the constitutionality of the Byron-Chamarno Nicaraguan canal treaty in light of provisions in the Nicaraguan Constitution that the state could give up no independence, Mr. Stimson said that he was confident that Nicaragua would take any steps ". . . necessary on its part to insure the proper realization of the objectives of the treaty."<sup>72</sup>

As to the subject-matter of treaties, the only requirements seem to be that it create rights and obligations or establish relationships governed by international law, and have a legal object. If an agreement is entered into without rights and obligations, it is not an act in international law and of no significance in the law of treaties.<sup>74</sup> Likewise, it has been suggested that if a treaty has an unlawful object, such as disposing of the rights of non-signatory nations without notice or consultation, the agreement is invalid.<sup>75</sup> Thus, if a treaty were entered into by the United States solely to achieve domestic legislation or to favor the federal government over the state governments, it would be invalid by principles of international law. Potter equates "fraud" with "bad faith," and would label this a fraud upon the treaty-making power.<sup>76</sup>

Of course, if international law is to control the essential validity of treaties, there must be proper machinery to provide effective enforcement. There are several possibilities. In the first place, national courts could apply these international law principles in testing essential validity. Customary international law has been regarded as a part of the common law in the United States and is directly applicable by both federal and state courts.<sup>77</sup> However, there is an immediate practical problem in that national judges are sworn to uphold the national constitutions and statutes. Thus they would not always be free to apply international law

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71. See 5 HACKWORTH, *INTERNATIONAL LAW* 154 (1943). Part III of the proposed *Code on the Law of Treaties* also provides that the fact that the treaty has proved inconsistent with the constitution or municipal laws of the state shall not be recognized as grounds for termination of the treaty. U.N. Doc. No. A/CN.4/107 (1957).

72. See 5 HACKWORTH, *INTERNATIONAL LAW* 155 (1943).

73. See U.N. Doc. No. A/CN.4/101 (1956) (definition of a treaty).

74. U.N. Doc. No. A/CN.4/23 (1950) (comment by Brierly on the definition of treaty in the Draft Convention).

75. See U.N. Doc. No. A/CN.4/Ser.A (1950) (statement by commission member Jesus Maria Yepes).

76. Potter, *Inhibitions Upon the Treaty-Making Power of the United States*, 28 AM. J. INT'L L. 456, 472 (1934).

77. See *The Paquete Habana*, 175 US.. 677 (1900); Wright, *Treaties as Law in National Courts with Especial Reference to the United States*, 32 IND. L.J. 1, 2 (1956).

principles, especially if the terms of the treaty violated provisions in the national constitution.<sup>78</sup> Secondly, an expanded world court system could be established with exclusive jurisdiction over the essential validity of treaties. National courts could then be required to grant full faith and credit to its decrees.<sup>79</sup> Thirdly, the United Nations could control the essential validity of treaties by a registration system. This course has been advocated in the International Law Commission.<sup>80</sup> A fourth alternative would be an original determination of essential validity in national courts, with a subsequent right to a hearing in the International Court of Justice. The decision of the latter court should be recognized as universally binding.<sup>81</sup> However, since only states may be parties before the International Court of Justice,<sup>82</sup> there may be a practical difficulty in that the losing party in the national court may be a private person or one of the United States.

Several of these alternatives will become practical only after a greater expansion in world cooperation. However, a start in the right direction would be made if courts abandoned the "domestic concern—proper subject of international concern" dichotomy and applied international law standards to test the essential validity of treaties. If essential validity is not a political question in national courts, at least it should not be tested by independent national standards. It may be that United States judges could not enforce a treaty which contravened express provisions of the Constitution, but even this has not gone un-

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78. See *Reid v. Covert*, 354 U.S. 1 (1957). ". . . no agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 16.

79. Charles S. Rhyne, past president of the American Bar Association, has advocated such an expanded world court system. Rhyne, *World Peace Through Law: The President's Annual Address*, 44 A.B.A.J. 937, 997 (1958).

80. Mr. Jesus Maria Yepes intended to propose the following Article for inclusion in the *Convention on the Law of Treaties*:

In order to be valid, a treaty, as understood in this Convention, must have a lawful purpose according to international law. In case of any dispute regarding the lawfulness of a treaty, the International Court of Justice shall state its opinion on the matter at the request of any State directly or indirectly interested, or of the United Nations.

A treaty with an unlawful object may not be registered with the Secretariat of the United Nations. Whenever the lawfulness of a treaty submitted for registration is in doubt, the Secretary General of the United Nations shall ask the International Court of Justice for an advisory opinion. U.N. Doc. No. A/CN.4/Ser.A (1950).

81. The same may be true in matters of interpretation of a treaty. Principles of international law could be applied, and the final authority could be the International Court of Justice. A party should not judge his own case. See Wright, *Amendments and Reservations to the Treaty*, 4 MINN. L. REV. 17, 29 (1919).

82. STAT. INT'L CT. JUST. art. 34, para. 1.

challenged.<sup>83</sup> It is sufficient to note that if political expediency and public opinion concur that such a treaty is desirable, the Constitution could be amended to permit the agreement to be enforced.<sup>84</sup>

Since the problem in the *Niagara River Power* case arose from a reservation to a treaty inserted by the Senate, it is necessary briefly to discuss this aspect of the treaty-making power. By definition a reservation is a formal statement made by a prospective party to create a different relationship between it and the other prospective party.<sup>85</sup> If made by the Senate and approved by the President, its effect is a new offer which must then be approved by the other party or parties. A mere interpretive statement is not a reservation,<sup>86</sup> nor can one be valid which is not stated in the original treaty proclaimed by the President.<sup>87</sup> But if the reservation is annexed to the treaty and subsequently ratified by the other party with the reservation attached, it is a part of the treaty and as binding as if it were in the body of the instrument.<sup>88</sup>

Since reservations are a part of the treaty as ratified by the Senate and proclaimed by the President, they should not be taken out of context and examined in isolation. It is sufficient if the treaty as a whole creates rights and obligations; each separate provision need not do so. Nor should the fact that a particular provision came into the treaty by reservation, rather than having been inserted by the executive in the first instance, be a relevant consideration.

Of course a rider may be attached to a treaty which has nothing to do with its valid purpose or subject matter. For example, the Senate could attach a provision that henceforth all matters of municipal zoning would be decided by Congress, or that the Taft-Hartley act is hereby repealed, to a treaty concerning fisheries in international waters. The other signatory party probably would not object and the treaty would be proclaimed with these "reservations." In this case, the so-called reservations obviously would be unconnected with the subject-matter of the treaty itself and not intended to create rights and obligations or to establish relationships between the parties. Thus, they would be invalid by principles of international law.<sup>89</sup> Since these provisions would be severable

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83. Potter, *Inhibitions Upon the Treaty-Making Power of the United States*, 28 AM. J. INT'L L. 456, 473 (1934).

84. See *Reid v. Covert*, 354 U.S. 1, 14 (1957).

85. 2 HYDE, INTERNATIONAL LAW 519 (2d ed. 1947); 5 HACKWORTH, INTERNATIONAL LAW 479 (1943).

86. See *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

87. See *New York Indians v. United States*, 170 U.S. 1 (1897).

88. See *Doe ex. dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 656 (1853).

89. There is an apparent similarity between these illustrations and the reservation in the *Niagara River Power* case. In fact the majority in that case noted that that reservation did not change the relationship between the parties and was not intended to create

from the remainder of the treaty, the residue should be valid.

Viewed in this light, the dictum in *Power Authority of New York v. Federal Power Commission*<sup>90</sup> seems unfortunate. Although it may be politically inexpedient to enter treaties about a variety of subjects that historically have been considered of purely domestic concern, there is no judicially enforceable constitutional limitation to prevent it. What is a proper subject for international concern depends upon the development of international law and cooperation, and courts should not erect a standard to test the essential validity of treaties upon this term or its converse, domestic concern. The courts' function in reviewing essential validity, if any, should be limited to the narrow area where it is contended that the treaty is unlawful according to principles of international law. The treaty-making power is a political one and in the main should be left to the wisdom and discretion of those who are charged with its operation, and who are responsible to the people for their conduct.

## ANTITRUST IMPLICATIONS FROM THE USE OF CONSIGNMENT CONTRACTS IN THE PETROLEUM INDUSTRY

Consignment is generally used as a device to protect a vendor from either the fraudulent bulk sales or insolvency of his vendee. Protection is afforded the vendor by his retention of title enabling him to set aside sales not made in the ordinary course of business and giving him sole claim to the goods in the event of the vendee's financial failure. Generally, the consignee retains the power to set the prices and is regarded as the bailee of the vendor for the sale of the goods. However, the vendor may exercise such control over the prices and business of the consignee that the consignee becomes the vendor's agent. When such control over the consignee's prices is exercised in conjunction with a genuine agency system of distribution, a consignment-agency plan exists, which has been held not to constitute a violation of the antitrust laws.<sup>1</sup> The use of consignment raises problems which may include not only a determination as to the existence of a genuine agency but also the applicability

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rights or obligations. *Power Authority of New York v. Federal Power Commission*, 247 F.2d 538, 541 (1957). The distinction to be noted is that the reservation in the *Niagara River Power* case was directly germane to the subject-matter of the treaty and an outgrowth of international negotiation. *Id.* at 549 (dissent). The illustrations, on the other hand, are remote from the negotiations and the subject-matter of the treaty.

90. 247 F.2d 538 (D.C. Cir), *vacated as moot*, 355 U.S. 64 (1957).

1. *United States v. General Electric Co.*, 272 U.S. 476 (1926).