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The Use of Legislative History in Treaty Interpretation: The Dual Treaty Approach

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THE USE OF LEGISLATIVE HISTORY IN TREATY INTERPRETATION: THE DUAL TREATY APPROACH

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The debate over the effect to be given to legislative history in determining the meaning of a statute has a counterpart in treaty interpretation. Treaties, like federal statutes, are the supreme law of the land,[1] and must be interpreted and applied by the courts. The question of the effect to be given to legislative history is even more complicated, however, with respect to treaties than it is with respect to statutes. To the various arguments for and against the use of legislative history in statutory interpretation must be added the consideration that treaties are agreements with one or more foreign states and are subject to international law.

The Vienna Convention on the Law of Treaties provides:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[2]

It further provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
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> (a) leaves the meaning ambiguous or obscure; or
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> (b) leads to a result which is manifestly absurd or unreasonable.[3]

Since, under international law, resort may not be had to preparatory materials at all (other than to confirm the plain meaning) except where the treaty is ambiguous or the plain meaning leads to an absurd

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1 U.S. CONST. art. VI.

2 Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, *reprinted in* 63 AM. J. INT'L L. 875 (1969). The United States is not a party to the Convention, but considers most of its provisions to be customary international law.

3 *Id.* art. 32.

result, and even then United States legislative history would not be considered part of the preparatory work, the use of legislative history by United States courts to interpret a treaty may result in different interpretations under United States and international law.

The question arose recently in the context of the Treaty on the Limitation of Anti-Ballistic Missile Systems between the United States and the Soviet Union (the ABM treaty).[4] Opponents of the Strategic Defense Initiative (SDI) argued that the development and testing of the so-called Star Wars violated the ABM Treaty.[5] The Legal Adviser of the Department of State, Abraham Sofaer, took the position that the broad interpretation of the ABM treaty that would bar SDI testing was not correct; that the negotiating history showed that a narrower interpretation, which did not bar SDI, was correct.[6] Proponents of the broader interpretation found a statement in the legislative history by a witness for the executive that supported their interpretation. They then argued that since the treaty clause requires Senate advice and consent,[7] the treaty, at least in so far as the United States is concerned, must be interpreted as it was understood by the Senate at the time of ratification, regardless of how it is interpreted internationally. Therefore, they concluded, the broader interpretation governs.[8]

The Senate's understanding, in the view of the proponents of this position, need not be included as a condition in the resolution giving the Senate's advice and consent to ratification; it may be determined from the legislative history of the resolution. As one ardent proponent of this position put it:

> Often, the Senate registers its understandings relatively informally, with a comment in the Foreign Relations Committee hearings or

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[4] Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, 23 U.S.T. 3435, T.I.A.S. No. 7503.

[5] *See, e.g.*, Chayes & Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986).

[6] According to the Legal Advisor, the negotiating history demonstrated that a United States proposal, which would have barred Star Wars, was rejected by the Soviet Union. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972, 1978-80 (1986).

[7] U.S. CONST. art. II, § 2, cl. 2 provides that 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."

[8] *See, e.g., The ABM Treaty and the Constitution, Joint Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 319 (1987) [hereinafter *ABM Treaty Hearings*] (statement of Louis Henkin); Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 AM. J. INT'L L. 854, 877 (1986); Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1405; *see also id.* at 1420.

> markup, in the committee reports, or in floor debate, rather than in the resolution of ratification. Occasionally, it is even necessary to draw meaningful inferences from virtual silence.[9]

In *United States v. Stuart*,[10] Justice Scalia took issue with that approach. He wrote:

> The question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to. And to answer that question accurately, it can reasonably be said, whatever extra-textual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding. Thus, we have declined to give effect, not merely to Senate debates and committee reports, but even to an explicit condition of ratification adopted by the full Senate, when the President failed to include that in his ratification.
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> . . . .
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> Of course the Senate has unquestioned power to enforce its own understanding of treaties. It may, in the form of a resolution, give its consent on the basis of conditions. If these are agreed to by the President and accepted by the other contracting parties, they become part of the treaty and of the law of the United States. . . . Moreover, if Congress does not like the interpretation that a treaty has been given by the courts or by the President, it may abrogate or amend it as a matter of internal law by simply enacting inconsistent legislation. . . . But it is a far cry from all of this to say that the meaning of a treaty can be determined, not by a reservation attached to the President's ratification at the instance of the Senate, nor even by formal resolution of the Senate unmentioned in the President's ratification, but by legislative history of the sort that we have become accustomed to using for (*sic*) purpose of determining the meaning of domestic legislation.[11]

Whatever one's views on the use of legislative history to interpret statutes, it seems clear that Justice Scalia is correct in rejecting the use of legislative history to interpret treaties, at least when such use will result in an interpretation of the treaty domestically that is different from its interpretation internationally. If the interpretation based on legislative history is narrower, i.e., imposes lesser restrictions on what the parties may do, the United States would be in breach of its obligations internationally. The United States could not justify its failure to comply with the broader interpretation of the treaty under interna-

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[9] Koplow, *supra* note 8, at 1420.

[10] 489 U.S. 353 (1989).

[11] *Id.* at 374-75 (Scalia, J., concurring).

tional law on the ground that under United States law the treaty has to be interpreted in light of the legislative history.

The Vienna Convention on the Law of Treaties provides:

1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.[12]

While the advice and consent requirement would probably qualify as an "internal law of fundamental importance," an understanding of the Senate would not be "objectively evident to any state conducting itself . . . in accordance with normal practice," if that understanding was not conveyed to the other state party, but had to be extrapolated from a comment in committee "hearings or markup," from "committee reports," the "floor debate," or inferred from "virtual silence."[13]

If an interpretation based on legislative history is broader than the international interpretation, i.e., imposes greater obligations on the parties, then the United States would be subjecting itself to restrictions on its conduct for which it would receive no reciprocal benefits. Moreover, the use of a legislative history to impose obligations domestically that the United States does not have internationally would also violate the United States Supreme Court's decision in *INS v. Chadha*.[14] Since a treaty is an agreement between two or more states, an obligation that is, by hypothesis, not part of the United States' obligations internationally, cannot be United States law as part of the treaty.[15] The additional obligation imposed under the broad interpre-

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12 Vienna Convention on the Law of Treaties, *supra* note 2, art. 46.

13 *See supra* text accompanying note 9.

14 462 U.S. 919 (1983). The Court in *Chadha* made it clear that the only constitutional process for creating domestic law is by vote of a majority of both houses of Congress signed by the President, or by a two-thirds vote of both houses overriding a Presidential veto. In *Chadha*, the Court held that Congress cannot circumvent those requirements even to recapture power it has delegated to the executive, even though it specifically so provided in the legislation delegating the power to the executive and made it a condition of such delegation. Moreover, the Court so held even though it was a process that Congress had used for many years as a means of controlling the power it delegated to the executive.

15 This point is discussed in greater depth in a paper by the author entitled *A Treaty is a Treaty is a Treaty*, presented at a Conference on Separation of Powers and the Debate About Treaty Interpretation Under the Constitution, held in Washington, D.C., March 15-16, 1990. The papers presented at this Conference are presently being edited for publication by Professor John Norton Moore at the University of Virginia. A copy of the author's paper is on file with the Cardozo Law Review.

tation has, however, not been voted on by both houses of Congress—even in the sense that legislative history in a statute can be viewed as having been voted on—because only the Senate gives its advice and consent to a treaty. Indeed, that is the position the Supreme Court took almost a century ago in *New York Indians v. United States*.[16] In that case the Court refused to give effect to a condition that the Senate had included in its advise and consent resolution, but that the President failed to convey to the Indian Tribe. The Court said:

> [W]hile this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. *It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate and House of Representatives.*[17]

The use of legislative history to justify a domestic interpretation of a treaty that differs from its interpretation internationally would also have other undesirable consequences. It would undermine the purpose of the advice and consent requirement, which was intended as a limitation on the executive's power to bind the United States internationally. It is argued in support of the dual treaty approach that the legislative history rather than the negotiating history—which may be considered in interpreting the treaty under international law—should be controlling domestically because it would be too burdensome for the Senate to keep informed of the negotiating history, and that an understanding[18] on every point the Senate considers important would make the treaty unmanageable.[19] But surely, the purpose of the constitutional requirement that the Senate give its advice and consent to treaties was not to ensure that domestic law comports with the Senate's understanding but, rather, to ensure that the United States does not bind itself *internationally* to that which the Senate considers objectionable. The justification for the dual treaty approach relieves the Senate of that responsibility. Thus, under the dual treaty approach, the Senate would abdicate the very function that the advise and consent requirement was designed to serve.

Where the legislative history results in an interpretation that is

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16 170 U.S. 1 (1898).

17 *Id.* at 23 (emphasis added).

18 The Senate could, of course, ensure that its view of the treaty is controlling on any point by adding an appropriate reservation or understanding on that point to the resolution giving the Senate's advice and consent to ratification.

19 *See, e.g.*, Glennon, *Interpreting "Interpretation": The President, The Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U.C. DAVIS L. REV. 913, 919-20 (1987), *reprinted in ABM Treaty Hearings, supra* note 8, at 827-28; see also Glennon, *supra*, at 920 n.16, *reprinted in ABM Treaty Hearings, supra* note 8, at 828 n.16 (citing unpublished testimony of Senator Nunn in support of that position).

narrower, i.e., more permissive, than the interpretation internationally, the United States would be in breach of its international obligations. Thus, the dual treaty approach would also undermine the very purpose of the supremacy clause, which was to make the obligations that the United States undertakes internationally binding domestically.

The dual treaty approach would also impose contradictory obligations on the Executive. On the one hand, he is required to give effect to United States obligations under international law, which, of course, include treaty obligations. On the other hand, he would be bound by the treaty as understood by the Senate, even if that breaches international law. Such contradictory obligations may also arise under a unitary treaty approach if Congress enacts superseding legislation or a court holds a treaty to be unconstitutional. But that is done after deliberation by Congress, or adjudication by a court, as the case may be. Here, the President would be required to breach international law automatically, without anyone deciding that the treaty's application as understood by the Senate at the time of ratification is of supervening importance, or that the treaty as interpreted internationally violates fundamental principles of United States jurisprudence.

Even if one considers legislative history helpful in statutory interpretation (a question on which I take no position in this paper), it would seem obvious that "a comment in the . . . Committee hearings or markup, in the committee reports, or in floor debate" should not be the basis for United States violation of its obligations internationally.[20]

Professor Vagts takes Justice Scalia to task for his statement in *Stuart* that he was "unable to discover a single case in which [the Supreme] Court has consulted the Senate debate, committee hearings or committee reports"[21] to interpret a treaty, proceeds to list a number of cases in which legislative history was used in treaty interpretation, and offers some research guidance on how those cases could have been found.[22] None of these cases, however, rely on legislative history to support an interpretation of the treaty that is contrary to, or differs from, the meaning of the treaty as determined by reference to the negotiating history. Nor has research, following Professor Vagts's suggestions, disclosed a case in which a court relied on legislative history of a treaty to impose obligations domestically that were

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20 *See supra* note 9 and accompanying text.

21 *United States v. Stuart*, 489 U.S. 353, 373 (1989) (Scalia, J., concurring).

22 Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L L. 546 (1989).

not required by the treaty as interpreted internationally.[23]

Whatever one's views on the extent to which legislative history should be used in determining the meaning of a statute, legislative history should not be used to interpret a treaty so as to impose different obligations on the United States domestically and internationally. If Congress believes the United States should not engage in conduct permitted by a treaty, it should pass legislation prohibiting such conduct. Conversely, if the United States decides not to abide by its international obligations, that decision should be made consciously and deliberately, by the President, or by Congress through legislation, not by reference to legislative history.

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23 While Justice Scalia's statement quoted by Professor Vagts was not so limited, that clearly was the issue in the ABM controversy (i.e., whether the legislative or negotiating history was controlling), and the issue to which both Justice Scalia's statement in his concurring opinion and Justice Brennan's statements in a footnote to the majority opinion in *Stuart*, were clearly addressed. Thus, Justice Brennan, disagreeing with Justice Scalia said:

> A treaty's negotiating history, which JUSTICE SCALIA suggests would be a better interpretive guide than preratification Senate 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.

Stuart, 489 U.S. at 368 n.7.