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A Treaty Is a Treaty Is a Treaty

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I. INTRODUCTION

The controversy concerning the interpretation of the Treaty on the Limitation of Anti-Ballistic Missile Systems ("ABM Treaty")[1] and the "condition" attached by the Senate to the resolution giving its advice and consent to the ratification of the Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles ("INF Treaty")[2] gave rise to a number of questions concerning treaty inter-

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This Article is based in part on a paper that was delivered at a symposium on Separation of Powers and the Debate About Treaty Interpretation Under the Constitution, sponsored by the American Bar Association Standing Committee on Law and National Security and the Center for Law and National Security, University of Virginia School of Law. The author wishes to thank Toms Ryan de Heredia, Cardozo '91, Anat Schapiro, Cardozo '91, and Esther Gueft, Cardozo '93, for their assistance in the preparation of this Article.

1. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 [hereinafter ABM Treaty].

2. Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, December 8, 1987, U.S.-U.S.S.R., 27 I.L.M. 90 (1990) [hereinafter INF Treaty]. See also Soviet Union-United States Summit in Washington, D.C.: Treaty on the Elimination of Intermediate and Shorter-Range Missiles, 23 Weekly Comp. Pres. Doc. 1459 (1987). In the resolution giving its advice and consent to the ratification of the INF Treaty, the Senate stated that its

> advice and consent to ratification of the INF Treaty is subject to the following condition, which shall be binding on the Executive: . . . .
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> (a) the United States shall interpret this Treaty in accordance with the understanding of the Treaty shared by the Executive and Senate at the time of Senate consent to ratification;
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> (b) such common understanding is:
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> (i) based on the text of the Treaty; and
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> (ii) reflected in the authoritative representations provided by the Executive

pretation.[3] In discussing these questions, several commentators took the position that a treaty may have different — and inconsistent — meanings domestically and internationally, and that the United States may be bound domestically, even though it is not bound internationally.[4] This is so, they argued, because whereas internationally a treaty is interpreted by reference to the negotiating history, domestically it must be interpreted as understood by the Senate at the time it gave its

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branch to the Senate and its Committees in seeking Senate consent to ratification, insofar as such representations are directed to the meaning and legal effect of the text of the Treaty;

(c) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute.

This understanding shall not be incorporated in the instruments of ratification of this Treaty or otherwise officially conveyed to the other contracting Party.

The INF Treaty: Report of the Committee on Foreign Relations, United States Senate, S. Exec. Rep. No. 15, 100th Cong., 2d Sess. 436 (1988) [hereinafter INF Treaty Report]. This "condition" was drafted in consultation with Professor Louis Henkin. Id. at 96. Elsewhere, Professor Henkin has written, "In my view the constitutional principle declared by the Senate is sound and its implications for treaty interpretation unexceptional. But its title as a condition is dubious." Louis Henkin, Treaties in a Constitutional Democracy, 10 Mich. J. Int'l L. 406, 417 (1989) [hereinafter Henkin I].

3. The matter has engendered a great deal of interest and discussion: in government, see, e.g., The ABM Treaty and the Constitution: Joint Hearings Before the Committee on Foreign Relations and the Committee on the Judiciary, 100th Cong., 1st Sess. (1987) [hereinafter ABM Hearings]; INF Treaty Report, supra note 2; among legal scholars, see, e.g., Symposium: Arms Control Treaty Reinterpretation, 137 U. Pa. L. Rev. 1353-1557 (1989) (it includes a long paper by David Koplow, and comments by Senators Joseph R. Biden, Jr. and Sam Nunn, Professors Eugene Rostow and Phillip Trimble, and Judge Abraham Sofaer, the Legal Adviser for the State Department); by practicing lawyers, see, e.g., Report of the Committee on International Arms Control and Security Affairs of the Association of the Bar of the City of New York, The Anti-Ballistic Missile Treaty Interpretation Dispute, 43 Rec. of the Ass'n of the Bar of the City of N.Y. 300 (1988); and in the media, see, e.g., Bruce van Voorst, George Schultz's Feisty Lawyer: Abraham Sofaer Draws Fire as State Department Legal Advisor, Time, Apr. 6, 1987, at 31; Michael R. Gordon, White House Criticizes Democrats for Threatening Arms Pact Delay, N.Y. Times, Feb. 7, 1988, § 1, at 1; Tom Wicker, A Slap for Reagan: the Treaty Reservation is Well Deserved, N.Y. Times, Mar. 25, 1988, at A39; State Dept.'s Legal Adviser Agrees to Testify at Hearing, N.Y. Times, Mar. 21, 1987, § 1, at 28; How to Kill the INF Treaty, Wash. Post, Feb. 9, 1988, at A22; Ernest F. Hollings, Fighting Over the ABM Treaty: Sam Nunn's interpretation is wrong, Wash. Post, Sept. 29, 1987, at A19; Sen. Nunn and the ABM Treaty, Wash. Post, Mar. 15, 1987, at C6.

The questions that have been discussed include: the interpretation to be given to the ABM Treaty; the effect to be given to the negotiating history in interpreting a treaty; the effect to be given to the legislative history in interpreting a treaty; the weight to be given to statements by various executive branch officials in evaluating the legislative history; whether a treaty can have different meanings domestically and internationally; whether the "condition" in the INF Treaty is a correct statement of the Senate's and the President's constitutional roles in the treaty process; what, if any, impact its inclusion as a "condition" has; whether it is, indeed, a "condition;" and, more broadly, the respective roles of the President and of the Senate in the treaty-making process.

4. See infra notes 44-45.

advice and consent to ratification. Even the State Department apparently accepted the dual treaty approach,[5] differing with its critics only on the criteria to be applied in determining whether the United States is bound domestically.

While questions concerning the ABM Treaty and the INF Treaty no longer have the pressing immediacy they had at the time they arose, the question whether a treaty can have different meanings domestically and internationally has continuing importance far beyond the proper interpretation of the treaties that gave rise to it. This Article takes the position that a treaty cannot have different meanings domestically and internationally. A treaty is law domestically only because and to the extent that it is law internationally; it has no domestic legal effect apart from that. The treaty process is not an alternate route for domestic legislation in the absence of an inter-

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5. In a statement to the Senate Foreign Relations and Judiciary Committees, Abraham Sofaer, the Legal Adviser for the Department of State, said:

> The Senate, of course, is entitled to full and fair presentations by Executive officials on the meaning of every aspect of treaties under Senate consideration. The Senate's interest in full and fair presentations, however, is to inform itself of the treaty that was actually made. When it gives its advice and consent to a treaty, *it is to the treaty that was made, irrespective of the explanation it is provided.*

ABM Hearings, supra note 3, at 374-75 (emphasis added).

In a letter to Time magazine, Sofaer stated, however, that his testimony "was addressed to the effect of the Senate's ratification record on *international obligations* toward the other party to a treaty, not the obligations of the President toward the Senate under the U.S. Constitutional structure." Time, April 27, 1987, at 10 (emphasis in original). Further, in an article published in the Pennsylvania Law Review, based on an address to the American Law Institute, he stated:

> The key question in the treaty interpretation "debate" is: what standards are correct for judging whether *the President is bound* to an interpretation of a treaty *under domestic law* because of the manner in which the treaty was presented to the Senate?

Abraham Sofaer, Treaty Interpretation: A Comment, 137 U. Pa. L. Rev. 1437, 1437 (1989) (emphasis added). He added:

> The Administration has also recognized, however, from the outset of this debate, that the Senate may adopt particular understandings of a treaty that are not formally communicated to the treaty partner. When the Senate acts in this manner, while it cannot change the meaning of the treaty under international law, *its understandings may be effective in binding the President under domestic law.*

Id. at 1440 (emphasis added).

The legal offices of the Department of State, the Department of Defense, the Office of Legal Counsel, the Department of Justice, the Arms Control and Disarmament Agency, and the National Security Council apparently all agreed that:

> The President is obligated to abide by a treaty interpretation clearly intended, generally understood and relied upon by the Senate, based on authoritative Executive Branch representations during its advice and consent to ratification.

INF Treaty Report, supra note 2, at 445 (letter to Sen. Richard G. Lugar from Arthur B. Culvahouse, Jr., White House Counsel, Mar. 17, 1988). See also id. at 442 (letter to Sen. Nunn from George P. Schultz, Secretary of State, Feb. 9, 1988); id. at 446 (letter to Sen. Lugar from Arthur B. Culvahouse, Jr., Mar. 22, 1988).

national obligation.[6] The dual treaty approach is invalid as a constitutional matter and unsound as a policy matter.

This position is admittedly contrary to the views of some of the "greats" of constitutional and international law, including Professor Henkin, the Chief Reporter for the Third Restatement of U.S. Foreign Relations Law.[7] However, as Henkin acknowledged when he first argued that "Article VI [of the U.S. Constitution] establishes that the treaty power includes an important power to *legislate domestically*,"[8] and that the "reservation" in the Niagara Waters Treaty[9] was valid as *domestic legislation* even if it was not "part" of the treaty,[10] that position was contrary to the position of the "greats" of an earlier generation: Professors Philip Jessup and Oliver Lissitzyn.[11]

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6. The treaty power can be an alternate route for domestic legislation to the extent that it creates an international obligation. In Missouri v. Holland, 252 U.S. 416 (1920), the Supreme Court held that the United States could enter into treaties on matters that were not within the enumerated powers of Congress and that Congress could enact legislation to implement the treaty even if in the absence of the treaty the matter was not subject to federal legislation.

Following the decision in Missouri v. Holland, there was great concern that the treaty process would be used to circumvent the constitutional limitations on federal power. It was feared that if the federal government wanted to regulate a matter that was not within the enumerated powers of Congress, it would get a foreign state to enter into a treaty with the United States on that matter, and thereby bring it within the scope of federal regulation. To avoid that possibility, a constitutional amendment was proposed. It provided, in part, "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." S.J. Res. 1, 83rd Cong., 1st Sess., 99 Cong. Rec. 6777 (1953). The "Bricker" amendment, as it was known, did not pass and proved to be unnecessary. The government has not used the treaty power as a pretext for getting federal legislation on matters that could otherwise be regulated only by the states. Louis Henkin, Foreign Affairs and the Constitution 390 n.57 (1972) [hereinafter Henkin II]; 1 Restatement (Third) of the Foreign Relations Law of the United States § 302 reporter's note 3 (1987) [hereinafter 1 Restatement (Third)].

The dual treaty approach now being suggested goes far beyond Missouri v. Holland. Under the dual treaty approach, the Senate could create law domestically, by making it a condition for its advice and consent, or by its interpretation of the treaty, explicit or implicit, even if that condition or interpretation is not agreed to, or even conveyed to, the other party to the treaty. See infra notes 44-45.

7. 1 Restatement (Third), supra note 6, at v.

8. Louis Henkin, The Treaty Makers and the Law Makers: The Niagara Reservation, 56 Colum. L. Rev. 1151, 1169 (1956) (emphasis added) [hereinafter Henkin III].

9. Treaty Relating to Uses of Waters of the Niagara River, Feb. 27, 1950, U.S.-Canada, 1 U.S.T. 694 [hereinafter Niagara Waters Treaty].

10. See Henkin III, supra note 8, at 1169.

11. Id. at 1151. See Philip C. Jessup and Oliver J. Lissitzyn, Opinion of Philip C. Jessup and Oliver J. Lissitzyn with Respect to the U.S. Senate's Attempt to Repeal the Federal Power Act in its Relation to the Niagara Through the Use of the Treaty-making Power, Power Authority of the State of New York (Dec. 1985). In a letter to Robert Moses, Chairman of the Power Authority, Jessup and Lissitzyn stated:

> It is our opinion that the so-called Senate "reservation" was a mere colorable use of the treaty-making power; was not a treaty reservation within the legal meaning of

II. CONSTITUTIONAL CONSIDERATIONS

When the Framers provided that the President shall make treaties with the advice and consent of the Senate in Article II[12] and that treaties shall be the supreme law of the land in Article VI,[13] they were using the term treaty as it was then understood, and is still understood—a binding agreement between two or more states.[14] The only binding agreement is the treaty as interpreted internationally. The proponents of the dual treaty approach do not disagree with that. The Restatement of U.S. Foreign Relations Law provides:

> A rule of international law or a provision of an international agreement derives its status as law in the United States from its character as an international legal obligation of the United States. A rule of international law or an international agreement has no status as law of the United States if the United States is not in fact bound by it . . . .[15]

The last phrase clearly means bound by it under international law. Yet dual treaty proponents argue that the Senate's power to give — or withhold—its advice and consent to a treaty includes a power to legislate domestically and that the treaty as understood by the Senate at the time of ratification constitutes such domestic legislation, and is, therefore, binding domestically, regardless of how the treaty is interpreted internationally.

The theory that the advice and consent power of Article II gives the Senate power to legislate domestically was first suggested by Professor Henkin[16] in an article involving the Niagara Waters Treaty between the United States and Canada.[17] In giving its advice and consent to that treaty, the Senate included a "reservation" that:

> The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the pub-

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that term; is not in legal contemplation a part of the Treaty with Canada; and is invalid as an attempt to amend or repeal in part the Federal Power Act. Id.

12. U.S. Const. art. II, § 2.

13. U.S. Const. art. VI.

14. In discussing the Treaty clause, Hamilton stated:

> Its objects are *CONTRACTS with foreign nations*, which have the force of law, ... They are not rules provided by the sovereign to the subject, but *agreements between sovereign and sovereign.*

The Federalist No. 75, at 81 (Alexander Hamilton) (E.G. Bourne ed., 1937) (capitalization in original; other emphasis added).

15. 1 Restatement (Third), supra note 6, § 111 cmt. b.

16. See Henkin III, supra note 8, at 1151.

17. See Niagara Waters Treaty, supra note 9.

> lic use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress.[18]

When Congress failed to enact legislation, New York challenged the reservation, arguing that since Canada had no interest in how the United States developed its waters the reservation was invalid.[19] In an article supporting the validity of the reservation, Professor Henkin argued first that the reservation was properly part of the treaty.[20] He further argued:

> [A]rticle VI establishes that the treaty power includes an important power to *legislate domestically* within a limited area. This "legislative power" of the President and the Senate, I suggest, includes at least the power to "enact" provisions in or relating to a treaty like the provision in the Niagara reservation.[21]

Professor Henkin did not, however, cite any authority in support of this position.[22]

When the case came before the D.C. Circuit Court of Appeals in *Power Authority of New York v. Federal Power Commission*,[23] Judge Bazelon, writing for the majority, framed the question as follows: "Since the reservation did not have the concurrence of the House of Representatives, it is not 'Law of the Land' by way of legislation. The question is whether it became 'Law of the Land' as part of the treaty."[24] The majority held that it did not.[25] It reasoned that since Canada had no interest in how the United States allocated its share of the waters, the reservation had application to the United States only; it was not part of the treaty and was, therefore, not valid as domestic law.[26] The majority also rejected the contention that "since the reser-

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18. Id. at 699.

19. Henkin III, supra note 8, at 1159 n.17.

20. Id. at 1164-69 & 1176-81.

21. Id. at 1169 (emphasis added).

22. Even Henkin did not suggest that the Senate had the authority under its advice and consent power to enact legislation domestically that differed from U.S. obligations internationally on a matter that affected the other state.

23. 247 F.2d 538 (D.C. Cir. 1957), vacated and remanded with instructions to dismiss as moot, 355 U.S. 64 (1957).

24. Id. at 540 (citation omitted).

25. Id. at 542-43.

26. Id.

vation was a condition to the Senate's consent to the treaty, to deny effect to the condition vitiates the consent and thus invalidates the whole treaty."[27]

Judge Bastion wrote a strong dissent, arguing that the reservation was properly part of the treaty.[28] He took the position that treaties could deal with matters that were not of "international concern."[29]

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27. Id. at 543.

28. Id. at 544-53 (Bastion, J., dissenting).

29. Id. at 545 (Bastion, J., dissenting). While the Supreme Court never held a treaty invalid on the ground that it did not deal with a matter of international concern, it had been argued that the treaty power was so limited, based on dicta in cases sustaining a broad exercise of the treaty power. See, e.g., Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872) (treaty power applies to "all those objects which in the intercourse of nations, had usually been regarded as the proper subject of negotiation and treaty"); Asakura v. Seattle, 265 U.S. 332, 341 (1924) (treaty power applies to "all proper subjects of negotiation between our government and other nations"). See also 1 Restatement (Third), supra note 6, § 302 cmt. c. A statement made by Charles Evans Hughes that the treaty power "is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty making power," 23 Proc. Am. Soc'y Int'l L. 196 (1929), was often quoted in support of that position. Henkin II, supra note 6, at 152-53. The Second Restatement of U.S. Foreign Relations Law accepted that position. It provided that "[t]he United States has the power under the Constitution to make an international agreement if (a) the matter is of international concern." Restatement (Second) of the Foreign Relations Law of the United States § 117(1) (1965).

The Third Restatement of U.S. Foreign Relations Law explicitly rejects the "international concern" limitation. A comment states, "Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with matters of international concern." 1 Restatement (Third), supra note 6, § 302 cmt. c. It is a position with which I fully agree, as I have written elsewhere. See Malvina H. Guggenheim [also known as Halberstam] & Elizabeth F. Defeis, United States Participation in International Agreements Providing Rights for Women, 10 Loy. L.A. L. Rev. 1, 32-41 (1976).

Statements that treaties had to deal with matters of "international concern" were intended to assuage the fears of those who were concerned that the treaty power would be used as a "pretext" to circumvent the constitutional limitations on federal power and to provide a basis for federal legislation on matters in which other nations had no real interest. Henkin II, supra note 6, at 144. In fact, the opposite has occurred. Not only has the federal government not entered into treaties in order to enable it to subject to federal legislation matters which could not otherwise be regulated by the federal government, but one of the arguments that has been used by opponents of various human rights treaties, and that the ABA made during its many years of opposition to the Genocide Convention, was that the United States should not ratify the treaty in question—even in cases where the treaty had been ratified by over 100 countries—where the treaty would subject to federal regulation matters that are otherwise regulated by the states. See id. See also Malvina Halberstam & Elizabeth F. DeFeis, Women's Legal Rights: International Covenants, an Alternative to ERA? 51 (1987). Even recently, the ABA Section of International Law and Practice, though supporting ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (Dec. 18, 1979), reprinted in 19 I.L.M. 33 (1980), included in its resolution supporting ratification a recommendation for a reservation on matters subject to state regulation. It states:

> [W]ith respect to the provisions over whose subject matter states of the United States exercise jurisdiction, the Federal Government shall bring to the attention of the

Judge Bastion argued, however, that if such a limitation existed it was satisfied even if Canada was not interested in how the United States divided its share of the waters, since Canada had an interest in getting the treaty ratified without delay and the reservation was necessary to obtain speedy ratification.[30] Further, he said, "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."[31]

Yet even Judge Bastion did not go as far as to state that there are two treaties, one binding internationally and one binding domestically, or that the Senate can legislate domestically as a concomitant of its power to give advice and consent to treaties. Nor did he take the position that a Senate understanding, even if not conveyed to the other signatory, is binding domestically; the Senate reservation in the Niagara Waters Treaty was included in the ratification resolution and conveyed to Canada.[32]

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competent authorities of the states the need to take appropriate measures for the fulfillment of this Covenant.

A.B.A. Ann. Meeting Rep., Summary of Action of the House of Delegates 25 (1984).

30. *Power Authority of New York*, 247 F.2d at 551 (Bastion, J., dissenting).

31. Id. at 546 (Bastion, J., dissenting).

32. Discussing the case in a reporter's note, the Third Restatement first acknowledges that "[a] condition imposed by the Senate that does not seek to modify the treaty and is solely of domestic import, is not part of the treaty and hence does not partake of its character as 'supreme Law of the Land.'" 1 Restatement (Third), supra note 6, § 303 reporter's note 4 (citing § 111(1) & comment d). It continues:

> It was once assumed, therefore, that a Senate proviso that a treaty shall not take effect for the United States until Congress adopts implementing legislation could not have the force of law necessary to prevent the agreement from automatically taking effect as law in the United States.

Id. (citing *Power Authority of New York*, 247 F.2d 538). It concludes:

> The effectiveness of such a Senate proviso, however, does not depend on its becoming law of the land as part of the treaty. Such a proviso is an expression of the Senate's constitutional authority to grant or withhold consent to a treaty, which includes authority to grant consent subject to a condition. The authority to impose the condition implies that it must be given effect in the constitutional system.

Id. The only authority cited for the conclusion, however, is Professor Henkin's article on the Niagara Waters Treaty reservation advocating that position. See Henkin III, supra note 8.

Moreover, the position asserted in the reporter's note does not go as far as the dual treaty theory. While the reporter's note argues that the Senate's authority "to grant or withhold consent . . . includes authority to grant consent subject to a condition" and that "the condition must be given effect," the only condition to which this broad argument is applied is the proviso that a treaty "shall not take effect for the United States until Congress adopts implementing legislation." The phrase "shall not take effect for the United States" is somewhat ambiguous. If it means that the treaty shall not take effect for the U.S. internationally, then there is no treaty as far as the U.S. is concerned unless and until Congress enacts implementing legislation. If it means, as is more probable, that the treaty shall not become law domestically until Congress enacts implementing legislation, that is true whenever it is determined that a treaty

The position that the Senate can somehow use the treaty power to legislate domestically—to bind the United States under domestic law even if it is not bound by the treaty internationally—is also clearly inconsistent with the Supreme Court decision in *I.N.S. v. Chadha*.[33] In that case, the Supreme Court made it clear that the only constitutional process for creating domestic law was by a vote by the majority of both houses of Congress signed by the President, or by a two-thirds vote of both houses overriding a Presidential veto.[34] The *Chadha* Court held that Congress could not circumvent those requirements even to recapture power it had delegated to the executive, and even though it specifically so provided in the legislation delegating the power to the executive and made it a condition of such delegation.[35] Moreover, the Court so held notwithstanding that the legislative veto had been included in over 200 statutes and was a device that Congress had used for many years as a means of controlling the power it delegated to the executive.[36]

The proponents of the dual treaty approach have cited no case holding that a treaty has legal effect domestically even if it has no such effect internationally, or that a treaty as interpreted internationally is not law domestically because it was understood differently by

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was not intended to be self-executing. See 1 Restatement (Third), supra note 6, § 111 reporter's note 5; Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878). In effect, then, the Senate would be using the proviso that the treaty shall not come into effect until Congress enacted implementing legislation to indicate its intent that the treaty not be self-executing. This is very different from saying that the Senate can require as a condition for its consent that the treaty be given a meaning domestically that is different from its meaning internationally.

33. 462 U.S. 919 (1983).

34. Id. The Court noted that there are four provisions in the Constitution by which one House may act alone "with the force of law, not subject to the President's veto." Id. at 955. The four were listed as:

> (a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 5;
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> (b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 6;
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> (c) The Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments. Art. II, § 2, cl. 2;
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> (d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

Id. The Court's statement that the Senate was given "unreviewable power to ratify treaties" is incorrect. The Senate does not ratify treaties; the President does so with the advice and consent of the Senate. See U.S. Const. art. II, § 2, cl. 2. Furthermore, since the President may refuse to ratify a treaty even after the Senate has given its advice and consent to ratification, the Senate's decision to ratify is in fact subject to Presidential review.

35. *Chadha*, 462 U.S. at 945, 967.

36. See id.

the Senate at the time it gave its advice and consent to ratification.[37] Nor have they cited a single statement in the constitutional debates showing that that was the intent of the Framers—that when the Framers provided in Article VI that treaties shall be the supreme law of the land, they meant *treaties as understood by the Senate at the time of ratification*, not treaties as binding on the U.S. internationally.[38]

In *United States v. Stuart*,[39] Justice Brennan and Justice Scalia disagreed on the use of pre-ratification Senate materials in interpreting a treaty. Justice Scalia objected to the use of such materials. He said:

> *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

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37. The district court decision in Rainbow Navigation, Inc. v. Department of Navy, 699 F. Supp. 339 (D.D.C. 1988), decided after the ABM Hearings, in the context of which much of the discussion on this issue occurred, has been cited for the proposition that statements by the executive to the Senate as to the meaning of a treaty become binding domestically. The decision was reversed by the court of appeals, 911 F.2d 797 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 1106 (1991). See also United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) ("[g]iven that the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties' . . . and special reason to avoid the particular materials that the Court unnecessarily consults").

38. On the contrary, it is clear that the Supremacy Clause was intended to make the international obligation binding domestically. Arguing against those who "are averse to [treaties] being the SUPREME laws of the land," John Jay stated:

> These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.

The Federalist No. 64, at 14-15 (John Jay) (E. G. Bourne ed., 1937) (capitalization in original).

39. 489 U.S. 353 (1989) (holding that neither the 1942 U.S.-Canada Convention Respecting Double Taxation nor domestic legislation imposes a precondition that before the U.S. Internal Revenue Service ("IRS") may issue an administrative summons pursuant to the Canadian authorities' request, the IRS must determine that the Canadian tax investigation has not reached a stage analagous to a domestic tax investigation's referral to the Justice Department for criminal prosecution).

> 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.
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> The American Law Institute's Restatement of the Foreign Relations Law of the United States would permit the courts to refer to materials of the sort at issue here. See Restatement (Third) of the Foreign Relations Law of the United States § 314, Comment d (1986); id., § 325, Reporter's Note 5. But despite the title of the work, this must be regarded as a proposal for change rather than a restatement of existing doctrine, since the commentary refers to not a single case, of this or any other United States court, that has employed the practice.[40]

Justice Brennan, writing for the majority, disagreed. He noted in a footnote in that case:

> 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.[41]

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40. Id. at 374-75 (Scalia, J., concurring in the judgment) (emphasis added).
41. Id. at 368 n.7.

However, not even Justice Brennan took the position that the treaty should be interpreted differently domestically than it is interpreted internationally, or that "pre-ratification Senate materials" constitute domestic legislation even if the treaty is interpreted differently internationally.[42]

In sum, the dual treaty approach has no support in the language of the Constitution, the Constitutional debates, or judicial decisions and is contrary to the rationale of *Chadha*.

III. POLICY CONSIDERATIONS

The dual treaty approach is also unsound as a policy matter. Interpreting treaties differently domestically and internationally would have a number of consequences that would be detrimental to the United States in its foreign relations and/or domestically. First, if a treaty as understood by the Senate is more restrictive than the treaty as interpreted internationally, the United States would be giving up more than it would be getting. Second, if a treaty as understood by the Senate is more permissive than the treaty as interpreted internationally, the United States would be in breach of its international obligations. Third, if, as the proponents of the dual treaty approach argue, the President is bound[43] by the Senate's understanding "of the

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42. See id.

43. Both the Legal Adviser for the Department of State (see supra note 5) and his critics (see, e.g., Koplow, infra note 44) speak of the President's being "bound." This terminology is not entirely clear, however. Does it mean that the President who made (or whose subordinates made) the representation is bound but other Presidents are not? If so, this would appear to be an estoppel argument rather than an interpretation of the treaty. (The District Court decision in Rainbow Navigation, Inc. v. Department of Navy, 699 F. Supp. 339 (D.D.C. 1988), rev'd 911 F.2d 797 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 1106 (1991), holding the executive bound by its representation that U.S. carriers would be protected, even though the treaty with Iceland did not address the matter directly, could reasonably be explained on that basis.) Or, does it mean that the President is bound, whether it is the same President or a different President, but that courts are free to interpret the treaty, based on the language, the legislative history, the negotiating history, and/or any other considerations they deem appropriate? Or is the judiciary also bound to interpret the treaty as the Senate understood it at the time it gave its advice and consent? If later Presidents and the judiciary are bound, then the proposition is not that the President is "bound" by the Senate's understanding, but that the treaty must be interpreted in accordance with the Senate's understanding at the time it gave its consent. That appears to be the intent of paragraph (a) of the "condition" included in the INF Treaty, see supra note 2 ("the United States shall interpret this Treaty . . . ."). This would give the Senate's understanding at the time of ratification, even an unarticulated implicit understanding (see Koplow, infra note 44), greater weight than has been given to the provisions of statutes, treaties, or even the U.S. Constitution, all of which have been interpreted differently over time by the courts. Compare Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (Treaty with Spain held not self-executing) with United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (same treaty with Spain held self-executing); Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth

treaty, at the time of ratification, whether explicit or implicit,"[44] the President would have to review the whole pre-ratification record—testimony, correspondence, reports, statements made in the Senate—every time a question of treaty interpretation arose, to see whether he could decipher any Senate understanding—explicit or implicit—that would require him to take a particular position on the question. Fourth, if the President and the Senate interpret a treaty one way and the other state party to the treaty urged a different interpretation, the President would be required to oppose the latter interpretation even if that interpretation was in the interest of the United States.

The dual treaty approach also has some logical problems. The rationale of the dual treaty approach is that since the Senate can only give its advice and consent to a treaty as it understands it, and since the President can only ratify a treaty with the Senate's advice and consent, the treaty the President ratifies must be the treaty as understood by the Senate.[45] Logically, if the President lacked authority to enter into the treaty because the treaty to which the Senate gave its advice and consent is *not* the treaty the President purported to ratify, the ratification should be without effect internationally as well as

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Amendment held not to require states to exclude evidence illegally seized) with Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment held to require states to exclude evidence illegally seized). Another interesting paradox of the treaty interpretation controversy is that some of the same scholars who argue that the Constitution need not be interpreted as it was understood by the Framers, argue that a treaty must be interpreted as it was understood by the Senate at the time it gave its advice and consent to ratification.

44. David A. Koplow, Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties, 137 U. Pa. L. Rev. 1353, 1405 (1989) ("The Senate's view of the treaty, whether explicit or implicit, is an integral part of the Treaty . . . ."). See also id. at 1420 ("Often, the Senate registers its understandings relatively informally, with a comment in the Foreign Relations Committee hearings or markup, in the committee reports, or in floor debate, rather than in the resolution of ratification. Occasionally, it is even necessary to attempt to draw meaningful inferences from virtual silence.") (citations omitted); ABM Hearings, supra note 3, at 319 (statement of Louis Henkin) ("The principle that the President can only make a treaty as it is understood by the Senate would govern even if the Senate had given no indication of its understanding of the treaty."); Kevin C. 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) ("[T]he President is bound by what the consenting Senate's understanding of a particular treaty was at the time it gave its consent to ratification.").

45. See authorities cited supra note 44; Michael J. Glennon, Interpreting "Interpretation": The President, The Senate, and When Treaty Interpretation Becomes Treaty Making, 20 U.C. Davis L. Rev. 913 (1987). Professor Henkin states:

> The President can make a treaty only if the Senate has consented to it. Therefore, the President can make only the treaty to which the Senate consents. Generally, the Senate consents to what the text of the treaty provides, as reasonably interpreted. *But if there is any ambiguity, the treaty to which the Senate consents is, inevitably, the treaty as the Senate understands it.*

Henkin I, supra note 2, at 413 (emphasis added).

domestically. The United States would, however, be bound internationally since under the Vienna Convention on Treaties:

> 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.[46]

While the requirement that the Senate give its advice and consent would probably qualify as an "internal law of fundamental importance," an understanding of the Senate, certainly if implicit, and probably even if explicit, would not be "objectively evident to any state conducting itself . . . in accordance with normal practice," if the understanding was not conveyed to the other state party.

Further, if the Senate had no understanding on a matter—it never having occurred to anyone—then it could not have given its advice and consent to ratification insofar as that matter is concerned. Logically, then, the treaty should not apply to such a matter. Adoption of the position that the President can only ratify a treaty as it is understood by the Senate at the time of ratification would also bar modification by subsequent practice. Although some of the proponents of the dual treaty approach have stated that they accept modification by subsequent practice[47] and the Restatement specifically provides for modification by subsequent practice,[48] it is clear that the Senate has not given its advice and consent to such modification, since by hypothesis it was not part of the treaty as ratified.[49]

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46. Vienna Convention on the Law of Treaties, Art. 46, U.N. Doc. A/CONF. 39/27, reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. The United States is not a party to the Convention, but considers most of its provisions to be customary international law. See 2 Restatement (Third) of the Foreign Relations Law of the United States 149-51 (1987).

47. See, e.g., Koplow, supra note 44, at 1387.

48. See 1 Restatement (Third), supra note 6, § 325(2) ("subsequent practice of the parties can be taken into account in interpreting international agreements") and comment c.

49. Modification by subsequent practice would also appear to contravene the constitutional principles set forth in the "condition" to the resolution giving Senate advice and consent to ratification of the INF Treaty. See INF Treaty Report, supra note 2, para. (a). Clearly, when a treaty is modified by subsequent practice, the treaty as modified is not the understanding that was "shared by the Executive and Senate at the time of Senate consent to ratification." See id. For example, in the PLO Observer Mission case, it was argued, and the district court held,

Thus, while the advocates of the dual treaty approach would hold the United States bound domestically where the Senate had an understanding on the point, explicit or implicit, at the time of ratification, the rationale that the President could only ratify the treaty as understood by the Senate because that is the treaty to which the Senate gave its advice and consent goes much further. Such a rationale would bar domestic application of any provision *unless* the Senate had an understanding on the matter at the time of ratification.

There is another flaw in the argument that since the President cannot ratify a treaty without the Senate's advice and consent, the treaty he ratifies must be the treaty as the Senate understood it. It can be argued with equal logic that since the President ratifies treaties on behalf of the United States—and need not ratify a treaty even if the Senate has given its advice and consent—the treaty he ratified is the treaty as the President understood it.[50] Since the treaty cannot come into effect for the United States unless the Senate gives its advice and consent to ratification *and* unless the President decides to ratify, it is no more logical to argue that it means what the Senate understood it to mean when it gave its advice and consent than to argue that it means what the President understood it to mean when he ratified it. When the concurrence of two branches of government is necessary to bring a law into effect there is no logical basis for saying that the understanding of one or the other is controlling in case of an ambiguity.[51]

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that the United States was bound under the Headquarters Agreement to permit the PLO to have an Observer Mission. United States v. Palestine Liberation Organization, 690 F. Supp. 1243 (S.D.N.Y. 1988), withdrawn by publisher and reported at 695 F. Supp. 1456. The court reached the decision, despite the fact that the Headquarters Agreement made no reference to Observer Missions, and that no one had even contemplated Observer Missions when the Headquarters Agreement came into force, on the ground that the agreement had been modified by subsequent practice. 695 F. Supp. at 1465-66. Modification by subsequent practice also contravenes paragraph (c) of the condition, that the United States "shall not . . . adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute." See INF Treaty Report, supra note 2, para. (c).

Modification by subsequent practice raises serious constitutional questions quite apart from the dual treaty approach. It may impose obligations on the United States to which neither the Senate, nor the President, ever agreed. Were the United States to ratify the Vienna Convention, it should include a reservation to that provision of the Convention. See Vienna Convention, supra note 46, art. 31(3)(b). In the absence of ratification, it would probably be advisable for the United States to go on record as objecting to the doctrine of treaty modification by subsequent practice, lest that become a rule of customary international law binding on the United States. The United States should also include a proviso in treaties ratified hereafter that they are not subject to modification by subsequent practice.

50. See Henkin II, supra note 6, at 133.

51. Obviously the treaty to which the Senate consents is the treaty as the Senate understood

The dual treaty approach would also impose contradictory obligations on the President. On the one hand, the President is required to give effect to U.S. obligations under international law, which, of course, includes treaty obligations. On the other hand, the President would be bound by the treaty as understood by the Senate, even if application of the treaty so interpreted were to breach U.S. obligations under the treaty. Of course, such contradictory obligations may also arise under a unitary treaty approach when Congress enacts superseding legislation or a court holds a treaty to be unconstitutional. But superseding legislation or a judicial decision that a treaty is invalid is based on deliberations by Congress or a court. Under a dual treaty approach, the President would be required to breach international law automatically, without deliberations by anyone to determine that application of the treaty 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 U.S. jurisprudence.

The dual treaty approach would undermine the very purpose of the Supremacy Clause, which was to make the obligations that the United States undertakes internationally binding domestically.[52] It would also 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 it would be too burdensome for the Senate to keep informed of the negotiating history of the treaty—which may be considered in interpreting the treaty under international law—and that an understanding on every point the Senate considers important would make the treaty unmanageable.[53] 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 to ensure that the United States does not

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it (assuming there is such a thing as Senate understanding as opposed to the understanding of the members of the Senate Committee or of one or more members of the Committee staff who drafted the report, see, e.g., Hirschey v. F.E.R.C., 777 F.2d 1, 7-8 & 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring)). But it does not follow that, therefore, the Senate's understanding should inevitably be controlling for the United States in case of ambiguity when both the consent of the Senate and of the President are necessary to bring the treaty into effect. Neither Henkin nor the other advocates of this approach offer any reason or authority for the proposition that in case of ambiguity the Senate's, rather than the President's, understanding should be controlling.

52. See supra notes 12-14 & 38 and accompanying text.

53. See, e.g., ABM Hearings, supra note 3, at 827-28 (statement of Michael Glennon) (quoting Senator Sam Nunn); id. at 191 (statement of Hon. Antonia Chayes).

bind itself *internationally* to that which the Senate considers objectionable. The justification for the dual treaty approach is that it relieves the Senate of that responsibility.[54] Thus, under the dual treaty approach, the Senate would abdicate the very function that the advice and consent requirement was designed to serve.

IV. CONCLUSION

This Article takes no position on the interpretation to be given the ABM treaty, on the weight to be given in interpreting a treaty to statements by various executive officers, by members of the Senate or their staff in the ratification process, or by representatives of the United States or other states in the negotiating process, or to their failure to make statements, or on whether and under what, if any, circumstances a treaty may be reinterpreted by the executive. The point of the Article is that whatever interpretation is correct, it must as a matter of constitutional law, and should as a matter of policy, be the same domestically and internationally.

The proposed dual treaty rule, to reiterate, is: that there are two treaties, one as domestically interpreted by reference to U.S. legislative history, and one as interpreted under international law by reference to the negotiating history; that under Article VI it is the treaty as domestically interpreted, or even more narrowly, as the Senate understood it,[55] that is the supreme law of the land; and that the President is required to implement the treaty as so understood, regardless of whether that would impose greater obligations than necessary under international law or require the United States to breach its obligations internationally. Such a rule is not, has never been, and should not be, the law. The rule is and should continue to be that there is only one treaty. If the United States is bound internationally it is bound domestically unless the treaty is unconstitutional or Congress enacts superseding legislation. If the United States is not bound internationally, it is not bound domestically, at least by the exercise of the treaty power.

Congress has numerous means for implementing its views domesti-

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54. See Glennon, supra note 45, at 919.

55. The proponents of the dual treaty approach have not addressed the question whether a U.S. court interpreting the treaty would be required to interpret it as the Senate understood it or would be permitted to give it the interpretation it thought correct, based on the language of the treaty, the negotiating history, and the legislative history, as it deemed appropriate. If the treaty as the Senate understood it is the supreme law of the land under Article VI, then a court should be bound by that interpretation as well. The proponents of this approach, however, generally speak of the "President" being "bound." See supra note 43.

cally, from the budget process (used with respect to the ABM treaty),[56] to the ability to enact superseding legislation, to the power to impeach the President if it believes his conduct was so egregious as to warrant it. The Senate can ensure that its understanding will prevail domestically and internationally by a reservation or understanding in the ratification resolution. The Report of the Senate Foreign Relations Committee on the INF Treaty states that it rejects the implication "that treaties tend to be replete with ambiguity or that the executive cannot be trusted to present an accurate account of the obligations to be assumed by the United States."[57] It is not necessary to adopt a new interpretation of the treaty clause, along with the problems that such an approach would create for the United States internationally, for the rare instance in which it is perceived that the executive cannot be trusted.

Differences about the correct interpretation of a particular treaty, even strong differences about the interpretation of an important treaty, and lack of confidence in the good faith of a particular executive, should not give rise to a new and undesirable interpretation of the treaty provisions of the Constitution. It is ironic that those who are usually the most vehement supporters of U.S. adherence to international law advocate the adoption of a rule that would give treaties a different interpretation under domestic law than under international law and that would cast doubt on and weaken U.S. adherence to its treaty obligations internationally.

56. See INF Treaty Report, supra note 2, at 89.
57. Id. at 101.