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The 'treaty power' and parliamentary democracy

Comparative perspectives

Introduction

Foreign affairs are historically *non*-parliamentary affairs. The right to wage war and to make peace were traditionally seen as part of the royal prerogative. And since the treaty power was perceived as an appendage to the right of war,[1] it was 'naturally' considered to belong to the executive branch. For Blackstone, it was 'the king's prerogative to make treaties, leagues, and alliances with foreign states and princes . . . Whatever contracts therefore he engages in, *no other power* in the kingdom can legally delay, resist, or annul'.[2] The sole check on executive abuses was 'parliamentary impeachment' of those ministers that had (mis)advised to conclude a treaty.[3] This view was widely shared in eighteenth-century philosophical circles.[4] Even the messiah of popular sovereignty did admit that '[t]he external exercise of power does not befit the People; the great maxims of State are not within its grasp'.[5]

[1] See P. Haggenmacher, 'Some Hints on the European Origins of Legislative Participation in the Treaty-Making Function' (1991) 67 *Chicago-Kent Law Review* 313.

[2] See W. Blackstone, *The Commentaries On the Laws of England*, ed. T. M. Cooley (Chicago, IL: Callaghan, 1899), 223–4 (emphasis added).

[3] *Ibid.*

[4] See G. F. W. Hegel, *Outlines of the Philosophy of Right*, trans. T. M. Know (Oxford University Press, 2008), § 329: 'The state's orientation towards the outside stems from the fact that it is an individual subject. Its relation to other states therefore falls to the *power of the crown*. Hence it directly devolves on the monarch, and him alone, to command the armed forces, to conduct foreign affairs through ambassadors etc., to make war and peace, and to conclude treaties of all kinds.'

[5] C. J.-J. Rousseau, *Lettres écrites de la Montagne* (Lausanne: L'Age d' Homme, 2007), 252: 'L'exercice extérieur de la puissance ne convient point au peuple; les grandes maximes d'État ne sont pas à sa portée; il doit s'en rapporter là-dessus à ses chefs qui, toujours plus éclairés que lui sur ce point, n'ont guère intérêt à faire au-dehors des traités désavantageux à la patrie; l'ordre veut qu'il leur laisse tout l'éclat extérieur et qu'il s'attache uniquement an solide.' However, it is important to bear in mind that for Rousseau democracy in this context meant direct democracy – not parliamentary democracy.

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This reasoning seems much less persuasive today than several hundred years ago. The internationalisation of trade and commerce in the eighteenth century would indeed add a new foreign affairs 'occupation': regulatory international agreements.[6] The amount of tariffs for goods needed to be regulated,[7] river navigation had to be coordinated[8] and intellectual property rights required to be protected.[9] And with the rise of the international *commercial* treaty, the idea of the treaty-making power as an exclusive part of the executive branch became doubtful. These doubts had led Alexander Hamilton – a 'founding father' of the American republic – to place the treaty power in between the rival claims of the executive and legislative departments.[10]

But while Hamilton's recommendation of a 'fourth power' was not taken up by modern constitutionalism, his concern for the 'particular nature of the power of making treaties' has remained a pressing constitutional question ever since. Indeed, the transformation of the international treaty into a 'regulatory' instrument did not pass unnoticed. National parliaments gradually realised that their hard-won *internal* prerogatives to co-decision could be undermined by the monarch's power over *external* affairs. Benjamin Constant – the great constitutional thinker of the French restoration – thus urged as follows:

> In light of the royal prerogative in treaty making, if the royal power could bind a people to clauses that affected its internal affairs, no constitution could subsist. For a superstitious king could conclude a treaty with one neighbour to suppress religious freedom; while a king opposed to the freedom of the press would negotiate with another in order to impose oppressive restrictions on writers. In this way, all constitutional rules could be amended without discussion and with a stroke of a pen. Despotism and persecution, disguised as peace treaties, would return from

[6] On this development, see L. Henkin, 'The Treaty-makers and the Law Makers: The Law of the Land and Foreign Relations' [1959] 107 *University of Pennsylvania Law Review* 903, 908 *et seq.*

[7] See 1860 Anglo-French Trade Agreement (Cobden–Chevalier Treaty).

[8] See 1868 Rhine Navigation Convention.

[9] See 1883 Paris Convention for the Protection of Industrial Property.

[10] See A. Hamilton, *The Federalist* No. 75 in A. Hamilton, J. Madison and J. Jay, *The Federalist*, ed. T. Ball (Cambridge University Press, 2007), 365: 'The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensible in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.'

abroad; and the king's ambassadors would be the real legislature of such a people.[11]

In the light of this anti-democratic danger, national parliaments were – unsurprisingly – eager to extend their rights of co-decision from the internal to the external sphere.[12] Nineteenth-century constitutionalism consequently witnessed the first attempts to (partially) parliamentarise the treaty power. The 1831 Belgian Constitution – a model for many constitutional monarchies in its time – thus required the king to obtain the assent of the Belgian Parliament for certain classes of treaties that touched upon the interests of his subjects.[13] And the idea of coordinating the treaty power with the legislative power also informed the 1871 German Imperial Constitution.[14] According to the latter, all international treaties 'relating to *objects falling into the scope of the legislative competences* of the Empire would require for their validity the assent of both houses of Parliament'. The demand to democratise the treaty power continued in the twentieth century.[15] The question however was henceforth 'no longer whether or not to involve the people or their representatives in the conduct of foreign affairs, but rather if there are any absolute limits – in the interest of the State – to this democratic evolution'.[16]

[11] B. Constant, *Cours de Politique Constitutionnelle* (Brussels: Hauman, Cattoir et Comp, 1837), 78 (translation – RS).

[12] The French Revolutionary Constitution of 1791 provided in its Art. 3: 'Il appartient au corps législatif de ratifier les traités de paix, d'alliance et de commerce; et aucun traité n'aura d'effet que par cette ratification.'

[13] The 1831 Belgian Constitution provided in Art. 68 as follows: 'Les traités de commerce et ceux, qui pourraient grever l'Etat ou lier individuellement des Belges, n'ont d'effet qu'après avoir reçu l'assentiment des Chambres. Nulle cession, nul échange, nulle adjonction de territoire ne peut avoir lieu qu'en vertu d'une loi.'

[14] The 1871 German Imperial Constitution provided in its Art. 11(3) as follows: 'Insoweit die Verträge mit fremden Staaten sich auf solche Gegenstände beziehen, welche nach Artikel 4 in den Bereich der Reichsgesetzgebung gehören, ist zu ihrem Abschluß die Zustimmung des Bundesrates und zu ihrer Gültigkeit die Genehmigung des Reichstages erforderlich.'

[15] For the German discussion, see E. Menzel, 'Die auswärtige Gewalt der Bundesrepublik' (1953) 12 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* 179, 183: 'Die bisherigen Regelungen scheinen für den modernen Staat angesichts der Intensivierung der zwischenstaatlichen Beziehungen . . . nicht mehr ausreichend zu sein'; and R. Wolfrum, 'Kontrolle der auswärtigen Gewalt' (1996) 56 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* 38, 43: 'Das gesteigterte Hineinwirken von Völker- und Europarecht in den nationeln Rechtsraum verlangt eine Weiterentwicklung der parlamentarischen Mitwirkung an der Ausübung der auswärtigen Gewalt. Vor allem verlangt es deren Vorverlargerung.'

[16] P. de Visscher, *De la conclusion des traités internationaux* (Brussels: Bruylant, 1943), 14–15 (translation – RS).

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What are these constitutional limits; and what are their underlying reasons? And, in particular, how democratic is the treaty power in the United States and the European Union? Answers to these questions depend on the type of standard(s) we use. This chapter will use *two* comparative standards – one internal, the other external.[17] The internal standard tells us how 'democratic' the treaty power is in comparison with the legislative procedures within a particular legal order. By contrast, the external standard will evaluate how 'democratic' the American treaty power is in comparison with the European treaty power (and vice versa). Section 1 therefore starts with an analysis of the American constitutional order and its solutions to international treaty-making. The express US treaty power does *not* traditionally involve the American 'parliament' – the House of Representatives; yet in order to counterbalance this democratic deficit, American constitutionalism has developed alternative treaty procedures in the past. Section 2 moves to the European treaty power. What is the role and power of the European Parliament here when compared to the Union's legislative procedures; and are there also alternative treaty-making procedures in the Union legal order? The final section compares the democratic credentials of the American and European treaty power, and thereby draws a variety of conclusions.

1 The 'treaty power' in the United States

Nowhere is the text of the American Constitution more laconic and obscure than in the context of foreign affairs.[18] This textual 'minimalism' is particularly strong for the treaty power. The sole provision on the conclusion of international treaties of the Union is to be found in Article II.[19] Dealing with the powers of the President, it states: 'He shall have Power, by and with the Advice and Consent of the Senate, *to make Treaties, provided two thirds of the Senators present concur.*'[20] This seemed to vest exclusive power to conclude international treaties in the President-cum-Senate.

[17] Both standards are relative standards and, as such, need to be complemented by an absolute standard. For the modern democratic principle, this absolute standard is that governmental decisions should be taken by the people as represented in parliament.

[18] M. Ramsey, *The Constitution's Text in Foreign Affairs* (Harvard University Press, 2007), Introduction.

[19] There are – admittedly – provisions dealing with the conclusion of international agreements by the states (see nn. 48 *et seq.* below).

[20] Art. II, s. 2 (cl. 2) (emphasis added).

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In the light of the 'monist' stance of the US Constitution vis-à-vis international treaties,[21] the exclusion of the American 'parliament' – the House of Representatives – was surprising and unique.[22] For whereas in other countries a treaty would only be a 'contract' and not a 'legislative act', the American Constitution 'declare[d] a treaty to be the law of the land'. 'It is consequently, to be regarded in courts of justice as *equivalent to an act of the legislature*, whenever it operates of itself without the aid of any legislative provisions[.]'[23] But if 'the Framers understood that the treaty-process would be anti-democratic',[24] what were their reasons for this solution? Section 1(a) will explore this question, before we investigate the arrangements of the 'New Internationalism' that followed the 'New Deal' in section 1(b).[25] This new internationalism generated a new instrument: the congressional-executive agreement. Yet as section 1(c) below will show, the rise of (sole) executive agreements has partly overshadowed this democratic development.

(a) Article II treaties with the 'advice and consent' of the Senate

When the US Constitution was drafted, the treaty power was one of the few provisions *not* subject to prolonged philosophical scrutiny. The framers had originally allocated it to the Senate *alone*, but the Constitutional

[21] Where a constitution chooses a monist philosophy towards international law, international law will be automatically part of national law. The US Constitution has chosen such a monistic path through its Art. VI, s. 2 (emphasis added): 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all treaties made, or which shall be made*, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby[.]'

By contrast, the dualist theory insists that international law and domestic law are two completely separate legal orders. Dualist theory thereby reconciled the rival claims of national parliaments and the royal executive by splitting the concept of sovereignty into an internal and an external sphere. The refusal to acknowledge the *direct* parliamentary participation in the conclusion of international agreements 'saved' the appearance of the monarch as the sole external representative of the nation. The royal sovereign could continue to be seen as vested with undivided external sovereignty.

[22] S. Riesenfeld and F. M. Abbott, 'The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties' in *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Dordrecht: Kluwer, 1994), 261, 265.

[23] *Foster* v. *Neilson* (1829) 27 US 253, 314 (emphasis added).

[24] J. C. Yoo, 'Laws as Treaties? The Constitutionality of Congressional-Executive Agreements' (2001) 99 *Mich L Rev* 757, 777.

[25] For an analysis of the changing American approaches to international affairs and international law, see G. C. Herring, *From Colony to Superpower: U.S. Foreign Relations since 1776* (Oxford University Press, 2011).

Convention subsequently added the President at the last minute.[26] This 'mixed' solution corresponded to the federal character of the American Union.[27] For it combined the 'international' Senate – representing the states – with a 'national' President.[28] Article II thereby tied the conclusion of international treaties to the advice and consent of a qualified majority of states: two-thirds of the senators would need to approve a treaty. This super-majority was a significant political safeguard of federalism.[29] It protected individual states from treaties that disadvantaged their regional interest, and deliberately made the conclusion of international treaties difficult.

How was an Article II treaty to be negotiated and concluded? The framers originally envisaged both the President and the Senate to be actively involved in the negotiation of treaties. For the Senate, this was the idea behind the phrase '*advice* and consent'.[30] Yet a first encounter

[26] For an extensive analysis of the drafting history, see A. Bestor, '"Advice" from the Very Beginning, "Consent" when the End Is Achieved' (1989) 83 *AJIL* 718; and C. Warren, *The Making of the Constitution* (New York: Barnes & Noble, 1937), 651–8.

[27] For an analysis of the mixed character of the United States, see *The Federalist* No. 39 (Madison) in A. Hamilton, J. Madison and J. Jay, *The Federalist*, ed. T. Ball (Cambridge University Press, 2007), 181.

[28] This is how *The Federalist* No. 75 (Hamilton, *ibid.*, 366) saw the advantages of presidential involvement: 'To have intrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. It is true that the Senate would, in that case, have the option of employing him in this capacity, but they would also have the option of letting it alone, and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representatives of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy. While the Union would, from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the cooperation of the Executive.'

[29] On the historical origins of the qualified majority requirement in the Senate, see R. Earl McClendon, 'Origin of the Two-thirds Rule in Senate Action upon Treaties' (1931) 36 *Am Hist Rev* 768; and C. Warren, 'The Mississippi River and the Treaty Clause of the Constitution' (1933–4) 2 *George Washington Law Review* 271.

[30] '[T]he use of the phrase "advice and consent" to describe the relationship between the two partners clearly indicated that the Framers' conception was of a council-like body in direct and continuous consultation with the Executive on matters of foreign policy. In brief, the phrase "by and with the advice and consent of the Senate" constituted a requirement that in performing the executive segment of the task of conducting foreign relations, the President is to seek the formal advice of the Senate – a deliberative body responsible to the electorate and not to him – concerning the policy to be pursued and the ends to be sought. In accord with everyday usage, "advice" was something to be given not only at the outset of an enterprise, but also at subsequent stages so long as the processes of planning,

with an *advising* Senate proved already too much for the presidency,[31] and American constitutionalism soon considered the power of external representation and negotiation to fall within the exclusive domain of the executive: '[T]he President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; *but he alone negotiates. Into the field of negotiation the Senate cannot intrude*[.]'[32] American constitutional practice thus reduced senatorial 'advice and consent' to mere 'consent'.[33] The President – or his appointed officers – will thus solely initiate, conduct and conclude the negotiation of an international treaty. And the presidential prerogative 'carries with it an absolute veto over international lawmaking'.[34] For the President might choose *not* to initiate, *not* to conduct or *not* to conclude the negotiations.

Where the President has negotiated a treaty, it must be referred to the Senate for consent.[35] The Senate has structured its power to review international treaties in Senate Rule 30.[36] The Senate Foreign Relations

proposing, negotiating, reviewing and renegotiating went on': Bestor, '"Advice" from the Very Beginning, "Consent" when the End is Achieved', n. 26 above, 726. This original view was based on the idea that there would be few international treaties, and that the Senate was a small chamber. For a detailed analysis of the meaning of the phrase 'advice and consent', see H. R. Sklamberg, 'The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treatymaking' (1996–97) 18 *Michigan Journal of International Law* 445.

31 The story of President Washington's first – and last – encounter with an 'advising' Senate is beautifully recounted by E. Corwin, *The President: Office and Powers* (New York University Press, 1964), 209–10.

32 *United States* v. *Curtiss-Wright Export Corp.*, 299 US 304 (1936), 319 (emphasis added).

33 L. Henkin, *Foreign Affairs and the US Constitution* (Oxford University Press, 1996), 177.

34 O. A. Hathaway, 'Presidential Power over International Law: Restoring the Balance' (2009–10) 119 *Yale LJ* 140, 209.

35 For a study on senatorial 'advice and consent' in the context of the 'Convention against Torture', see T. M. Franck, *Foreign Relations and National Security Law* (St Paul: West, 2012), 290 *et seq.*

36 See Senate Rules, Rule 30 ('Executive Session – Proceedings on Treaties'): '1. (a) When a treaty shall be laid before the Senate for ratification, it shall be read a first time; and no motion in respect to it shall be in order, except to refer it to a committee, to print it in confidence for the use of the Senate, or to remove the injunction of secrecy. (b) When a treaty is reported from a committee with or without amendment, it shall, unless the Senate unanimously otherwise directs, lie over one day for consideration; after which it may be read a second time, after which amendments may be proposed. At any stage of such proceedings the Senate may remove the injunction of secrecy from the treaty. (c) The decisions thus made shall be reduced to the form of a resolution of ratification, with or without amendments, as the case may be, which shall be proposed on a subsequent day, unless, by unanimous consent, the Senate determine otherwise, at

Committee starts to examine the treaty. It may hold hearings and might prepare a written report for the Senate. The Senate thereby enjoys the power to look at each and every treaty provision. It can suggest 'amendments', or attach 'reservations', 'understandings' and 'declarations'.[37] The Senate can indeed make its consent conditional on changes to the original treaty.[38] This active power to propose 'amendments' may require the President to renegotiate. It is complemented by a second – passive – power: the power to remain silent. For under Senate rules, there is no procedure by which the President can force a vote of ratification; and many – important – treaties have thus ended on a 'purgatory' shelf where they were neither alive nor dead.[39] Yet once the Senate takes a negative vote, the treaty will be dead – and is unlikely to have an afterlife.[40]

Where is the House of Representatives in the conclusion of Article II treaties? The House is not formally involved and its exclusion from the treaty power was explained by one of the fathers of the American Constitution as follows:

> The fluctuating and, taking its future increase into the account, the multitudinous composition of that body, forbid us to expect in it those qualities

which stage no amendment to the treaty shall be received unless by unanimous consent; but the resolution of ratification when pending shall be open to amendment in the form of reservations, declarations, statements, or understandings. (d) On the final question to advise and consent to the ratification in the form agreed to, the concurrence of two thirds of the Senators present shall be necessary to determine it in the affirmative; but all other motions and questions upon a treaty shall be decided by a majority vote, except a motion to postpone indefinitely, which shall be decided by a vote of two thirds. 2. Treaties transmitted by the President to the Senate for ratification shall be resumed at the second or any subsequent session of the same Congress at the stage in which they were left at the final adjournment of the session at which they were transmitted; but all proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon.'

[37] On these various 'conditions', see Congressional Research Service, *Treaties and other International Agreements: The Role of the United States Senate: A Study* (Washington DC: Library of Congress, 2001), 7–11; and K. C. Kennedy, 'Conditional Approval of Treaties by the US Senate' (1996–7) 19 *Loyola LA International & Company Law Journal* 89.

[38] A famous example is the Jay Treaty (1794), which could only be concluded after revisions by the Senate were requested and accepted by Britain. On the Jay Treaty, see K. Ziegler, 'Jay Treaty' in *Max Planck Encyclopaedia of International Law* (Oxford University Press, 2012).

[39] Famous examples are the Vienna Convention on the Law of Treaties (1969) and United Nations Convention on the Law of the Sea (1982).

[40] The most famous victim of the Senate is the Versailles Treaty (1919). Another illustration is the Comprehensive Nuclear Test Ban Treaty (1996).

> which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; *decision, secrecy, and despatch, are incompatible with the genius of a body so variable and so numerous.* The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project.[41]

The House was thus excluded on the belief that parliamentary involvement was not suitable to the business of international affairs. The framers had deliberately *not* required the 'advice and consent' by Congress – but solely that of the Senate. And the Senate had been chosen *because* of its 'undemocratic characteristics'.[42] (This choice stemmed from the fear that 'advice and consent' meant involvement in the *negotiation* phase;[43] but as we saw above, not even the Senate would be allowed to 'advise' the President during that phase.) The House was neither to advise nor to consent. It was completely cut off from the treaty power.

*(b) Article I: the (*ex post*) congressional-executive agreement*

While Congress has no constitutional rights under Article II, the US Constitution nonetheless recognises congressional foreign affairs powers under Article I. It is thus Congress – not the President – that is competent '[t]o regulate Commerce with foreign Nations',[44] to define and punish 'Offences against the Law of Nations'[45] and '[t]o declare War'.[46] Would these 'legislative' powers include the external power to conclude international agreements with foreign states? Could Congress, with the

[41] *The Federalist* No. 75 (Hamilton) in Hamilton, Madison and Jay, *The Federalist*, n. 27 above, 366–7 (emphasis added).

[42] L. Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (Columbia University Press, 1990), 49.

[43] M. S. McDougal and A. Lans, 'Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II' (1945) 54 *Yale LJ* 534, 539 (emphasis added), arguing that the House was excluded on the belief 'that it was not suited to participate in the task then contemplated for the Senate, that of *participating equally with the President in the detailed negotiation of treaties.* As a sheer question of expediency, it was felt that the House was too large to maintain the secrecy and dispatch deemed requisite in negotiation.'

[44] Art. I, s. 8 (cl. 3). [45] Art. I, s. 8 (cl. 10). [46] Art. I, s. 8 (cl. 11).

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assistance of the President, conclude international *agreements* outside the *treaty*-making procedure under Article II? For even if Article II set out an exclusive procedure for the conclusion of international *treaties*, this would not necessarily mean that the Union could not develop alternative procedures for the conclusion of international *agreements*.

From the very beginning, the US Constitution acknowledged a distinction between 'treaties' and 'agreements' with regard to the international powers of the states.[47] For while the latter cannot 'enter into any *Treaty*',[48] they can – with the consent of Congress – 'enter into an *Agreement*' with a third state.[49] Did this distinction also exist at the Union level? The distinction was eventually transposed to that level, and the idea of congressional agreements gained much momentum in the 'New Deal' era.[50] Perhaps the best – but certainly longest – defence of these agreements here argued as follows:

> The wise statesmen who drafted the Constitution of the United States not only gave the President a *permissive* power, 'with the advice and consent of the Senate,' 'to make treaties, provided two-thirds of the Senators present concur,' but they also gave both to the President and to the whole Congress broad powers of control over external relations of the Government which are meaningless if they do not include the instrumental powers, first, to authorize the making of intergovernmental agreements and, secondly, to make these agreements the law of the land . . . *The result is that our constitutional law today makes available two parallel and completely interchangeable procedures, wholly applicable to the same subject matters and*

[47] What distinguished 'treaties', from which the states were absolutely barred, from 'agreements' or 'compacts', that would be constitutional if consented to by the federal Union? The classic text that influenced the drafters of the American Constitution was E. de Vattel's *Law of Nations* (see E. de Vattel, *The Law of Nations* (Philadelphia: Johnson, 1883), Book II, § 152–4). Here, a treaty was defined as 'a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time'. By contrast, '[t]he compacts which have temporary matters for their object are called agreements, conventions, and pactions'. 'They are accomplished by one single act, and not by repeated acts.' Public treaties were thus equivalents to 'laws' – lasting forever or a considerable time; whereas agreements or compacts were executive in nature as they settled a specific situation. On the influence of Vattel on the founding fathers, see A. C. Weinfeld, 'What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?' (1935–6) 3 *University of Chicago Law Review* 453, 458.

[48] Art. I, s. 10 (cl. 1) (emphasis added).

[49] *Ibid.*, cl. 3 (emphasis added).

[50] In this sense, see B. Ackerman and D. Golove, 'Is NAFTA Constitutional' (1995) 108 *Harv LR* 799, 808: 'Until Versailles, American constitutional practice was remarkably consistent. The Constitution's special treatment of treaty-making was understood to imply that *only* the Senate, and not Congress, had the power to commit the country to binding international agreements.'

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> *of identical domestic and international legal consequences, for the consummation of intergovernmental agreements.* In addition to the treaty-making procedure, which may – as the nation has found from bitter experience – be subjected to minority control, there is what may be called an 'agreement-making procedure,' which may operate either under the combined powers of the Congress and the President or in some instances under the powers of the President alone.[51]

Constitutional traditionalists have ferociously attacked this position.[52] But despite some modern doubts surrounding the conclusion of the North American Free Trade Agreement,[53] the constitutionality of the congressional-executive agreement is firmly established.[54] In parallel to the 'treaty-making procedure' in Article II, American constitutionalism thus recognises an 'agreement-making procedure' in Article I. Congressional agreements are here concluded under the 'ordinary' legislative procedure set out in that Article I, Section 7. This gives the House of Representatives an equal share, with the Senate, in the conclusion of international agreements. '[T]he congressional-executive agreement avoids lawmaking by less than a full, democratic legislature';[55] and this parliamentarisation of the Union's treaty power has – unsurprisingly – eased the quest for constitutional limits on the *scope* of its external competences.[56]

[51] M. S. McDougal and A. Lans, 'Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I' (1945) 54 *Yale LJ* 188 (emphasis added). The 'article' is 171 pages long, and followed by a second instalment, n. 43 above, of 82 pages.

[52] For a 'traditionalist' advocate of the exclusivity of the Art. II procedure, see E. Borchard, 'Shall the Executive Agreement Replace the Treaty?' (1944) 53 *Yale LJ* 664. It was, in part, this article that led to McDougal and Lans' famous apologia. For a subsequent reply by Borchard, see 'Treaties and Executive Agreements: A Reply' (1945) 54 *Yale LJ* 616.

[53] For the most remarkable 'doubts', see L. Tribe, 'Taking Text and Structure Seriously: Reflections on Free-form Method in Constitutional Interpretation' (1995) 108 *Harv LR* 1221, esp. 1272: 'That the Treaty Clause was regarded as the exclusive method for treaty approval for much of our nation's history is beyond debate. Article II's own structure provides still further support for an exclusive reading of the Treaty Clause. In particular, it is instructive to compare the Treaty Clause with its next-door neighbor, the Appointments Clause.'

[54] Henkin, *Foreign Affairs and the US Constitution*, n. 33 above, 218.

[55] Henkin, *Constitutionalism, Democracy and Foreign Affairs*, n. 42 above, 60.

[56] The exclusion of the House of Representatives from the treaty-making procedure had always been a poisonous sting for the scope of the treaty power. Very early on, Jefferson had therefore recommended limiting the treaty power by excluding 'those subjects of legislation in which [the Constitution] gave participation to the House of Representatives': T. Jefferson, *Manual of Parliamentary Practice*, cited by Henkin, *Foreign Affairs and the US Constitution*, n. 33 above, 189. The Supreme Court has never followed this position, see *Geofroy* v. *Riggs* (1890) 133 US 258; and *Missouri* v. *Holland*, 252 US 416 (1920).

While less difficult a procedure with regard to the Senate, the Article I procedure had however added a new procedural hurdle with the inclusion of the House. And in order to make approval by both chambers of Congress easier, Congress accepted – from 1974 to 2007 – a 'fast-track procedure' for international trade agreements.[57] The procedure was to accelerate congressional approval by providing for a special set of procedural devices to streamline the legislative process.[58] In essence: in exchange for consultation powers during the negotiation phase,[59] Congress would not suggest amendments to the agreement and would limit parliamentary debate.[60] Through this compromise, Congress gained a power to

[57] The 'fast track' procedure was first provided for in the 1974 Trade Act. It was renewed in 1979, 1984, 1988 and 1993 (expired: 1994). After an 'interregnum' between 1994–2002, the 2002 Trade Act reintroduced the procedure, albeit under a different name: the 'Trade Promotion Authority'.

[58] H. H. Koh, 'The Fast Track and United States Policy' (1992) 18 *Brooklyn Journal of International Law* 143, 163: 'At bottom, the Fast Track procedure differs from normal legislative process in six respects: it is an accelerated process that results from self-imposed congressional limits upon ordinary committee deliberation, committee and floor amendment, and filibuster, that effectively bundles disparate substantive provisions together in a take-it-or-leave-it package.'

[59] Section 2104 of the 2002 (Bipartisan) Trade (Promotion Authority) Act set out the specific consultation requirements. Section 2104(a) thereby dealt with 'Notice and Consultation before Negotiation': 'The President, with respect to any agreement that is subject to the provisions of section 2103(b), shall – (1) provide, at least 90 calendar days before initiating negotiations, written notice to the Congress of the President's intention to enter into the negotiations and set forth therein the date the President intends to initiate such negotiations, the specific United States objectives for the negotiations, and whether the President intends to seek an agreement, or changes to an existing agreement; (2) before and after submission of the notice, consult regarding the negotiations with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives, such other committees of the House and Senate as the President deems appropriate, and the Congressional Oversight group convened under section 2107; and (3) upon the request of a majority of the members of the Congressional Oversight Group under section 2107(c), meet with the Congressional Oversight Group before initiating the negotiations or at any other time concerning the negotiations.'

Section 2104(d), by contrast, dealt with 'Consultation with Congress before Agreements Entered Into', and states: '(1) Consultation. – Before entering into any trade agreement under section 2103(b), the President shall consult with – (A) the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate; (B) each other committee of the House and the Senate, and each joint committee of the Congress, which has jurisdiction over legislation involving subject matters which would be affected by the trade agreement; and (C) the Congressional Oversight Group convened under section 2107.'

[60] Section 151(d) of the 1974 Trade Act (as amended) stated: 'No amendment to an implementing bill or approval resolution shall be in order in either the House of Representatives or the Senate; and no motion to suspend the application of this subsection shall be in

'advise' the President during the negotiations; yet it partly lost its power to 'consent'. This pragmatic choice has an 'undemocratic' side-effect,[61] for it reduces the parliamentary prerogative to actively co-decide to a passive consent. For the House (and the Senate) will only be voting on the agreement *en bloc*.

Can the President choose whether to submit an agreement/treaty to the alternative procedures of Articles I or II? According to the dominant academic view this is indeed the case.[62] The proponents of complete interchangeability thus leave the choice between the Article I and Article II procedure to the 'political judgment' of the President.[63] Some have attacked the interchangeability thesis by identifying thematic spheres into which 'agreements' or 'treaties' should respectively fall.[64] But this approach will not stand when judged against the empirical record.[65] However, the latter equally shows that 'there are many areas of law in which one instrument or the other is exclusively or almost exclusively used'.[66] Article I agreements are thus commonly used for 'trade',[67] while Article II treaties

order in either House, nor shall it be in order in either House for the Presiding Officer to entertain a request to suspend the application of this subsection by unanimous consent.' The following two paragraphs deal with shortened committee and floor consideration (see s. 151(e)–(g) of the Act).

61 For a criticism of this view, see Koh, 'The Fast Track and United States Policy', n. 58 above, 163: 'It should be self-evident that none of these features, by itself, is inherently undemocratic. An accelerated legislative process may force interest groups to band together and lodge their objections earlier and faster than they otherwise would, but so long as the process is not unduly truncated, acceleration need not silence interested voices.'

62 See McDougal and Lans, 'Treaties and Congressional-Executive or Presidential Agreements', n. 51 above; and Ackerman and Golove, 'Is NAFTA Constitutional?', n. 50 above, 802–3: 'During and after the War, the President won the constitutional authority to substitute the agreement of both Houses for the traditional advice and consent of the Senate'; and Henkin, *Foreign Affairs and the US Constitution* (n. 33 above), 217: 'a complete alternative to a treaty'.

63 Third Restatement on Foreign Relations Law of the United States (American Law Institute, 1987), § 303, 161 (emphasis added): 'Which procedure should be used is a *political judgment*, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty.'

64 Yoo, 'Laws as Treaties?', n. 24 above, claims that congressional-executive agreements are exclusively used for agreements that fully fall within Congress' powers, whereas treaties are used for agreements that fall outside those powers or where Congress and the President have concurrent powers.

65 O. Hathaway, 'Treaties' End: The Past, Present, and Future of International Lawmaking in the United States' (2008) 117 *Yale LJ* 1236, 1270.

66 *Ibid.*, 1243.

67 P. Spiro, 'Treaties, Executive Agreements, and Constitutional Method' (2001) 79 *Texas Law Review* 961, 1002: 'The use of the congressional-executive agreement for trade-related

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continue to be used for human rights.[68] But these patterns are not the result of reason but of history.[69] Their irrationality has recently led to arguments (almost) to completely abandon the – undemocratic – Article II treaty-making procedure.[70]

(c) Executive agreements: presidential unilateralism – old and new

(aa) Article II and sole executive 'agreements'

Since its earliest days, American constitutional thought has allowed the President to conclude 'agreements' under his own constitutional authority.[71] And with time, it was equally accepted that an Article II treaty could delegate power to the President to conclude 'executive agreements'.[72] These executive agreements are called *sole* executive agreements, since the President is the *sole* constitutional organ involved in their conclusion.

undertakings has not merely been routine, but exclusive; there does not appear to be a single important postwar trade agreement that was approved as an Article II treaty.'

[68] The modern history behind this choice is interesting, and has to do with the (failed) Bricker amendment. The latter was an attempt, in the pre-civil rights era, to stop human rights agreements from externally challenging racial segregation policies in the southern states. And while the Bricker amendment did not pass, a political convention emerged not to use a congressional agreement to by-pass the Senate – and thus the southern states.

[69] Hathaway, 'Treaties' End', n. 65 above, 1240: 'There is, I argue, no persuasive explanation for these differences based on the subject matter, form, topic, or any other substantive basis. The explanation for these differences lies not in reason, but in history – a history that it is now time to leave behind.'

[70] *Ibid.*, 1307 *et seq.*

[71] Henkin, *Constitutionalism, Democracy and Foreign Affairs*, n. 42 above, 57: 'Presidential agreements other than treaties are not mentioned in the Constitution. But the framers clearly understood that nations make some agreements that are not treaties.' For the same view, see M. Ramsey, 'Executive Agreements and the (Non)Treaty Power' (1998) 77 *North Carolina Law Review* 133, 138: '[T]he text and structure of the Constitution, combined with the historical usage of the relevant phrases in international law, suggest that the founding generation recognized a class of nontreaty "agreements" falling within the President's independent power.' For a criticism of the analogy from state agreements to Presidential agreements, see R. Berger, 'The Presidential Monopoly of Foreign Relations' (1972–3) 71 *Mich L Rev* 1.

For a judicial confirmation of the constitutionality of sole executive agreements, see *inter alia*: *United States* v. *Belmont*, 301 US 324 (1937), 330–1: 'But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations.'

[72] See Third Restatement on Foreign Relations Law, n. 63 above, 159: § 303 (3): 'the President may make an international agreement as authorized by treaty of the United States'. On this point, see *Wilson* v. *Girard*, 354 US 524 (1957).

These agreements are – like treaties – the supreme law of the land.[73] They could, in the past, be secret; but today they must be reported to Congress within sixty days after their entry into force.[74]

The key unknown for sole executive agreements is the scope of the President's independent constitutional powers. For even if his external powers run parallel to his internal powers, the extent of his (autonomous) internal powers has been controversial. In the last century, the Supreme Court was thus often called upon to delineate the executive domain in which the President may autonomously act on foreign affairs.[75] The most

[73] Sole executive agreements are federal agreements. And while they are not expressly caught by the Supremacy Clause of Article VI, cl. 2, they have nonetheless been held to be supreme over state law, see *United States* v. *Belmont*, n. 71 above, 331: 'Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning . . . And while this rule in respect of treaties is established by the express language of clause 2, Article VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states'; see also *American Insurance Association* v. *Garamendi*, 539 US 396 (2003), 416: 'valid executive agreements are fit to preempt state laws, just as treaties are'.

[74] This 'publication' requirement was established in the 1972 Case-Zablocki Act, see 1 USC §112b: 'The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.'

[75] The widest expression of the President's independent powers was given in *United States* v. *Curtiss-Wright Export Corp.*, 299 US 304 (1936), where the Court confirmed the independent constitutional power of the President in the following terms (*ibid.*, 319–20): 'It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.'

For a more nuanced – albeit still extensive – approach, see *United States* v. *Belmont*, n. 71 above, as well as *United States* v. *Pink*, 315 US 203 (1942). In the latter case, the Court held that the President's express power to 'receive Ambassadors' (Article II, s. 3) implied his power to recognize foreign nations, and that the latter power had to be interpreted widely

famous guidelines in this respect have been laid down in *Youngstown*.[76] In his (concurring) opinion, Justice Jackson here acknowledged a 'zone of twilight in which [the President] and Congress may have concurrent authority'.[77] 'In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.'[78] Simple congressional acquiescence could thereby indirectly confirm the existence of independent presidential powers to conclude international agreements.[79] Yet the President was surely on safest ground where he could point to an express constitutional entitlement under Article II. The great majority of sole executive agreements have indeed been concluded under the President's power as chief law-enforcer and in his role as Commander-in-Chief.[80]

(bb) Delegating Article I powers: the (*ex ante*) congressional-executive agreement

With the rise of the 'administrative state', delegations of legislative powers to the executive have become a hallmark of modern constitutionalism.[81]

(*ibid.*, 229–30): 'That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition . . . Power to remove such obstacles to full recognition as settlement of claims of our nationals certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations." Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted.'

[76] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 US 579 (1952).

[77] The authority of the President would be 'at its maximum' (*ibid.*, 635), where he acted pursuant to an authorisation of Congress, since in this scenario he enjoys his own powers plus that Congress delegated. In the second scenario, the President acts on his independent powers alone 'but there is a zone of twilight in which he and Congress may have concurrent authority': *ibid.*, 637. In the third scenario, the President's power 'is at its lowest ebb' (*ibid.*), where it is clear that he acts against the express or implied wish of Congress. 'Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution for what is at stake is the equilibrium established by our constitutional system': *ibid.*, 638.

[78] *Ibid.*, 637.

[79] See *Dames & Moore* v. *Regan*, 453 US 654 (1981).

[80] For a discussion of the – uncertain – scope of 'sole executive agreements', see Henkin, *Foreign Affairs and the US Constitution*, n. 33 above, 219–26; and H. Chang, 'International Executive Agreements on Climate Change' (2010) 35 *Columbia Journal of Environmental Law* 337, 356: 'Sole executive agreements are relatively uncommon. From the Founding until the early 1990s, only two types of sole executive agreements were concluded, both grounded in the President's executive and commander-in-chief powers: claims settlements and temporary agreements. In the twentieth century, sole executive agreements have been used most commonly in military and foreign relations matters, and then only sparingly – between 1946 and 1972, only 5.5% of the international agreements entered by the United States were based solely on the President's authority.'

[81] See G. Lawson, 'The Rise and Rise of the Administrative State' (1993–4) 107 *Harv LR* 1231.

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This would increasingly include delegations of international powers. The 'vast majority' of international agreements concluded by the United States today are indeed made by the President under delegated powers.[82] These so-called *ex ante* congressional-executive agreements are in fact the traditional form of the congressional-executive agreement.[83] Yet the name is a (partial) misnomer.[84] For the actual agreements are not consented to by Congress. Congress simply delegates its powers to the President, who will subsequently conclude the agreement on his own. *Ex ante* congressional-executive agreements are thus closer to sole executive agreements than to *ex post* congressional-executive agreements. Like sole executive agreements, their conclusion will not involve Congress; yet, unlike sole executive agreements, their constitutional basis lies in Article I – and not Article II.

Are there constitutional limits to a delegation of treaty-making powers? The delegation of such powers to the President was famously challenged in *Field* v. *Clark*.[85] Yet the Supreme Court unequivocally backed the 'administrative state'. '[I]t is often desirable, if not essential, for the protection of the interests of our people against the unfriendly or discriminating regulations established by foreign governments, in the interest of their people, *to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.*'[86] This was confirmed in *Altman & Co.*,[87] and in

[82] Hathaway, 'Presidential Power over International Law', n. 34 above, 149.

[83] Hathaway, 'Treaties' End', n. 65 above, 1298: 'Up until the New Deal Era, congressional executive agreements almost always took the form of ex ante authorization by Congress to the President to negotiate an agreement on a particular topic . . . During the New Deal, the President began to initiate agreements himself, inviting Congress to approve the terms after the fact . . . This type of ex post congressional-executive agreement emerged in response to the high hurdle imposed by the Treaty Clause alongside the desire and need for the country to engage more fully in the international sphere.'

[84] Hathaway, 'Presidential Power over International Law', n. 34 above, 146. 'Indeed, the very label applied to such an agreement – "ex ante congressional agreement" – is misleading, since it suggests a level of cooperation in making the agreement that rarely exists. In reality, once Congress delegates authority to the President to make the agreement, it usually plays no further role – contrary to what the separation of powers requires.'

[85] *Field* v. *Clark*, 143 US 649 (1892).

[86] *Ibid.*, 691 (emphasis added).

[87] *Altman & Co.* v. *United States*, 224 US 583 (1912). In *Altman*, the Court also confirmed that *ex ante* congressional executive agreement enjoy 'supremacy' over state law, and are thus, in this respect, like 'treaties' (*ibid.*, 601): 'While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the

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Curtiss-Wright.[88] In the latter case, the Court clarified that 'the international field must often accord to the President a degree of discretion and freedom from statutory restriction *which would not be admissible were domestic affairs alone involved*'.[89] For foreign affairs, this de-activated the non-delegation doctrine from the start. The resulting breadth of delegated powers in foreign affairs was remarkable.[90] No evidence could be more telling than the – peculiar – executive conclusion of 1947 GATT.[91]

In the absence of any *constitutional* safeguards, would Congress nonetheless insist on the inclusion of *political* safeguard of democracy? In order to compensate for the broad delegations of international powers to the President, Congress originally insisted on a political control mechanism: the legislative veto. The legislative veto would allow Congress to veto an *intra (!) vires* executive act, where its substance conflicted with the will of the democratic majority in Congress. Importantly, both branches of Congress could – independently – exercise the veto. The legislative veto was designed to 'promot[e] democratic accountability',[92]

President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court.'

88 *United States* v. *Curtiss-Wright Export Corp.*, 299 US 304 (1936).

89 *Ibid.*, 320 (emphasis added).

90 Hathaway, 'Presidential Power over International Law', n. 34 above, 144. For an excellent analysis of the ever-widening delegation mandates in various fields, see the author's Table 2 on 'Selected Authorizing Statutes for Ex Ante Congressional-Executive Agreements', *ibid.*, 159–65. For a classic example of an open-ended delegation, she quotes the 1954 Agriculture Trade Development and Assistance Act, which gave authorisation 'to negotiate and carry out agreements with friendly nations or organizations of friendly nations to provide for the sale of surplus agricultural commodities for foreign currencies'.

91 The old 1947 GATT had never been submitted to the Senate, nor to Congress. American adherence originally rested on the 'Protocol of Provisional Application'. The latter had been signed and proclaimed by President Truman under powers delegated by the Reciprocal Trade Agreement Act (as amended in 1945). This choice in favour of a 'presidential' executive agreement was highly controversial, especially as it seemed designed to circumvent Senate consent for a treaty creating an 'International Trade Organization'. For an excellent apologia of the executive route, see J. H. Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law' (1967–8) 66 *Mich L Rev* 249, esp. 273: 'Thus, in answer to the question whether the President had statutory authority to enter GATT, it seems clear that he did. The wording of the statute, legislative history, and the known precedents of prior trade agreements at the time of the 1945 Act combine to show a delegation of authority to enter into all particular provisions of GATT[.]'

92 L. Tribe, *American Constitutional Law* (New York: Foundation Press, 2000), 142.

and this function it discharged for half a century. Yet, after fifty years of constitutional practice, the Supreme Court invalidated the constitutional theory behind the veto in *Immigration and Naturalization Service* v. *Chadha*,[93] and '[i]n eliminating the legislative veto, the Court eliminated the single most significant control over *ex ante* congressional-executive agreements that Congress passed'.[94]

Surprisingly, the emasculation of both constitutional and political safeguards over *ex ante* congressional-executive agreements did not precipitate a decline in delegations of treaty power. 'Faced with a choice between the overwhelming prospect of rewriting perhaps as many as one hundred laws to provide for greater case-by-case oversight or delegating even greater authority to the President, Congress chose to delegate.'[95] Through this combination of judicial activism and congressional passivity 'presidential unilateralism came to dominate U.S. international lawmaking' – a situation in which 'nearly all of U.S. international law [is] made by the President acting alone with little oversight by Congress'.[96]

(d) Excursus: terminating (and suspending) treaties or agreements

There is nothing in the US Constitution that tells us anything about the procedure for 'suspending' or 'terminating' international treaties. Would this mean that the termination question was a 'political question'? In the past 200 years, the question of treaty termination has been highly controversial, yet its constitutional dimensions have largely remained unexplored.[97]

The framers appear to have favoured a procedural parallelism between conclusion and termination. Following Blackstone,[98] the *Federalist* thus

[93] *Immigration and Naturalization Service* v. *Chadha*, 462 US 919 (1983).

[94] Hathaway, 'Presidential Power over International Law', n. 34 above, 194. And see also T. M. Franck and C. A. Bob, 'The Return of Humpty-Dumpty: Foreign Relations Law after the Chada Case' (1985) 79 *AJIL* 912, 959: 'The Supreme Court, by holding the concurrent resolution procedure an unconstitutional form of lawmaking, has created serious problems for the conduct of foreign policy in a system of government by laws . . . Congress has lost its trusted device for making the Executive consult and come into agreement, instance by instance, on the proper meaning to be ascribed to statutory words conveying legislative intent. This could lead to a system that too severely tethers the Presidency or invites a return to its "imperial" era. Neither extreme is desirable or necessary.'

[95] Hathaway, 'Presidential Power over International Law', n. 34 above, 200.

[96] *Ibid.*, 205.

[97] See Ramsey, *The Constitution's Text in Foreign Affairs*, n. 18 above, ch. 8.

[98] For Blackstone, an Act of Parliament 'cannot be altered, amended, dispensed with, suspended, or repealed, but by the same forms and by the same authority of parliament: for it

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argued that '[t]hey 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'.[99] And the early Supreme Court declared that '[t]he obligations of [a] treaty could not be changed or varied, but by the same formalities with which they were introduced; or, at least, by some act of as high an import, and of as unequivocal an authority'.[100] But unfortunately, the historical record on treaty termination is varied[101] and modern constitutional practice points in the opposite direction.[102] When asked to provide guidelines on the termination issue in *Goldwater* v. *Carter*,[103] the Supreme Court indeed refused to offer support to the idea of procedural parallelism. Senator Goldwater had challenged the unilateral decision of President Carter to terminate the Mutual Defence Treaty between the United States and the (then) Republic of China (Taiwan). And by finding that this was a 'political question', the Court (in)advertently strengthened the view that the President enjoyed inherent powers to dissolve international obligations.

This view subsequently shaped the Third Restatement in Foreign Affairs, where it was justified by reference to the 'constitutional authority of the President to conduct the foreign relations of the United States'.[104] The relevant section of the Restatement states:

is a maxim in law, that it requires the same strength to dissolve, as to create an obligation': W. Blackstone, *Commentaries on the Laws of England*, Book 1 – Ch. 2, VI.

[99] *The Federalist* No. 64 (Jay) in Hamilton, Madison and Jay, *The Federalist*, n. 27 above, 316.

[100] Justice Story in *The Amiable Isabella*, 19 US 1 (1821), 75. And see also *Clark* v. *Allen*, 331 US 503 (1947), 509: 'President and Senate may denounce the treaty, and thus terminate its life.'

[101] Congressional Research Service, *Treaties and other International Agreements*, n. 37 above, 14: 'Treaties have been terminated in a variety of ways, including by the President following a joint resolution of Congress, by the President following action by the Senate, by the President and with subsequent congressional or Senate approval, and by the President alone[.]' For an analysis of some of the constitutional practice, see R. Berger, 'The President's Unilateral Termination of the Taiwan Treaty' (1980–1) 75 *Northwestern University Law Review* 577.

[102] Franck, *Foreign Relations and National Security Law*, n. 35 above, 488. A famous example is President Bush's unilateral termination of the Anti-Ballistic Missiles Treaty.

[103] *Goldwater* v. *Carter*, 444 US 996 (1979). For an extensive discussion of this Supreme Court case and its prehistory in the federal courts, see A. Mamalakis Pappas, 'The Constitutional Allocation of Competence in the Termination of Treaties' (1980–1), 13 *New York University Journal of International Law & Politics* 473.

[104] Third Restatement on Foreign Relations Law, n. 63 above, 227: § 339 with reference to *United States* v. *Curtiss-Wright Export Corp.*, 299 US 304 (1936).

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§ 339. Authority to Suspend or Terminate International Agreements: Law of the United States

Under the law of the United States, the President has the power

(a) to suspend or terminate an agreement in accordance with its terms;
(b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or
(c) to elect in a particular case not to suspend or terminate an agreement.

Nonetheless, while unilateral termination makes profound sense for *sole* executive agreements, what constitutional arguments have been marshalled to justify the exclusion of the Senate from the termination of Article II treaties, and the exclusion of Congress from Article I agreements? American constitutional scholars have here returned to an analogy with the appointment power of the President.[105] 'The constitutional treatment of appointments shows that Senate participation in *approving* a presidential executive action did not conventionally imply Senate participation in *undoing* it.'[106] But while this reading of the removal power may itself be overstated,[107] the very analogy between treaty termination and officer removal has been questioned. For '[w]ho would assimilate termination of the North Atlantic Alliance to firing a member of the Cabinet?'[108] Indeed, if an international treaty is equivalent to a national law,[109] should the power to terminate treaties not be analogous to the power to repeal

[105] The Constitution requires the 'advice and consent' of the Senate in the appointment of executive officers, and yet the Supreme Court has given indications that there exists a unilateral presidential power to remove such officers (see *Myers* v. *United States*, 272 US 52 (1926)). For an excellent and extensive discussion of the case, and its relevance to treaty termination, see R. Nelson, 'The Termination of Treaties and Executive Agreements by the United States: Theory and Practice' (1957–8) 42 *Minnesota Law Review* 879.

[106] Ramsey, The Constitution's Text in Foreign Affairs, n. 18 above, 160.

[107] In *Humphrey's Executor* v. *United States*, 295 US 602 (1935), the Court appears to have limited the President's unilateral power to remove officers to 'purely executive officers'.

[108] Berger, 'The President's Unilateral Termination of the Taiwan Treaty', n. 101 above, 596. For a similar criticism, see A. Bestor, 'Respective Roles of Senate and President in the Making and Abrogation of Treaties: The Original Intent of the Framers of the Constitution Historically Examined' (1979–80) 55 *Washington Law Review* 1, 30: 'The persuasive analogy is not between the power to terminate a treaty and the power to terminate the appointment of a subordinate, but between the power to terminate a treaty and the power to terminate (that is, to repeal) a statute.'

[109] See *Foster* v. *Neilson*, n. 23 above.

legislation? And should this power not belong to the legislature – that is, Congress?[110]

The absence of Congress from treaty termination represents a facet of the democratic deficit within the American treaty power. Yet Congress still enjoys the power to override – and thus internally 'suspend' – an international treaty within domestic law. This follows from a constitutional choice that places international treaties on a par with ordinary legislation to the effect that the last-in-time rule will apply. This constitutional solution was clarified in *Whitney* v. *Robertson*:

> By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; *but, if the two are inconsistent, the one last in date will control the other*: provided, always, the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests.[111]

Domestically, international treaties and agreements may thus fall victim to an implied 'repeal'.[112] And while this may expose the United States to international liability, the ability of domestic legislation to internally 'repeal' an international treaty partly 'democratises' the treaty termination process, for Congress can choose whether an international treaty binding the United *States* will also bind the American *people*.

2 The 'treaty power' in the European Union

When compared to the verbal minimalism of the US Constitution, the European Union's foreign affairs provisions appear verbose. Yet the charge that there is 'too much constitutional law' on foreign affairs loses its

[110] E. Corwin, *The President's Control in Foreign Relations* (Princeton University Press, 1917), 115: '[T]he power of terminating the international compacts to which the United States is a party belongs, as a prerogative of sovereignty, to Congress alone.'

[111] *Whitney* v. *Robertson*, 124 US 190 (1888), 194 (emphasis added).

[112] *Reid* v. *Covert*, 354 US 1 (1957) 18: 'This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'

fervor in the context of the Union's treaty power.[113] For the European Treaties have 'condensed' their constitutional law into a single 'unified' procedure set out in Article 218 TFEU.[114] Under this procedure, the central institution in the making of Union treaties is the Council. The latter embodies – like the US Senate – the federal principle in the form of the Member States. And like its American counterpart, the Council thereby acts – as a rule – by a qualified majority.[115] But what is the role of the European Parliament in the conclusion of international treaties? The Union legal order adopts – again like the United States – a monist stance vis-à-vis international treaties;[116] and a Union treaty will thus be '*equivalent to an act of the legislature*, whenever it operates of itself without the aid of any legislative provisions'.[117] What is the democratic legitimation behind this form of 'external legislation'?

When the Union was founded, the democratic nature of its treaty power(s) was as deficient as its scope was minimal.[118] The 1957 Rome

[113] For the idea that there is too much European constitutional law on foreign affairs, see B. de Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations?' in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford: Hart, 2008), 3.

[114] Admittedly, compared to the 25 words of the American treaty power, Art. 218 TFEU counts 669 words.

[115] There are however four exceptions to this rule. The Council shall act unanimously (i) when the agreement covers a field for which unanimity is required; (ii) for association agreements; (iii) with regard to Art. 212 agreements with states that are candidate for Union accession; and (iv) in respect of the Union's accession agreement to the ECHR (Art. 218(8) TFEU). Importantly, the new Art. 218 TFEU has not incorporated the old CFSP rule under ex-Art. 24(5) (old) EU, according to which a Member State would not be bound by an agreement to which its representative had not consented. However, the constitutional relationship between the general voting rules in Art. 218(8) TFEU and the special CFSP voting rules in Art. 31 TEU are not yet clarified. Whether special CFSP arrangements, such as the 'constructive abstention' or the 'emergency break', will apply to CFSP agreements remains to be seen. (However, importantly: unlike Art. 222(3) TFEU no express mention is made of the applicability of the voting arrangements in Art. 31 TEU.)

[116] See Art. 216(2) TFEU states: '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States'. The Court has expressly confirmed that international agreements 'form an integral part of the [European] legal system' from the date of their entry into force without the need for a legislative act of 'incorporation' (see Case 181/73, *Haegeman* v. *Belgium* [1974] ECR 449).

[117] *Foster* v. *Neilson*, n. 23 above (emphasis added).

[118] For three early analyses of the Union's treaty power see P. Pescatore, 'Les Relations extérieures des Communautés européennes: contribution à la doctrine de la personnalité des organisations internationales' (1961) 103 *Recueil des Cours* 1; J. Weiler, *The European Parliament and its Foreign Affairs Committees* (Padova: CEDEM, 1982); and E. Stein and L. Henkin, 'Towards a European Polity? The European Foreign Affairs System from the

Treaty conferred extremely limited treaty-making competences to the Union,[119] and requested parliamentary consultation only for 'association agreements'.[120] All other types of agreements did not require parliamentary participation.[121] Worse, there was no express provision in the Treaties guaranteeing Parliament's right to be informed about treaty negotiations. Yet Parliament soon fought, and won, this soft right for association agreements,[122] as well as trade agreements.[123] More importantly still, it was subsequently given the political promise to be consulted on

Perspective of the United States Constitution' in M. Cappelletti, M. Seccombe and J. Weiler (eds.), *Integration through Law: Europe and the American Federal Experience*, 5 vols. (Berlin and New York: de Gruyter, 1986), I-3, 33.

[119] The 1957 Rome Treaty contained two 'classic' treaty powers in the context of the Common Commercial Policy (ex-Art. 113 EEC) and with regard to the conclusion of 'association agreements' (ex-Art. 238 EEC).

[120] The original treaty procedure was laid down in ex-Art. 228 EEC that simply provided that agreements 'shall be concluded by the Council after consulting the Parliament, where required by this Treaty'. But the sole provision that expressly required consultation was Art. 238 EEC. The latter originally stated: 'The Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures. These agreements shall be concluded by the Council, acting unanimously after consulting the [Parliament].'

[121] Ex-Art. 113(3) EEC did not envisage any parliamentary involvement; and while the procedural arrangements for the Union's implied external powers have never been clear it seems that constitutional practice preferred to apply the procedure within ex-Art. 113 EEC analogously (see R. G. Bono, 'The International Powers of the European Parliament, the Democratic Deficit and the Treaty on European Union' (1992) 12 *YEL* 85, 100).

[122] The first of these concessions became known as the 'Luns Procedure' (1964) (see Commission Communication: The Role of the European Parliament in the Preparation and Conclusion of International agreements and Accession Treaties, COM (82) 277, 8). It states: 'A debate may take place in the Parliament before negotiations with a view to the association of a third country with the Community are started. During the negotiations close contacts shall be maintained between the Commission and the appropriate committees of the Parliament. When the negotiations are concluded, but before the agreement is signed, the Council or its representative shall confidentially and unofficially inform the appropriate committee of the substance of the agreement.'

[123] This second concession became known as the 'Westerterp Procedure' (1973), and states (*ibid.*): '[F]uller participation by the European Parliament in the field of trade agreements could be envisaged along the following lines: prior to the opening of negotiations concerning a trade agreement with a third country and in light of the information supplied by the Council to the competent committee of the Parliament, a debate could, where appropriate, be held in the European Parliament; when negotiations are completed, but before the signing of the agreement, the President of the Council or his representative would confidentially and unofficially acquaint the competent committees with the substance of the agreement; bearing in mind the European Parliament's interest in trade agreements concluded by the Community, the Council would acquaint the European Parliament with the content of such agreements, after their signing and before their conclusion.'

all 'significant' agreements – even where this was not provided for in the Treaties.[124] This remained the status quo until the 1986 Single European Act. The latter introduced, albeit in a limited sphere, the requirement of parliamentary consent for the conclusion of some Union agreements;[125] and the 1992 Maastricht Treaty expanded this sphere.[126] However, it was the 2007 Lisbon Treaty that significantly democratised the Union's treaty power(s).

What, then, are the democratic credentials of Union treaty-making today? In order to answer this question, we shall analyse the general rules of treaty-making in the Union in section 2(a), before exploring the special rules for agreements concluded under the Common Foreign and Security Policy (CFSP) in section 2(b). A third subsection explores the constitutional foundations of executive agreements in the Union legal order, whereas an excursus investigates the termination and suspension of international treaties by the EU.

(a) The 'ordinary' treaty procedure: Article 218 TFEU

Article 218 TFEU acknowledges the central role of the Council in all stages of treaty-making in the Union: 'The Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them.'[127] The provision gives the Council an *indirect* role in the negotiation and a *direct* role in the conclusion

[124] With the Stuttgart 'Solemn Declaration on European Union' (Stuttgart, 1983), reproduced in A. G. Harryvan and J. van der Harst (eds.), *Documents on European Union* (Basingstoke: MacMillan, 1997), 214, the European Council committed to seeking the opinion of the European Parliament '[i]n addition to the consultations provided for in the Treaties' for 'the conclusions of other significant international agreements by the Community' (Point 2.3.7.).

[125] The consent or 'assent' of the European Parliament was only introduced for 'association agreements'. The (reformed) ex-Art. 238 EEC now stated: 'These agreements shall be concluded by the Council, acting unanimously and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members.' Parliament used this power for the first time with regard to the Israel Association Agreement (see R. Corbett, F. Jacobs and M. Shackleton, *The European Parliament* (London: Harper, 2007), 235–6).

[126] With the Maastricht amendments, ex-Art. 228 EC required parliamentary consent for 'agreements referred to in [ex-]Article 238 [EC], other agreements establishing a specific institutional framework by organizing cooperation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment for an act adopted under the procedure referred to in [ex-]Article 289b [EC]'. For an analysis of the Maastricht changes, see Bono, 'The International Powers of the European Parliament, the Democratic Deficit and the Treaty on European Union', n. 121 above.

[127] Art. 218(2) TFEU.

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of Union agreements. Despite these primary roles, Article 218 TFEU still requires the participation of constitutional actors other than the Council in various procedural stages. The provision thereby distinguishes between the initiation and negotiation of the agreement, and its signing and conclusion. The Union executive dominates the first stage; the second stage involves the European legislature. But which part of the Union executive will negotiate; and which part of the Union legislature concludes an international agreement? Unlike the pragmatic solution offered by the United States Constitution, the identity of the Union institutions involved categorically depends on the subject matter of the international agreement. And the principal distinction here is whether the content of the agreement falls into one of the Union's special policies or whether it constitutes a general instrument of its CFSP.[128]

(aa) Proposal and negotiation phase

Who may propose and who may negotiate Union agreements? Under Article 218(3) TFEU, the Commission holds the exclusive right to make recommendations for agreements, except 'where the agreement envisaged relates exclusively or principally to the common foreign and security policy'. In the latter case, the right of recommendation belongs to the High Representative for Foreign Affairs and Security Policy.[129]

On the recommendation, the Council may decide to open negotiations; and where it decides to do so, it must nominate the Union negotiator 'depending on the subject matter of the agreement envisaged'.[130] This formulation is ambivalent. Textually, the phrase suggests a liberal meaning. The Council can – but need not – appoint the Commission as Union negotiator for an agreement. According to this reading the Commission would never enjoy a prerogative to be the Union's negotiator. A systematic reading of the phrase, however, leads to a different meaning. For if read in the light of the jurisdictional division between

[128] For an analysis of the distinction, see Ch. 9, section 1(d) above.

[129] The office is defined in Arts. 18 and 27 TEU. The High Representative for Foreign Affairs and Security Policy (HRFASP) shall ensure the implementation of the decisions adopted by the European Council and the Council and make (mandated) proposals to the development of that policy. The HRFASP will represent the EU for CFSP matters and conduct the political dialogue with third parties, and shall express the EU's position in international organisations. He or she has the task of ensuring the consistency of the EU's external action. In the pursuit of this task, the HRFASP will not only preside over the (new) Foreign Affairs Council; he or she will also be the Commissioner for 'external relations and for co-ordinating other aspects of the Union's external action': Art. 18(4) TEU.

[130] Art. 218(3) TFEU.

the Commission and the High Representative at the recommendation stage, the Commission could be constitutionally entitled to be the Union negotiator for all Union agreements that 'exclusively or principally' fall into the Treaty on the Functioning of the European Union. This teleological reduction should indeed be applied to Article 218(3).[131] But even if the Council has to appoint the Commission as negotiator, it will be able to address directives to it and may subject its powers to consultation with a special committee. These general rules are nonetheless subject to slight modifications in two special contexts.[132]

Where is the European Parliament? Parliament is not formally allowed to propose a new Union treaty, nor is it directly involved in the negotiation.[133] However, Article 218(10) TFEU has constitutionalised its right to be fully informed during *all stages* of the procedure. This constitutional prerogative has been given concrete content through an inter-institutional agreement between Commission and Parliament.[134] According to the latter, Parliament should be 'immediately and fully informed at all stages of the negotiations and conclusion of international agreements, *including the definition of negotiating directives*'.[135] The information must thereby be given 'in sufficient time' for Parliament to 'express

[131] In this sense: P. Eeckhout, *EU External Relations Law* (Oxford University Press, 2011), 196; and now also M. Gatti and P. Manzini, 'External Representation of the European Union in the Conclusion of International Agreements' [2012] 49 *CML Rev* 1703, esp. 1708.

[132] Art. 218 TFEU is qualified by two special procedures for the conclusion of international agreements. They are set out in Arts. 207 and 219 TFEU, and concern – respectively – trade agreements and monetary agreements. Art. 207 TFEU deals with trade agreements within the context of the Union's Common Commercial Policy. The special rules within Art. 207 TFEU principally concern the enhanced powers of the Commission and the special voting rules in the Council. With regard to the former, Art. 207(3) TFEU grants the Commission the exclusive right to initiate and to conduct all negotiations but automatically – and thus compulsorily – subjects it to the control powers of the Trade Policy Committee: 'The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.' An express derogation from the general procedure is also made in Art. 219 TFEU for 'formal agreements on an exchange-rate system for the euro in relation to the currencies of third states'. The Council here acts, on a recommendation from the Commission or the European Central Bank (ECB), unanimously after consulting the European Parliament in accordance with the specific arrangements (to be decided under Art. 219(3) TFEU).

[133] See Framework Agreement on Relations between the European Parliament and the European Commission (2010) OJ L 304/47, para. 25 – third indent: 'Members of the European Parliament may not participate directly in these negotiations.' However, the Agreement continues: '[s]ubject to the legal, technical and diplomatic possibilities, they may be granted observer status by the Commission'.

[134] *Ibid.* [135] *Ibid.*, para. 23 (emphasis added).

its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account'.[136] In line with past constitutional practice,[137] Parliament may thus hold a debate before or during the negotiations,[138] and it may adopt (non-binding) recommendations to the negotiator.[139] These parliamentary powers are soft powers, yet the Union negotiator should take them seriously – lest it bangs its head against the hard(er) parliamentary powers at the conclusion stage.[140]

(bb) Conclusion and Parliament: consultation or consent?

The Council concludes the agreement on behalf of the Union on a proposal by the negotiator.[141] But prior to that conclusion, the European Parliament might have to be involved. The rules on parliamentary participation in the conclusion of Union treaties are set out in Article 218(6) TFEU. The provision states:

[136] *Ibid.*, para. 24.

[137] On the Luns and Westerterp procedures, see nn.122 and 123 above.

[138] Parliament has claimed the (informal) right to recommend the non-authorisation of negotiations by the Council, see Rule 90(2) of its (internal) Rules of Procedure: 'Parliament may, on a proposal from the committee responsible, a political group or at least 40 Members, ask the Council not to authorise the opening of negotiations until Parliament has stated its position on the proposed negotiating mandate on the basis of a report from the committee responsible.'

[139] Rule 90(4) of Parliament's Rules of Procedure states: 'At any stage of the negotiations Parliament may, on the basis of a report from the committee responsible, and after considering any relevant proposal tabled pursuant to Rule 121, adopt recommendations and require them to be taken into account before the conclusion of the international agreement under consideration.'

[140] On the necessity of an 'anticipation strategy' adopted by the Commission and the Council, see S. Di Paola, 'International Treaty-making in the EU: What Role for the European Parliament' (2003) *The International Spectator* 75, 76: 'the real importance of the right of refusal is not revealed in the actual act of assent but in the period leading up to it'. The author explores this claim through an analysis of the Union negotiations with regard to the customs union with Turkey (*ibid.*, 82–4), where Parliament 'forced' Turkey to adopt a 'package for democracy' after having adopted a resolution expressing its view that the customs union was premature. For a more recent example of these anticipation dynamics, consider the protracted negotiations of the US–EU on 'Passenger Name Record' (PNR), see European Parliament Resolution of 5 May 2010 on the launch of negotiations for PNR agreements with the United States, Australia and Canada (2011) OJ C 81E/70), esp. para. 9.

[141] Art. 218(5) and (6) TFEU. On the prerogative of the negotiator to make the proposal, see I. Macleod, I. D. Hendry and S. Hyatt, *The External Relations of the European Communities* (Oxford: Clarendon Press, 1998), 96: 'No matter how desirable the Council finds the outcome of negotiations opened under Article [218 TFEU], it cannot conclude any agreement until the Commission [or the High Representative] has made a proposal to that effect.'

> Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:
>
> (a) after obtaining the consent of the European Parliament in the following cases:
> (i) association agreements;
> (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
> (iii) agreements establishing a specific institutional framework by organising cooperation procedures;
> (iv) agreements with important budgetary implications for the Union;
> (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.
>
> The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.
>
> (b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

The European Parliament will thus always be actively involved in the conclusion of Union agreements – except where the agreement *exclusively* relates to the CFSP.[142] Article 218(6) thereby distinguishes between two forms of parliamentary participation: consent and consultation. The latter constitutes the residual category and applies to all agreements that do not require consent.

What are the respective procedural rules applying to parliamentary consent and consultation? The former requires Parliament to formally consent to the negotiated international treaty. Consent is here less than co-conclusion, as Parliament will be forced to 'take-or-leave' the negotiated treaty. Its internal rules therefore determine that Parliament must express consent 'in a single vote by a majority of the votes cast', and '*[n]o amendments to the text of the agreement or protocol shall be admissible*'.[143] The lack of formal amendment powers is regrettable but the veto power

[142] When compared to the Commission's involvement at the proposal state (see Art. 218(3) TFEU: agreements relating 'exclusively *or principally*' to the CFSP), the TFEU is here more generous for it expands parliamentary involvement to agreements that even principally relate to CFSP matters.

[143] Rule 90(7) of the Parliament's Rules of Procedure (emphasis added).

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to 'leave' an agreement has proven to be (relatively) strong in the past.[144] By contrast, the parliamentary rights under the consultation procedure are much weaker. For while the Court has recognised that consultation is 'an essential factor in the institutional balance intended by the Treaty',[145] consultation is still a mere 'formality',[146] for the formal obligation to consult will not mean that the Council must take into account the substantive views of Parliament.[147]

What classes of international treaties require parliamentary consent under Article 218(6)(a)? The types of international agreements are enumerated in the form of five situations. The first, second and third category may be explained by the constitutional idea of 'political treaties',[148] for association agreements as well as institutional agreements – including the European Convention on Human Rights – will, by definition, express an important *political* choice with long-term consequences. For these fundamental political choices Parliament – the representative of the European citizens – must give its democratic consent. The fourth category

[144] The European Parliament used its negative veto for the first time in March 1988, when it rejected three Protocols relating to the Community–Israel Association Agreement, n. 125 above. It equally rejected the first US–EU Swift Agreement on 11 February 2010 (see European Parliament legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, OJ (2010) C 341E/100). For many academic commentators, '[t]he rejection of the so-called [SWIFT] Interim Agreement can be considered as one of the so far not so many historic votes of the Parliament on an EU external relations issue – with significant implication for EU external relations': J. Monar, 'The Rejection of the EU–US SWIFT Interim Agreement by the European Parliament: A Historic Vote and its Implications' (2010) 15 *EFAR*, 143. An amended version of the SWIFT agreement was subsequently approved – after Parliament's concerns had been addressed (see OJ (2010) L 195/5). But since then, Parliament has also rejected the Anti-counterfeiting Trade Agreement (ACTA) on 4 July 2012.

[145] Case 138/79, *Roquette Frères* v. *Council (Isoglucose)* [1980] 3333, para. 33.

[146] The 'formality' still requires that the Council must wait until Parliament has provided its opinion (*ibid.*): 'In that respect it is pertinent to point out that observance of that requirement implied that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council's simply asking for the opinion.' On this point, see also Case C-65/93, *Parliament* v. *Council* [1995] ECR I-643. However, the latter case also established implied limitations on Parliament's prerogative (*ibid.*, paras. 27–8).

[147] This was confirmed in Case C-417/93, *Parliament* v. *Council* [1995] ECR I-1185, esp. paras. 10–11.

[148] R. Jennings and S. Watts (eds.), *Oppenheim's International Law* (Oxford University Press, 2008), 211.

represents a constitutional reflex that protects the special role the European Parliament enjoys in shaping the Union budget.[149] Article 218(6)(a)(v) finally expands parliamentary consent to all agreements within policy areas that internally require parliamentary consent or co-decision. And with this fifth category, parliamentary consent has become the constitutional rule.[150]

This fifth category of Union treaties represents the (small) 'democratic revolution' brought about by the Lisbon Treaty. For despite the gradual expansion of the consent requirement after the Single European Act, the pre-Lisbon Treaty power had linked parliamentary consent to an international agreement *amending* internal Union legislation adopted under *co-decision*.[151] Article 218(6)(a)(v) removes this dual limitation. First, the provision disconnects parliamentary consent from the requirement that pre-existing internal legislation is being affected and, secondly, it establishes a procedural parallelism between external and internal consent. Nonetheless, the parallelism between the internal and external sphere is not complete. Parliament does *not* enjoy the power of co-conclusion in areas in which the co-decision procedure applies. Its active power of co-decision for internal legislation is reduced to a passive power of 'consent' for external legislation.

(b) In particular: CFSP agreements and the European Parliament

The conclusion of CFSP agreements did originally follow its own 'specific' procedure.[152] Formally, this changed with the 2007 Lisbon reforms according to which CFSP agreements are now also concluded under the general procedure set out in Article 218 TFEU. Substantially, however, the

[149] For an extensive discussion of this category, see Case C-189/97, *Parliament* v. *Council (Mauritania Fisheries Agreement)* [1999] ECR I-4741.

[150] On the rise of the European Parliament's internal powers, see R. Schütze, *European Constitutional Law* (Cambridge University Press, 2012), ch. 5, section 3.

[151] For the text of ex-Art. 228 EC, see n. 120 above.

[152] Ex-Art. 24 TEU (old) stated: 'When it is necessary to conclude an agreement with one or more States or international organisations in implementing this [CFSP] title, the Council may authorize the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.' For an analysis of the Art. 24 TEU-procedure, see S. Marquardt, 'The Conclusion of International Agreements under Article 24 of the Treaty on European Union' in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague: Asser Press, 2001) 333; and A. Sari, 'The Conclusion of International Agreements by the European Union in the Context of the ESDP' (2008) 57 *ICLQ* 53.

conclusion of CFSP agreements has remained 'special'.[153] The specificity of the CFSP finds a particular expression in the lack of parliamentary participation, for, as we saw above, Article 218(6) TFEU expressly excludes Parliament from the conclusion of all CFSP agreements.[154]

Are there alternative constitutional routes to ensure a degree of parliamentary oversight and control within the CFSP? We find a general requirement for parliamentary *consultation* for CFSP matters in Article 36 TEU. The provision states:

> The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the *main* aspects and the *basic* choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are *duly taken into consideration*. Special representatives may be involved in briefing the European Parliament. The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy. [Emphasis added]

The article stipulates parliamentary consultation for the 'main' aspects and the 'basic' choices of the Union's foreign and security policy – a constitutional rule that excludes Parliament from shedding light on the devils in the details. This inability to be consulted on *individual* foreign policy measures also erodes the obligation on the High Representative to ensure that the positions of Parliament are 'duly taken into consideration'. The right of 'consultation' in Article 36 TEU thus boils down to a right of 'information'; and until 2006, it was not even clear whether this was a right to be informed *in advance*.[155] In the absence of real oversight rights,

[153] Art. 24(1) TEU – second indent: 'The common foreign and security policy is subject to specific rules and procedures.'

[154] Eeckhout, *EU External Relations Law*, n. 131 above, 211: 'The Parliament also continues to be excluded from participation in the negotiation and conclusion of agreements on CFSP matters. This is clearly untenable. The EU is developing its defence capacity, it is setting up military operations, it is concluding international agreements regarding such operations, and no parliamentary organ is formally involved in the process.'

[155] On this point, see D. Thym, 'Parliamentary Involvement in European International Relations' in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart, 2008), 201, 221. The author points to the 2006 Interinstitutional Agreement on the Financial Perspective (2006) OJ C139/1, as a turning point, whose para. 43 states: 'Each year, the Council Presidency will consult the European Parliament on a forward-looking Council document, which will be transmitted by 15 June for the year in question, setting out the main aspects and basic choices of the CFSP, including the financial implications for the general budget of the European Union

it is hardly surprising that Parliament also lacks direct control rights over CFSP agreements. The only indirect control it might exert is through the – blunt – medium of budgetary control,[156] for expenditure arising under the CFSP will generally be charged to the Union budget,[157] and this has given the European Parliament some control over the basic foreign affairs choices of the European Union.[158] Nonetheless, the lack of direct oversight and control by Parliament represents a major democratic deficit when compared to other areas of Union law.

May this democratic deficit at the Union level be compensated by national parliamentary democracy? This democratic legitimation of CFSP agreements could follow from two 'special' constitutional characteristics of this area. First, Council voting within the CFSP will – as a rule – be by unanimity;[159] that is, all Member State governments within the Union must consent to the conclusion of a Union agreement. The fact that each national government can veto the conclusion confers some – albeit indirect and remote – democratic legitimacy onto the CFSP agreement.[160] Yet there is a second, more direct, route to democratic

and an evaluation of the measures launched in the year n-1. Furthermore, the Council Presidency will keep the European Parliament informed by holding joint consultation meetings at least five times a year, in the framework of the regular political dialogue on the CFSP, to be agreed at the latest at the conciliation meeting to be held before the Council's second reading.'

156 On this point, in the American context, see L. Fisher, 'How Tightly Can Congress Draw the Purse Strings?' (1989) 82 *AJIL* 758.

157 Art. 41 TEU. The provision, however, expressly exempts 'such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise'.

158 In the past, even the drastic and blunt instrument of 'democratic blackmail' has not always found open ears. Faced with a 'choice' to be blackmailed and to look for alternative finances, the Council has sometimes preferred the second option. On the idea of 'democratic blackmail' and its limits, see the excellent analysis by D. Thym, 'Beyond Parliament's Reach? The Role of the European Parliament in the CFSP' [2006] 11 *EFAR* 109, esp. 113 *et seq*.

159 The Council voting rules are set out in Art. 31 TEU. The general rule is that the Council acts unanimously. There are, however, a number of exceptional situations in which qualified majority voting applies (see Art. 31(2) TEU); yet, the provision also envisages two absolute limits to decisional supranationalism. The first is of a political nature, the second of a constitutional nature. The political limit incorporates the Luxembourg Compromise into the CFSP: any Member State may 'for vital and stated reasons of national policy' declare that it opposes a decision to be taken by qualified majority voting (see Art. 31(2)). By contrast, the second limit is of a constitutional nature: any qualified majority voting can never apply to decisions having military or defence implication (see Art. 31(5) TEU).

160 This depends, of course, on the powers of national parliaments to oversee and control their national governments. For a discussion of this point, see G. de Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008), 167–9.

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legitimacy. For CFSP agreements will, as a rule, not be directly effective and will therefore not be equivalent to a 'legislative act'.[161] In order to because a source of rights and obligations for European citizens, CFSP agreements will thus generally need to be implemented through European or national legislation. And this 'domestic' implementation should involve (national) parliamentary control and consent.

(c) Executive agreements: inherent and delegated treaty powers

(aa) Commission agreements

Does Article 218 TFEU constitute the Union's *exclusive* procedure for the conclusion of Union treaties? Or, has the European Union – like the United States – devised alternative procedures for the making of international agreements? With the European Parliament (now) generally involved in the conclusion of Union agreements, European constitutionalism has here concentrated on the question of whether there exists a procedure for sole executive agreements and, in particular, Commission agreements. Will the European Commission – the Union's supranational executive – enjoy inherent powers to conclude administrative agreements with third states and international organisations? And can the Council delegate treaty powers to the Commission? These important questions have hardly received any attention from European scholars in the past.[162]

The European Treaties (and their Protocols) provide ambivalent signals as to the Commission's treaty powers. The Treaties do contain a small number of provisions that expressly equip the Commission with the power to conclude international agreements on its own authority. For example, Article 220 TFEU (partly) charges the Commission with establishing and maintaining relations with international organisations,[163] and this

[161] According to Art. 24(1) TEU – second indent, '[t]he adoption of legislative acts shall be excluded' within the CFSP. This enigmatic phrase might mean that CFSP agreements may never have general and direct effects.

[162] The general absence of academic attention by European scholars may be gauged by the number of pages dedicated to the problem in the two traditional English-language textbooks on EU external relations. Eeckhout's *EU External Relations Law*, n. 131 above, dedicates 2/548 pages, while Panos Koutrakos' *EU International Relation Law* (Oxford: Hart, 2006) reserves 3/506 pages to this constitutional problem; and neither textbook analyses the question of delegated Commission powers. For a first and ground-breaking analysis, see E. Baroncini, *Il Treaty Making Power della Commissione Europa* (Bologna: Libreria Bonomo, 2008).

[163] Art. 220 TFEU reads: '1. The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe,

competence is said to entail the power to conclude executive agreements.[164] Moreover, Union primary law expressly provides that '[t]he Commission may conclude agreements for . . . *laissez-passer* to be recognised as valid travel documents within the territory of third countries';[165] and, in the past, the Treaties implicitly recognised the Commission's power to conclude 'headquarter agreements' for Commission delegations in third states.[166]

However, has the European legal order also followed American constitutionalism and confirmed the implied existence of parallel external powers of the Union executive? A strong textual recognition of such implied powers was located in the *pre*-Lisbon formulation of the Union's treaty power. Dealing with the signing and conclusion of an international agreement, ex-Article 300(2) EC conferred this power on the Council, yet expressly qualified this conferral as being '[s]ubject to the powers vested in the Commission in this field'. What did this enigmatic phrase mean?[167]

the Organization for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The Union shall also maintain such relations as are appropriate with other international organisations. 2. The High Representative of the Union for Foreign Affairs and Security Policy and the Commission shall implement this Article.' For an extensive analysis of this provision, see Baroncini, *Il Treaty Making Power della Commissione*, n. 162 above, ch. 1.

164 On this point, see J. Kokott, 'Artikel 220' in R. Streinz (ed.), *EUV/AEUV Kommentar* (Munich: Beck, 2012), 2094: 'Eine Zuständigkeit der Kommission und des Hohen Vertreters zum Eingehen von Verpflichtungen auf der Grundlage des Art. 220 AEUV dürfte zu bejahen sein[.]' For illustrations of these administrative agreements, see Exchange of Letters between the European Communities and the International Labour Organization (1990) OJ C 24/06; and Exchange of Letters between the World Health Organization and the Commission of the European Communities concerning the consolidation and intensification of cooperation (2001) OJ C 1/7.

165 Art. 6 of Protocol (No. 7) 'On the Privileges and Immunities of the European Union'.

166 On this point, see I. Macleod, I. D. Hendry and S. Hyatt, *The External Relations of the European Communities* (Oxford: Clarendon Press, 1996), 215–17, as well as Baroncini, *Il Treaty Making Power della Commissione*, n. 162 above, ch. 3. With the Lisbon Treaty, *Commission* Delegations have been transformed into *Union* Delegations (see Art. 221 TFEU), with the latter being placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy (see Art. 221(2) TFEU). And it is now for the HRFASP to conclude the necessary arrangements with the host country, see Art. 5(6) of the Council Decision 2010/427 establishing the Organisation and Functioning of the European External Action Service (2010) OJ L 201/30: 'The High Representative shall enter into the necessary arrangements with the host country, the international organisation, or the third country concerned. In particular, the High Representative shall take the necessary measures to ensure that host States grant the Union delegations, their staff and their property, privileges and immunities equivalent to those referred to in the Vienna Convention on Diplomatic Relations of 18 April 1961.'

167 Eeckhout, *EU External Relations Law*, n. 131 above, 205.

Some have seen it as a textual confirmation of a general power of the Commission to conclude sole executive agreements.[168]

This very question came before the European Court of Justice in *France* v. *Commission*.[169] France had brought annulment proceedings against an international agreement concluded by the Commission with the United States. The purpose of the agreement was to promote cooperation in the field of competition law.[170] The French government claimed that the Commission was not competent to conclude this agreement as this power was not expressly conferred onto the Commission, and was consequently reserved to the Council.[171] The Commission counterclaimed that it could generally 'negotiate and conclude agreements or contracts whose implementation does not require action by the Council'.[172] And since this was the case in the field of competition law,[173] the cooperation agreement fell within the scope of its executive powers.

The Court roundly rejected this argument:

> Even if the Commission has the power, internally, to take individual decisions applying the rules of competition, a field covered by the Agreement, *that internal power is not such as to alter the allocation of powers between the [Union] institutions with regard to the conclusion of international agreements*, which is determine by Article [218] of the Treaty.[174]

The Court here refused to derive external powers to conclude administrative agreements from the internal executive powers of the Commission. Unlike American constitutionalism, the European legal order would thus *not* adopt the idea of parallel external powers belonging to the executive by reason of its (internal) administrative powers. Unless executive agreements were expressly provided for in the European Treaties, the

[168] C. Tomuschat, 'Artikel 228' in H. von der Groeben, J. Thiesing and C.-D. Ehlermann (eds.), *Kommentar zum EWG-Vertrag* (Baden-Baden: Nomos, 1991), 5660: 'In Absatz 1 Satz 2 wird mit den Worten "vorbehaltlich der Zuständigkeiten, welche die Kommission auf diesem Gebiet besitz", angedeutet, daß der Regeltypus des Vertragsschlußverfahrens nicht für Abkommen gelten soll, welche die Kommission aus eigener Machtvollkommenheit abschließen darf. Solche Verwaltungsabkommen können beispielsweise die Details der Zusammenarbeit mit den in Artikel 229 genannten Internationalen Organisationen regeln.'

[169] Case C-327/91, *France* v. *Commission* [1994] ECR I-3641. For an extensive analysis of the case, see C. Kaddous, 'L'arrêt France c. Commission de 1994 (accord concurrence) et le contrôle de la "légalité" des accords externes en vertu de l'art. 173 CE' (1996) 32 *Cahiers de Droit Européen* 613.

[170] *France* v. *Commission*, n. 169 above, para. 6. [171] *Ibid.*, para. 20.

[172] *Ibid.*, para. 31. [173] *Ibid.*, para. 40. [174] *Ibid.*, para. 41 (emphasis added).

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Commission would not be entitled to conclude binding Union agreements on its own.[175]

Can the Union nonetheless delegate international treaty powers to the Commission? While constitutionally possible,[176] the Union seems to have made little use of this in its constitutional practice. We can however find some illustrations of such delegations both in Union secondary law and international agreements. With regard to the first, the Commission has for example been empowered to conclude 'financing agreement[s]' with beneficiary countries under its Financial Regulation;[177] and it has been entitled (with France) to renegotiate and conclude, on behalf of the European Union, a Monetary Agreement with the Principality of Monaco.[178] With regard to the second scenario – a delegation on the basis of an international agreement[179] – we find a good illustration in

[175] For non-binding arrangements concluded by the Commission, see Case C-233/02, *France* v. *Commission* [2004] ECR I-2759, esp. para. 45: 'It follows that the Guidelines do not constitute a binding agreement and therefore do not fall within the scope of Article [218 TFEU].'

[176] That a delegation of international powers must be possible cannot be doubted. However, with the Lisbon Treaty, the basis for such a delegation has become harder to locate. The Treaty on the Functioning of the European Union deals expressly with delegations to the Commission in Arts. 290/291 TFEU. However, the former appears to be confined to delegations of 'legislative power' in relation to amendments of a legislative act (see Art. 290(1) TFEU: 'A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.'); whereas the latter concerns the conferral of executive power. Functionally, then, the delegation of 'international' powers falls in between, and it seems that the constitutional basis for such delegations will have to be found elsewhere.

[177] Art. 166(1) of Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (2002) OJ L 248/1.

[178] Art. 4 of Council Decision 2011/190 on the arrangements for the renegotiation of the Monetary Agreement between the Government of the French Republic, on behalf of the European Community, and the Government of His Serene Highness the Prince of Monaco states: 'France and the Commission shall be entitled to conclude the renegotiated Agreement on behalf of the Union, unless the EFC or the ECB is of the opinion that the renegotiated Agreement should be submitted to the Council.' This has recently happened with the Monetary Agreement between the European Union and the Principality of Monaco (2012) OJ C 310/01.

[179] The European Treaties expressly recognise one form of such treaty power delegation in Art. 218(7) TFEU, according to which the Council may 'authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure'. For an illustration of this technique, see Council Decision 2006/871/EC on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (2006) OJ L 345/24, Art. 3(1): 'As regards matters falling within [Union] competence, the Commission is hereby authorised to approve, on behalf of the Community, amendments to the

the international agreement for scientific and technological cooperation between the European Union and the United States of America.[180] For Article 6(a) of the Agreement grants the following implementing power: 'The coordination and facilitation of cooperative activities under this Agreement shall be accomplished on behalf of the Government of the United States of America by the Department of State and on behalf of the [Union] by the European Commission, acting as Executive Agents.' This power has recently been used to adopt 'implementing arrangements'.[181]

All delegations of treaty power to the Commission must however concern technical and non-political questions. This absolute limitation follows from the constitutional frame given to the 'delegation doctrine' in the Union legal order.[182] Delegations to the Commission can only concern 'non-essential' elements.[183] The basic foreign affairs choices must thus be made by international agreements concluded under Article 218 TFEU.

(bb) Executive agreements by other Union institutions and bodies

Apart from the Commission, a number of other Union institutions and bodies have been said to enjoy inherent or delegated international powers: first and foremost, the European Central Bank (ECB).[184] The argument

Annexes to the Agreement adopted in accordance with Article X(5) of the Agreement.' For an extensive discussion of Art. 218(7) TFEU and its international law praxis, see Baroncini, *Il Treaty Making Power della Commissione*, n. 162 above, ch. 4.

[180] See (1998) OJ L 284/37. The Agreement has been extended and amended several times in the past.

[181] This power has been used in the past, see e.g. 'Implementing Arrangement' between the European Commission and the Government of the United States of America for cooperative activities in the field of homeland/civil security research (2010) OJ L 125/54.

[182] For an overview of this doctrine, see R. Schütze, 'Constitutional Limits to Delegated Powers' in A. Antoniadis, R. Schütze and E. Spaventa (eds.), *European Union and Global Emergencies: A Law and Policy Analysis* (Oxford: Hart, 2011), 49.

[183] See in particular Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v. *Köster and Berodt & Co.* [1979] ECR 1161.

[184] For the academic literature here, see B. Martenczuk, 'Die Außenvertretung der Europäischen Gemeinschaft auf dem Gebiet der Währungspolitik' (1999) 59 *ZaöRV* 93; C. Zilioli and M. Selmayr, 'The External Relatations of the Euro Area: Legal Aspects' (1999) 36 *CML Rev* 273, as well as 'Recent Developments in the Law of the European Central Bank' (2006) 25 *YEL* 1; C. Hermann, 'Monetary Sovereignty over the Euro and External Relations of the Euro Area: Competences, Procedures and Practice' (2002) 7 *EFAR* 1; and J. V. Louis, 'Les Relations extérieures de l'union èconomique et monétaire' in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer, 2002) 77.

has been made that 'the ECB is the natural bearer of external competences in the field of monetary policy, including external representation and the conclusion of agreements in areas paralleling the ECB's internal competence'.[185] Yet serious doubts must be in order,[186] and the better view indeed denies such parallel external powers.[187] There nonetheless exist a number of – specific and limited – express competences that grant the ECB international treaty powers.[188] Yet these external competences will only allow it to conclude administrative agreements on technical and 'non-political' issues. And similar rules seem to apply, *mutatis mutandis*, to the European Investment Bank.[189]

Has the Union delegated treaty powers to bodies other than the Commission? The Union has indeed made use of this constitutional option and delegated some of its international powers to European Agencies.[190] An illustration of this may be found in the context of Europol.[191] Its founding document contains the following provision:

[185] Zilioli and Selmayr, 'The External Relatations of the Euro Area', n. 184 above, 292.

[186] R. Torrent, 'Whom is the European Central Bank the Central Bank of? Reactions to Zilioli and Selmayr' (1999) 36 *CML Rev* 1229; and Case C-11/00, *Commission* v. *European Central Bank* [2003] ECR I-7147.

[187] Hermann, 'Monetary Sovereignty over the Euro and External Relations of the Euro Area', n. 184 above, 2.

[188] We may find such entitlements in the Statute of the European Central Bank, especially its Arts. 6 and 23. The former in particular grants it the power 'to participate in international monetary institutions' (Art. 6.2). And Art. 23 of the Statute also allows the ECB to 'establish relations with central banks and financial institutions in other countries and, where appropriate, with international organisations'. These powers appear analogous to the Commission power under Art. 220 TFEU.

[189] The Statute of the European Investment Bank (Protocol No. 5) provides in Art. 14: '(1) The Bank shall cooperate with all international organisations active in fields similar to its own. (2) The Bank shall seek to establish all appropriate contacts in the interests of cooperation with banking and financial institutions in the countries to which its operations extend.'

[190] For a brief introduction to European Agencies, see Schütze, *European Constitutional Law*, n. 150 above, 125–8.

[191] The legal history of Europol – the European Police Office – has been complex. It was originally founded on an international agreement concluded between the Member States; but since 1 January 2010, it is an 'official' European Agency (see Council Decision 2009/371 establishing the European Police Office (Europol) (2009) OJ L 121/35). Art. 55(1) of the Europol Decision thereby regulates the succession of old Europol agreements: 'This Decision shall not affect the legal force of agreements concluded by Europol as established by the Europol Convention before the date of application of this Decision.' For an analysis of the external cooperations of Europol, see C. Rijken, 'Legal and Technical Aspects of Co-operation between Europol, Third States, and Interpol' in V. Kronenberger (ed.), *The European Union and the International Legal Order* (The Hague: TMC Asser, 2001), 577.

> Article 23: Relations with third States and Organisations
> 1. In so far as it is necessary for the performance of its tasks, Europol may also establish and maintain cooperative relations with:
> a. third States;
> b. organisations such as:
> (i) international organisations and their subordinate bodies governed by public law;
> (ii) other bodies governed by public law which are set up by, or on the basis of, an agreement between two or more States; and
> (iii) the International Criminal Police Organisation (Interpol).
> 2. Europol shall conclude agreements with the entities referred to in paragraph 1. Such agreements may concern the *exchange of operational, strategic or technical information*, including personal data and classified information, if transmitted via a designated contact point identified by the agreement referred to in paragraph 6(b) of this Article. *Such agreements may be concluded only after the approval by the Council*, which shall previously have consulted the Management Board and, as far as it concerns the exchange of personal data, obtained the opinion of the Joint Supervisory Body via the Management Board. [Emphasis added.]

The article clarifies that Europol is entitled, under EU law, to conclude international agreements with third states or specified international organisations.[192] Yet Article 23(2) of its founding document limits this treaty power in two ways. First, the subject matter of these international agreements is strictly confined to the exchange of information and, secondly, prior to the conclusion of any exchange agreement by Europol, the latter must have obtained the consent of the Council – that is, the Member States. This political safeguard of federalism can also be found in the external relations regimes of other European Agencies, such as the European Defence Agency.[193] For yet other Agencies, it is the Commission that is charged with the political control of any international

[192] For a list of operational or strategic agreements with non-EU states and international organisations, see www.europol.europa.eu/content/page/international-relations-31.

[193] See Council Decision 2011/411 defining the statute, seat and operational rules of the European Defence Agency (2011) OJ L 183/16, whose Art. 24(1) on 'Administrative arrangements and other matters' states: 'For the purpose of fulfilling its mission, the Agency may enter into administrative arrangements with third countries, organisations and entities. Such arrangements shall notably cover: (a) the principle of a relationship between the Agency and the third party; (b) provisions for consultation on subjects related to the Agency's work; (c) security matters. In so doing, the Agency shall respect the single institutional framework and the decision-making autonomy of the EU. Each such arrangement shall be concluded by the Steering Board upon approval by the Council acting by unanimity.'

administrative cooperation. This seems to be the case for the Union's Fundamental Rights Agency,[194] as well as Frontex – the Union's external border agency.[195]

(d) Excursus: terminating (and suspending) treaties or agreements

What is the role of the European Parliament in the termination and suspension of Union treaties? Surprisingly, Article 218 TFEU does not expressly set out a procedural regime for the termination of Union agreements. It solely deals with the procedural rules governing the suspension of international agreements in Article 218(9) TFEU. The provision specifies that, on a proposal from the Commission or the High Representative,[196] it is for the Council to unilaterally decide on the suspension of the

[194] See Regulation 168/2007 establishing a European Union Agency for Fundamental Rights (2007) OJ L 53/1, whose Art. 8 deals with 'Cooperation with organisations at Member State and international level' and states in paras. 2 and 3: 'To help it carry out its tasks, the Agency shall cooperate with: (a) governmental organisations and public bodies competent in the field of fundamental rights in the Member States, including national human rights institutions; and (b) the Organization for Security and Cooperation in Europe (OSCE), especially the Office for Democratic Institutions and Human Rights (ODIHR), the United Nations and other international organisations. The administrative arrangements for cooperation pursuant to paragraph 2 shall comply with Community law and shall be adopted by the Management Board on the basis of the draft submitted by the Director after the Commission has delivered an opinion. Where the Commission expresses its disagreement with these arrangements the Management Board shall re-examine and adopt them, with amendments where necessary, by a two-thirds majority of all members.'

[195] See Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2004) OJ L 349/1, whose Art. 14 on 'Facilitation of operational cooperation with third countries and cooperation with competence authorities of third countries' states (emphasis added): '1. In matters covered by its activities and to the extent required for the fulfilment of its tasks, the Agency shall facilitate the operational cooperation between Member States and third countries, in the framework of the European Union external relations policy, including with regard to human rights . . . 2. The Agency may cooperate with the authorities of third countries competent in matters covered by this Regulation in the framework of working arrangements concluded with these authorities, in accordance with the relevant provisions of the Treaty. *Those working arrangements shall be purely related to the management of operational cooperation* . . . 8. *The activities referred to in paragraphs 2 and 3 shall be subject to receiving a prior opinion of the Commission, and the European Parliament shall be fully informed as soon as possible.*'

[196] While the provision does not expressly refer to the jurisdictional division between the two actors, as mentioned in Art. 218(3) TFEU for the proposal stage, we should assume that this rule would apply analogously. The High Representative should thus solely by entitled

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agreement. Parliament is not mentioned and will thus only have to be informed of the Council decision.[197] This truncated procedure allows the Union quickly to decide on the (temporary) suspension of an agreement.[198] Yet the 'executive' nature of the decision – devoid of any parliamentary involvement – distorts the institutional balance in the external relations field. The non-participation of Parliament is indeed 'difficult to justify', since '[d]ecisions on suspension are nearly always highly charged political acts'.[199]

In the absence of any express constitutional text, how are Union agreements permanently terminated? Two views have here traditionally competed with each other. According to a first position, the suspension procedure applies analogously to termination situations. This has been justified by reference to the constitutional traditions of the Union's Member States, which leave the termination decision principally in the hands of their executive.[200] However, it is hard to see the analogy between a decision to *temporarily* suspend an agreement and one that *permanently* ends it. A second view has therefore insisted on the idea of *actus contrarius*: the termination of an agreement would need to follow the same procedure that was applied for its adoption[201] – that is, Article 218(6) TFEU applied analogously. The procedural parallelism between conclusion and termination is, at least partly, reflected in the constitutional practice of the Union. For example, the Union has terminated its cooperation agreement with the (then) Socialist Federal Republic of Yugoslavia by means of a Council decision on a proposal from the Commission and with the

to recommend the suspension for international agreements that relate 'exclusively or principally' to the CFSP.

197 Art. 218 (10) TFEU.

198 For the most celebrated suspension 'decision', see Council Regulation 3300/91 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia (1991) OJ L 315/1. The Regulation was famously challenged in Case C-162/96, *Racke GmbH & Co.* v. *Hauptzollamt Mainz* [1998] ECR I-3655.

199 Eeckhout, *EU External Relations Law*, n. 131 above, 210.

200 C. Tomuschat, 'Artikel 300 EG' in H. von der Groeben and J. Schwarze (eds.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 4 vols. (Baden-Baden: Nomos, 2004), IV, para. 61.

201 In favour of this view, see Eeckhout, *EU External Relations Law*, n. 131 above, 209: 'here one would expect the same procedure to apply as that governing the conclusion of the agreement'; and S. Lorenzmeier, 'Artikel 218 TFEU' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim. (eds.), *Das Recht der Europäischen Union – Kommentar* (Munich: Beck, 2011), para. 61: 'eine Vertragskündigung nur mit seiner Zustimmung geschehen kann, wenn die Übereinkunft nur mit seiner Zustimmung geschlossen werden konnte'.

consent of the European Parliament;[202] and it has denounced its fishing agreement with the People's Republic of Angola on a proposal from the Commission and *after consultation of the European Parliament*.[203]

Finally, what about an implied 'repeal' of a Union agreement by means of superseding Union legislation? As we saw above in the American context,[204] this power to 'override' an international treaty by subsequent domestic legislation partly compensates for the absence of Congress from treaty termination. Has this method equally been developed in the European Union, despite the presence of the European Parliament in the treaty termination procedure? The answer must be in the negative. Since its early days, the Union legal order has placed international treaties on a hierarchical rank *above* ordinary Union legislation.[205] The Court indeed regularly confirms 'the *primacy of international agreements* concluded by the [Union] over provisions of secondary [Union law]'.[206] Union agreements will thus 'prevail' over Union legislation – even if the latter is adopted subsequently.

Conclusions (and comparisons)

Classic constitutionalism considered the power to conclude international treaties to fall within the executive's exclusive domain. With the treaty power being seen as an appendix to the war power, the conclusion of (peace) treaties was said to demand secrecy and efficiency – two characteristics that counselled against parliamentary participation. This eighteenth-century logic hardly convinces in the twenty-first century. For,

[202] See Council Decision 91/602 denouncing the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia (1991) OJ L 325/23.

[203] See Council Regulation 1185/2006 denouncing the Agreement between the European Economic Community and the Government of the People's Republic of Angola on fishing off Angola and derogating from Regulation (EC) No. 2792/1999, (2006) OJ L 214/10.

[204] On this point, see section 1(d) above.

[205] Joined Case 21–24/72, *International Fruit Co. NV and others* v. *Produktschap voor Groenten en Fruit* [1972] ECR 1219.

[206] Case C-61/94, *Commission* v. *Germany* [1996] ECR I-3989, para. 52 (emphasis added). This has been subsequently confirmed in Case C-179/97, *Spain* v. *Commission* [1999] ECR I-1251; and Case C-344/04, *International Air Transport Association and European Low Fares Airline Association* v. *Department for Transport* [2006] ECR I-403, para. 35: 'Article [216(2) TFEU] provides that "agreements concluded under the conditions set out in this Article shall be binding on the institutions of the [Union] and on Member States". In accordance with the Court's case-law, those agreements prevail over provisions of secondary [European] legislation[.]'

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with the transition of international law from a law of 'co-existence' to a law of 'cooperation',[207] the function of international treaties has shifted from the military to the regulatory domain. In the wake of this 'new internationalism', the traditional divide between 'internal' and 'external' affairs has increasingly disappeared.

Did the enlarged scope of the treaty power trigger a transformation of its nature? Has the rise of 'regulatory' international treaties been compensated by a greater role accorded to parliaments? It is undoubtedly 'a demand of the principle of popular sovereignty that the foreign affairs of a democratic state should coincide with the will of the people'.[208] Yet it has been 'a remarkable feature in all States that the democratic process with regard to foreign affairs is infinitely slower, and always less complete, than within domestic affairs'.[209]

What are the democratic credentials of the treaty power today? This chapter explored this question comparatively by looking at the constitutional law of the United States and the European Union. Section 1 started by analysing the democratic credentials of the treaty power in the United States. While the plea for parliamentary involvement in foreign affairs was here heeded first, it was – ironically – *not* in relation to the treaty power,[210] for, as we saw above, the US constitutional order originally excluded the House of Representative – the American 'parliament' – from the negotiation and conclusion of all international treaties.[211] According to Article II of the US Constitution, the treaty power belonged to the President and the Senate. For a long time, the exclusion of the House of Representatives was *the* 'undemocratic anachronism' of the US foreign

[207] W. G. Friedman, *The Changing Structure of International Law* (London: Stevens, 1964).

[208] H. Rumpf, 'Demokratie und Außenpolitik' in W. Schütz (ed.), *Aus der Schule der Diplomatie* (Düsseldorf: Econ, 1965), 111 (translation – RS).

[209] *Ibid.*, 115 – referring to J. Barthélemy, *La Gouvernement de la France* (Paris: Payot, 1939), 129: 'C'est un trait remarkable dans tous les pays que le progès démocratique est infiniment plus lent, et toujours moins complet en ce qui concerne la direction de la politique étrangère que pour ce qui touche à la politique interne.'

[210] Congress was to have the power '[t]o declare war', see Art. I, s. 8 of the US Constitution.

[211] Cold shudders will go down the comparativist spine when reading the following statement by R. Bieber (see 'Democratic Control of European Foreign Policy' (1990) 1 *EJIL* 148, 153): 'The example of the combined action of the United States President and Senate shows, nevertheless, that it is perfectly possible for institutional changes to be made in the procedures for shaping foreign policy to enable parliament [!] to participate.' The passage displays, with shocking efficiency, the degree of comparativist ignorance on this side of the Atlantic when it comes to the most basic constitutional structures of the US Constitution!

affairs system.[212] It has been partially remedied by the rise of the (*ex post*) congressional-executive agreement (CEA). From an internal perspective, the CEA fully democratises the treaty power because it is concluded on the basis of the 'ordinary' legislative procedure set out in Article I of the Constitution. However, the scope of the CEA has remained limited, as American constitutionalism insists on the co-existence of Article II treaties.[213] And importantly, the spectacular rise of the presidential agreement in the twentieth century – whether based on inherent or delegated powers – has dramatically undermined parliamentary involvement in the conclusion of international agreements.

Section 2 analysed the democratic credentials of the treaty power in the European Union. We saw here that the Union started out from a position similar to that of Article II of the US Constitution: the conclusion of international treaties was left to the Commission – the Union's supranational executive – and the Council representing the Member States. Yet the European Parliament was, unlike the House of Representatives, never completely excluded from the Union's treaty power. Moreover, with the rise of the European Parliament in the domestic sphere, its minimal involvement in the treaty power became increasingly seen as problematic. Subsequent constitutional amendments have thus regularly increased its powers in the external sphere; and today, the European Parliament must give its consent to the majority of international treaties concluded by the Union.[214] The main exceptions to this rule are agreements concluded under the CFSP title; yet CFSP agreements will generally lack direct effects within the Union legal order and will thus not constitute 'external legislation'.

From a comparative perspective, what is the more democratic constitutional arrangement – the US or the EU solution? This difficult question involves a qualitative and a quantitative dimension. Qualitatively, the procedure under Article II of the US Constitution is undoubtedly less democratic than the procedure under Article 218 TFEU. (The exception here concerns CFSP agreement; yet even there, the direct legitimation brought by the Senate under Article II is arguably smaller then the indirect

[212] Henkin, *Foreign Affairs and the US Constitution*, n. 33 above, 217. But see already, E. Corwin, *The Constitution and World Organization* (Princeton University Press, 1944), 53 – speaking of the 'Senate's prerogative' as an 'anachronism' that 'is completely out of line with the democratic assumptions which have generally come to underlie the functioning Constitution'.

[213] On this point, see section 1(b) above.

[214] On this point, see section 2(a)(bb) above.

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democratic credentials of the Council under Article 218 TFEU;[215] and in the majority of cases, the American President is likely to conclude the American counterpart of 'CFSP agreements' as sole executive agreements.[216]) By contrast, when compared to the Article I procedure for (*ex post*) congressional-executive agreements, the treaty-making procedure under Article 218 TFEU is less democratic than its American counterpart. For while the former gives full parliamentary participation, Article 218 TFEU generally reduces parliamentary involvement to 'take-or-leave' consent.[217] Yet this (stylised) picture changes once we add a quantitative dimension to our comparison. For the European Union requires consent

[215] There are two elements to this point – one relating to the composition, the other to the function of the Senate/Council. First, and in terms of their respective composition, the Council of Ministers seems better to reflect the democratic idea of proportionate representation than the Senate. For even if the senators are (since 1913) directly elected, each state – the biggest as much as the smallest one – will have two senators. The composition of the Senate thus follows the international idea of the 'sovereign equality' of the states, instead of the democratic idea of 'one person, one vote'. By contrast, thanks to its system of weighted votes, the Council has traditionally represented not so much the Member *States* but rather their national *peoples*. Secondly, and in terms of their respective functions, the Council is also more involved in the treaty-making process than the Senate; see E. Stein and L. Henkin, 'Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution' in M. Cappelleti, M. Seccombe and J. H. H. Weiler (eds.), *Integration through Law*, I: *Methods, Tools and Institutions* (Berlin: de Gruyter, 1986), 3, 42: 'In comparison with the American system, the Council performs the Senate's original function of "advice" on on-going negotiations (albeit with a mandatory effect), the Senate's "consent" role, as well as the President's function of "making" the treaty.'

[216] For even if the President is (in)directly elected, this will not provide executive agreements with much democratic legitimacy, see Hathaway, 'Presidential Power over International Law', n. 34 above, 224: 'Even if the electorate were informed about executive agreements, however, a presidential election is an extremely blunt tool for accountability. The voters may disagree with the international lawmaking of a President, but vote for him because they approve of his handling of, say, the economy – an issue on which they hold more intense preferences.'

[217] We find the reduction of parliamentary participation to 'consent', as opposed to co-conclusion, in many a state legal order. For example, the German Parliament has expressly limited its powers to simple consent, see § 82(2) Rules of Procedure of the German Parliament.

Interestingly, the consent requirement for international treaties might give more de facto power to the European Parliament than to its national counterparts. For in the fully parliamentary systems of the Member States, the parliamentary majority will typically support a treaty negotiated by its government – see C. Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen' (1978) 36 *Veröffentlichungen der Vereinigung Deutscher Staatsrechslehrer* 7, 28: 'Dem einmal ausgehandelten Vertrag kann die Mehrheit im parlamentarischen System kaum die Unterstützung verweigern'; and S. Krauß, *Parlamentarisierung der europäischen Außenpolitik* (Wiesbaden: Verlag für

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under Article 218 TFEU in the great majority of cases, while the *ex post* congressional-executive agreement represents a tiny fraction of American treaty practice.[218]

What comparative conclusions can thus be drawn? When judged by their respective 'internal' standards, both the American and the European treaty powers still suffer from a democratic deficit. For the American system, this deficit principally stems from the Article II procedure and the widespread use of sole executive agreements. For the European system, this deficit derives from Parliament's lack of co-conclusion rights for treaties that fall into areas that internally require co-decision.[219] When compared from an external perspective, however, the European Union treaty power appears more democratic than its American counterpart. This results from the – quantitatively – dramatic shift towards executive agreements in US foreign affairs. This shift has been said to 'rest . . . on a mistaken assumption that less democratic international lawmaking is

Sozialwissenschaften, 2000), 40: 'Das tatsächliche Scheitern eines Abkommens im Parlament muß unter den Bedingungen eines funktionsfähigen Mehrheitsparlamentarismus nahezu als singuläres Ereignis erscheinen.' By contrast, in the *semi*-parliamentary system of the European Union, the Union executive (and the Council) will not necessarily have the backing of a parliamentary majority. The point is well made by Di Paola, 'International Treaty-making in the EU', n. 140 above, 78: 'The EP and national parliaments do not differ greatly with regard to formal powers in international treaty-making, in that they both have the right to authorize ratification. Although each national parliament has a slightly different mandate in this policy domain, they all have one fundamental characteristic in common that is not present at the European level: a majority of members are usually reluctant to undermine the executive by rejecting an international agreement. The EU, on the other hand, is characterized by the absence of a majority linked by loyalty to the body, the Council, that approves international agreements. Therefore, the EP does not have any duty of loyalty towards the Council, but at the same time, it does not have any tool of pressure to ensure the respect of parliamentary positions.' In a similar sense, see also Thym, 'Parliamentary Involvement in European International Relations', n. 155 above, 210–1; and Weiler, *The European Parliament and its Foreign Affairs Committees*, n. 118 above, 58: 'Given that the political fate of the members of the Parliament is independent from that of the Commission and the Council, there is no reason to think Parliament as a whole should not be inclined to exercise a tighter control upon the [Union] executive.'

[218] The figures produced by Hathaway are striking. In between 1980 and 2000, the USA concluded 375 Article II treaties, 9 ex-post congressional-executive agreements, and 2,735 executive agreements (see Hathaway, 'Treaties' End', n. 65 above, 1258–60, and Hathaway, 'Presidential Power over International Law', n. 34 above, 150 fn.16).

[219] The absence of parliamentary involvement in setting the negotiating mandate of an international treaty is – from an internal perspective – no democratic deficit. For in the Union's internal sphere, the prerogative to initiate legislation also belongs to the Commission, that is: the Union executive.

more effective international lawmaking'.[220] However, not only may the dichotomy between 'democracy' and 'efficiency' turn out to be a false one;[221] a democratic extra-effort might be the price worth paying to legitimise 'regulatory' treaty-making in the twenty-first century.

[220] Hathaway, 'Presidential Power over International Law', n. 34 above, 147.
[221] *Ibid.*, 230.

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