effects approach to considering what state level interference might exist. This is represented by *Barclay's Bank v Franchise Tax Bd Calif.*[257] A California statute taxing foreign companies doing business in California on the basis of their worldwide operations did not discriminate nor place undue burdens on foreign commerce and created no actual or functional conflict with federal powers. The latter tends to pursue a structural or domain approach (whether or not any actual conflict exists). This is represented by *Zschernig v Miller.*[258] An Oregon statute prohibiting the inheritance of Oregon property by a non-resident alien unless it were shown that the foreign state would not confiscate that property and would grant US citizens reciprocal rights represented too great an intrusion into foreign affairs, requiring an assessment of political and legal qualities of foreign states. While no federal legislation existed on the matter to ground a direct conflict, it did have a direct impact on foreign affairs and may produce adverse effects for the national government. Be that as it may, this complexity and debate in domestic cases on pre-emption passes into those concerning the federal foreign affairs power. Judging from the nature of the debate, it would appear that the since at least the *interbellum* period, the federal level has benefitted from a significant accretion and expansion to its powers domestically where foreign affairs are concerned.[259]

Second, and more briefly, a treaty carries the character of ordinary federal legislation in the national legal system, without any further precedence or "higher normativity". Like other ordinary federal legislation, a treaty may override prior Acts of Congress just as subsequent Acts may override it. This was established early on with the Head Money Cases.[260] Subject to the condition noted above in *Reid v Covert*, that the Constitution governs the nature and scope of treaties entered into by the federal government, the principle has not been doubted or qualified since. Moreover, the courts are not bound to the interpretation advanced by the government. While not deferring to the government's interpretation, they will nonetheless accord it significant weight in appropriate circumstances.[261]

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[257] *Barclay's Bank v Franchise Tax Bd Calif.* 512 US 298 (1994).

[258] *Zschernig v Miller* 389 US 429 (1968). Yet the Court (and Douglas J also writing the decision of the Court) in *Clark v Allen* 331 US 503 (1947) had upheld a similar statute on the absence of any functional conflict. A variation on this may be "field pre-emption" where federal legislation exists providing a complete regulatory scheme; thus a state cannot interfere with or supplement that legislative arrangement: *Hines v Davidovitz* 312 US 52 (1941) and *Crosby v Nat. Foreign Trade Council* 530 US 363 (2000) (Massachusetts law prohibiting trade with Burma invalid because federal legislation on the same matter existed (passed three months subsequent)). See the analysis in Vazquez 2001.

[259] As White 1999 concludes.

[260] *Edye v Robertson* 112 US 580 (1884); see also *Whitney v Robertson* 124 US 190 (1888); *US v Lee Yen Tai* 185 US 213 (1902); *Reid v Covert* 354 US 1 (1957), 18; and see also *De Geofroy v Riggs* 133 US 258 (1890).

[261] *Kolovrat v Oregon* 366 US 187 (1961); *Sumitomo Shoji v Avagliano* 457 US 176 (1982), and *Barclay's Bank v Franchise Tax Bd Calif.* 512 US 298 (1994).

3.4.4.1 The Doctrine of Self-executing Treaties

Notwithstanding the above, by far the most prominent issue under the rubric of interpretation is of course the doctrine of self-executing treaties. Indeed it may be asserted without too significant objection that the origins of the doctrine as a whole lie in and with the US Constitution, and two early nineteenth century Supreme Court decisions. The doctrine, to repeat, is of purely domestic manufacture, arising (as in the Netherlands) in the particular constitutional settlement of the state. Self-execution (or the absence of) is not therefore a point of international law for the characterisation of a treaty. It is nevertheless a point of domestic law respecting the interpretation of treaty provisions duly brought into the US legal system, and thus falling under the general interpretative jurisdiction of the courts. Specifically, the question for the courts is whether the treaty provisions invoked by a party do in fact present justiciable, legally enforceable rights and obligations. But ostensibly simple questions in law often hide a mass of complex issues.[262]

Given that the Supremacy Clause provides that "… all Treaties… shall be the supreme Law of the Land", Chief Justice Marshall considered that to entail the following rule in the interpretation of an 1819 treaty between Spain and the US ceding certain lands to the US:

> A treaty is in its nature a contract between two nations, and not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> In the United States a different principle is established. Our constitution declares 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 provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[263]

Thus words in the treaty (an English translation) to the effect that Spanish grants of title prior to 1818 "shall be ratified and confirmed to persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty" indicated a promise which

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[262] The academic commentary here is immense, and largely follows the doctrine's application in *Sei Fuji v California* 217 P 2d 481 (1950) (CA) aff'd other grds 242 P 2d 617 (1952) (Cal. Sup Crt) (Human rights provisions of UN Charter directly enforceable to invalidate discriminatory application of California Alien Land Law): see Iwasawa 1986, p. 628 (and sparking European interest in the doctrine). Earlier works are noted in Iwasawa 1986 and Jackson 1987, p. 149. Some more recent, leading ventures include Paust 1988; Vasquez 1992, Vasquez 1995, Vasquez 2008c; Sloss 1999, Sloss 2002; Bradley and Goldsmith 2000; Bradley 2008, and the exchange of views among Yoo 1999a, Yoo 1999b, Flaherty 1999, and Vasquez 1999.

[263] *Foster v Neilson* 27 US 253 (1829) 314. See Vasquez 1995, p. 700ff and Vasquez 2008 for a detailed discussion.

must be the act of a legislature.[264] Accordingly, the treaty was not "self-executing".

In the decades following, the US courts expanded the circumference of their examinations beyond the mere terms of the treaty in order to determine whether a treaty might be held to be self-executing or not.[265] The courts grasped at a convenient, comprehensive test to bring order to the relative uncertainty and confusion in the area given the variegated factors accounted for in past decisions. By 1985, it might be said that the multiplicity of factors were being distilled and organised into a sixfold test: (1) the language an purpose of the international agreement; (2) the circumstances of its execution; (3) the nature of the obligations in the agreement; (4) the availability of alternative enforcement mechanisms; (5) the implications of a private right of action; and (6) the ability of the courts to resolve disputes.[266] Even with this, the determination of the self-executing character of a treaty remained necessarily a case-by-case process.

Underscoring this judicially-driven evolution of the rule in *Foster v Neilson* has also been a shift in perspective. In the first place, the courts now focus primarily on the intent of the US, whether in the negotiations, associated Presidential statements, or in the Senate's advice and consent, as determinative of a treaty's import.[267] A contracts-based analysis of finding the common intent of the parties has apparently fallen by the wayside. In the second place, and following, the courts have become more attentive to the law status of treaty provisions, and the implications for law-making authority under the Constitution. In particular these concerns resound in the distribution of legislative power between the Senate and President, and the Congress as a whole, and also to a degree in the federal division of powers. Hence a certain reluctance or reserve has sprung up in the courts. While on occasion articulated as a "presumption" that treaties are not directly enforceable,[268] the reserve of the courts is more often, and better, observed in the strictness and detailed attention paid to the terms of the treaty, searching in effect

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[264] *US v Percheman* 32 US 51 (1833) while confirming *Foster v Nielson,* had the Spanish version of the same treaty where it was shown that the language was more definitive, in the order of the ratification and confirmation acting directly so as to be "self-executing".

[265] Iwasawa 1986 catalogues these criteria into "subjective" (intent—and language—oriented) factors and "objective" (precision, subject matter justiciability). And see also Vasquez 1995.

[266] *Frolova v USSR* 761 F 2d 370 (7th Cir 1985) 373–76 (the 1975 Helsinki Accords signed by President Ford were, *inter alia* per his declaration, not self-executing); and cited by Iwasawa 1986, pp. 655, 678–79; Vasquez 1995, p. 711, and Bradley 2008, p. 137.

[267] Vasquez 1995, p. 711; Bradley 2008, p. 149ff; Restatement of the Law Third 1987, §111). Reflected in the "great weight" attributed by and in the courts to the US interpretation of a treaty: *Sumitomo Shoji v Avagliano* 457 US 176 (1982) and *El Al Israel Airlines v Tsui Yuan Tseng* 525 US 155 (1999).

[268] Vasquez 1995, p. 701, citing *Tel–Oren v Libya* 726 F 2d 774 (DC Cir 1984), 808 (per Bork J) (Genocide Convention, 1949 Geneva Convention (Treatment of Prisoners of War) and American Convention on Human Rights). See also *Mannington Mills v Congoleum* 595 F 2d 1287 (3rd Cir 1979) (Paris Convention for the Protection of Industrial Pty) and *Can. Transport v US* 663 F 2d 1081 (DC Cir 1980). For more recent precedents, see the cases noted in *Medellin v Texas* 552 US 491 (2008) 506 n. 3.

for clear words of direct enforceability.[269] It is in fact precisely around what presumptions respecting the direct enforceability of treaties may be legitimately and validly drawn from the constitutional optic, that animates the academic debate on treaties and the Supremacy Clause. Specifically, if the presumption arising from the Supremacy Clause is that treaties are self-executing, then the proper issue is the validity of reserving enforceability, as outlined the quartet typology of Vasquez.[270] On the other hand, if the Supremacy Clause does not presume automatic enforceability, the proper issues are legislative power and legislative intent.[271]

The problems—and extensive doctrinal debate around them—arise from the wording and direction of the Supremacy Clause, that "… all Treaties… shall be the supreme Law of the Land". If a treaty is ratified, then by that wording, the treaty is law. And as "law", it seems inconceivable that a treaty cannot but give rise to some judicially enforceable rule, rights, and obligations. This particularly so given the clear wording of the Supremacy Clause, so the argument continues, which does not qualify nor allow qualification of a treaty's legal enforceability as law.[272] And, as canvassed above, since Senate declarations on the domestic enforceability of treaty provisions are at best interpretative declarations with no international legal force among treaty partners, they cannot bind the courts or constrain the interpretation of the treaty according to its own terms. Hence declarations on non-self-execution, or perhaps even self-execution, are legally irrelevant. But the argument does not necessarily give heed to the possibility of a statute having no immediately or judicially enforceable parts, like the Geneva Conventions.[273] For example, Acts may be declaratory, or permissive without attaching any particular enforcement provision. As Iwasawa would argue, the Supremacy Clause may substantiate a difference between directly valid and directly applicable.[274] But there is no need for present purposes to invest heavily in this discussion of what is or not justifiably the better reading of the Supremacy Clause to appreciate the separation of powers significance and undercurrent. Underscoring this judicially driven evolution to the rule in *Foster* has been greater attention to the constitutional and internal implications of treaties as "supreme law". This is well exemplified, for better or worse, in the recent three Supreme Court cases on the Vienna Convention on Consular Relations. All three concerned the domestic legal implications on conviction and sentencing regarding a failure to inform of a foreign national of the Convention right to communicate with local consular officials upon arrest and detention.

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[269] Thus the point on which the majority and the dissenter joined in *Medellin v Texas* 552 US 491 (2008). See also the critique of Vasquez 1995 and Sloss 2002.

[270] Vasquez 1995 (intention of the parties, justiciability by the courts, constitutional objections, no extant basis in law for private rights of action); see also Vasquez 2008c and Sloss 2002.

[271] Bradley 2008, and echoing the distinction Iwasawa 1986 proposed between "directly valid" and "directly applicable".

[272] See esp. Sloss 1999 and 2002; contra, Yoo 1999a.

[273] *Johnson v Eisentrager* 339 US 763 (1950); *Hamdan v Rumsfeld* 548 US 557 (2006).

[274] Iwasawa 1986.

In the first, Breard sought a stay of execution on the basis of that infringement, and given the Convention's US ratification, its paramountcy over any local rule rejecting the infringement grounds as out of time. Paraguay supported his claim and brought further actions before US courts and the ICJ regarding the alleged breach of the Convention.[275] The Supreme Court rejected Breard's application and that of Paraguay.[276] Without deciding whether the Convention was self-executing or not, the Court found no sustainable case on the merits. First, national rules and procedures govern the domestic implementation of a treaty, something also recognised in the Convention itself. Those rules in the US include a "procedural default" rule, putting the availability of certain defences and claims out of time after certain stages of the proceedings. Second, a statute subsequent to the Convention, qualifying how and when a Convention claim might raise, also put his action out of reach. Lastly, the prejudice he claimed to arise from the infringement was not seen as sufficiently detrimental to merit the relief claimed. It would therefore appear that the conversion of international obligations—apparently whether directly enforceable or not—into the domestic legal system obtains subject to existing procedures. In other words, the international rule, without more, must fit or accommodate itself to the extant legal system.

The second case, *Sanchez–Llamas v Oregon*, added several new factors to the mix.[277] In the first place, Sanchez–Llamas was appealing a ruling of a state court (Oregon) not to strike confession evidence in the face of a breach of the Convention right. This drew federalism, and the supervisory jurisdiction of the Supreme Court over state courts, into the picture, as well as the extraordinary remedy to strike or exclude evidence. Whether permissible or not as a Convention remedy, the Court denied that the recognised circumstances for the exclusion of evidence existed in his case. And underpinning this approach was the federalism point that the Court had no constitutional basis, outside the treaty itself, to define and impose a particular remedy on state courts in the exercise of their constitutionally conferred jurisdiction.[278] Where the treaty did not prescribe a particular remedy, it was left to the procedures and jurisdiction of the relevant court. In the second place (and in the conjoined case of *Bustillo v Virginia*) Bustillo sought to avoid a direct and easy application of *Breard v Greene* in his similar situation by invoking the ICJ decisions of *LaGrand* (2001) and *Avena* (2004). In as diplomatic a fashion as possible, the Court discounted the ICJ decisions entirely. From the constitutional optic, the Constitution conferred judicial power—including the interpretation of treaties—upon the courts. That formed a background assumption to US ratification of the international agreements governing the jurisdiction of the ICJ in VCCR matters. ICJ decisions have no binding force, and address state

[275] *Breard v Greene* 523 US 371 (1998).

[276] Paraguay's separate domestic claim against the US was rejected as not having any foundation under the Convention: it did not confer such a right of action: *Breard v Greene*, 377–78.

[277] *Sanchez–Llamas v Oregon* 548 US 331 (2006).

[278] *Sanchez–Llamas v Oregon*, 345–46, referring to *Dickerson v US* 530 US 428 (2000).

parties, and cannot be thought therefore to be controlling on domestic courts. What is more the ICJ failed to appreciate, not only that procedural rules of domestic law govern (as a matter of international law) implementation of a treaty, but also the nature, and legitimacy of procedural default rules in an adversarial system, and in particular how that meets the aspects of the Convention right.

The last case, *Medellin v Texas*, addressed the interaction of the VCCR and the treaty provisions conferring jurisdiction on the ICJ.[279]Medellin was one of the named individuals under the ICJ *Avena* decision. Following that decision, the President issued a memorandum stating that the US would discharge its international obligations under the *Avena* decision by having state courts give effect to it. The memo apparently did not purport to give effect to US obligations under the Convention itself, only the ICJ decision. Medellin raised the VCCR defence to mitigate his death sentence. The Texas courts rejected his application, on the basis that neither the ICJ decision nor the President's memo was binding upon it. The Supreme Court agreed. Like the cases before it, *Medellin* does not decide whether the Convention is self-executing.[280] Rather, the case was framed as the direct enforceability of an ICJ decision under the UN Charter (an "undertaking" to comply), the ICJ Statute, and the VCCR Protocol (submitting disputes over the VCCR to the compulsory jurisdiction of the ICJ). For the majority, Roberts CJ pursued an interpretation of those international instruments which required a clear and express articulation that ICJ judgments would be internally (as opposed to internationally) binding and enforceable. Of course no such language was present—and as was the principal contention of the dissent, would ever be present in such a multilateral instrument. And he construes the grant of compulsory jurisdiction to refer only to a bare grant of jurisdiction, a submitting to jurisdiction, but not additionally an agreement to be bound.[281] And, as noted above, the President's memo had no constitutional authority, nor express treaty authority, to overcome basic federal division of powers and compel state courts. Indeed, Roberts CJ framed the case as converting a non-self-executing treaty into a self-executing one by presidential fiat. In one sense, it completed the circle in which the VCCR was seemingly left bereft of any substantial legal effect in the US. Howsoever that may be adjudged, it also encapsulated what appears to be a growing appreciation of the duality between constitutional system and international system. As Bradley aptly concludes, "As the Court appears to have recognised, treaties have a dual nature in that they are situated in the domain of international politics as was as in the domain of law, and this duality

[279] *Medellin v Texas* 552 US 491 (2008). Medellin's earlier challenge, prior to *Avena*, is not relevant. And see the commentary sparked by *Medellin*, including, Vasquez 2008, Bradley 2008, Levit 2008, and Comment 2008.

[280] Yet note *Torres v Mullin* 540 US 1035 (2003) (petition for cert. denied, pending ICJ *Avena* decision (Torres, like Medellin, a named individual in those proceedings) acknowledging that lower courts (state courts) have held the VCCR as self-executing.

[281] A seemingly spurious distinction, unless perhaps refined in the direction of *Duff Dev v Kelantan* [1924] AC 797 (agreement to arbitrate did not extend waiver of sovereignty to include award enforcement).

is relevant to their judicial enforceability. Their dual nature means that their domestic judicial enforceability is in part a political decision, not some automatic rule of the Supremacy Clause. ...The doctrine of treaty self-execution thus entails a degree of judicial discretion, but is a type of discretion that is ultimately subject to political branch control."[282]

3.4.5 Hamdan *and Interpretative Incorporation*

This last point can be addressed quite shortly. It is open to the courts to construe a legislative enactment referring to the "laws and customs of war" or "the law of nations" as indirectly incorporating relevant non-self-executing treaties into the legislative scheme. The Geneva Conventions, albeit ratified, offered no private right of action to an aggrieved combatant detained by the US. Yet, the US Uniform Code of Military Justice rendered the relevant provisions subject to the laws and customs of war. Since the Geneva Conventions pertained to just that, the UCMJ was construed to incorporate certain of their operative provisions.[283]

3.5 France: Executive Power

In contrast to the US situation, the French constitutional order grants the Executive Branch not only the power of initiating and making international agreements binding in international law, but also the determinative voice in deciding to implement them in the domestic legal order. That is, the law-making power relating to international accords sits decisively with the Executive Branch, the President in particular. The Parliament (the National Assembly and Senate), on the other hand, has little if any effective power and say in this domain. Its power to control and guide foreign policy, and the transposition of rules formulated in international compacts into the domestic legal system is quite restricted under the traditional, strict French reading of the separation of powers. And just as Parliament takes its cue from the government, so too are the various courts bound by the same reading of the separation of powers to follow the constitutional lead of the

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[282] Bradley 2008, p. 182.

[283] *Hamdan v Rumsfeld* 548 US 557 (2006). Powell 2008, p. 785ff argues that the incorporation of the Geneva Conventions confers a high level of democratic legitimacy for international law in the US legal system, and allows international law to act as a restraint on Presidential unilateralism by forcing the President to consult Congress as democratic legislator. I submit that the claims made for this effect and weight of the Geneva Conventions are not truly borne out in the reasons, nor do they support the direct linkage between international law and constitutionalism as strongly as advocated.

government while reconciling that authority with the constitutional position of the legislative arm of state.[284]

The responsibility for the conduct of foreign affairs resides primarily with the President, in close cooperation with the government. Indeed, it is the French President, and not the Foreign Minister nor the Prime Minister, who appears on the international stage. Like the US Constitution, there is no general grant of "foreign affairs" power to the President, but the power arises by constitutional convention in conjunction with specific grants of jurisdiction over treaties, diplomatic missions, and the military.[285] By Article 5, he guarantees "national independence, territorial integrity and due respect for Treaties." Article 11 also allows the President to submit to referendum a Bill authorising a treaty which, though not otherwise contrary to the Constitution, would yet affect the functions of domestic institutions. This power is conditioned, however, on a recommendation of the government or a joint resolution of Parliament. Article 14 confers on the President powers to accredit and receive ambassadors, and Article 15 makes him the Commander-in-Chief. Clearly the most important and decisive constitutional authorisation of presidential power in the field of foreign relations is found in Article 52:[286] "The President of the Republic shall negotiate and ratify treaties. He shall be informed of any negotiations for the conclusion of an international agreement not subject to ratification." All these express powers ought to be read in conjunction with the domestic relationship and interaction between the President and the government, in particular any control exercised or exercisable by the President over government policy and action.

Following from Article 52, the government has the power to initiate and conclude such international agreements as do not require ratification. Like the US position, the reference to ratification in Article 52 likely refers to that particular and formal means in international law of signifying a state's consent to be bound to a treaty. There are, as noted above in Section 1, other ways of signalling consent to be bound to a "treaty" or international compact more broadly. This in theory leaves a wide plain for government action. Whether the government can and does make use of the full range and breadth of such power depends in large measure on how the other international parties are proceeding, and conceive the nature of whatever agreement may ultimately be reached, whether ratifiable treaty, or some other type of binding instrument. And it may also depend on the degree of any control or direction exercised over the government and its policies by the President, such as the domestic political benefits of proceeding by way of treaty. Howsoever that political facet to the separation of powers may play itself out in the

[284] For example, the decision of the French government to engage French forces in Kosovo is not reviewable as an administrative act because it is integrally connected to the foreign relations power: 206303, 206965 CdE 5 Jul 2000.

[285] See e.g., Luchaire 1991b, p. 341.

[286] See generally, e.g., Manin 1987, p. 996.

circumstances, the government's share of foreign affairs has been traditionally and conventionally concentrated in the hands of the Ministry of Foreign Affairs.[287]

With the strict, French reading of the separation of powers doctrine, the predominance of the executive in foreign affairs has led to a close intertwining of those powers with law-making jurisdiction through treaties and other binding international agreements. Parliament does not contribute any substantive law-making to internalisation of international rules, as does the US Congress, or even the Estates General of the Netherlands. Its role in the transposition seems but a mere formality. Approving or disapproving of a treaty by way of an Act does indeed fall to Parliament under Article 53, but constitutional rules and convention deny it any power to address specific treaty provisions, and leave it only a vote of "aye" or "nay" for the entire treaty.[288] Parliament may not condition its approval or otherwise introduce amendments, modifications, reservations, and so on, to the treaty as negotiated by the government. This would be understood as an impermissible, and unconstitutional, intrusion by the Legislative branch into the exclusive domain of the Executive Branch.[289] (It may however recommend, on a nonbinding, advisory basis, that certain reservations be attached.) Likewise, the power to initiate a Bill approving an international agreement or ratification of a treaty lies with the government, and not MPs generally. Further, Parliament has no effective power to compel a government to submit a treaty for approval, nor ratify one already approved, nor denounce one. All this remains within the domain of the executive. Just as do the power to decide when to publish a ratified treaty so as to give it full internal effect.[290] In marked contrast with, for example, the US situation, Parliament's jurisdiction to pass an Act of Approbation does not, moreover, extend to constraining or restraining the application of a treaty within the French legal order by way of that Act. In its general legislative jurisdiction under Article 34, Parliament must expressly bear in mind the provisions of ratified treaties in light of the workings of the Article 55 supremacy clause.[291] Any legislative attempt subsequent to a treaty's due ratification, purporting directly or indirectly to interpret the treaty, directing or limiting the interpretation of its terms, may fall afoul of the supremacy clause to the extent the legislation is inconsistent with the treaty, or at

[287] Eisemann and Kessedjian 1995, p. 2 citing the Decree of 25 Dec. 1810 on the powers and functions of the Ministry of Foreign Affairs (see also the Act relating to the Powers of Ministers of 24 Nov. 1945, *as amd.*).

[288] On Article 53, see generally, e.g., Pellet 1987.

[289] Luchaire 1991b, pp. 342–343, citing also the *Réglement de l'Assemblée nationale* and the hitherto unvaried and unchallenged 1977 statements of position by the then Minister of Foreign Affairs, and Presidents of the Senate and National Assembly. See also Eisemann and Kessedjian 1995, p. 7.

[290] It is the President who decides when the publication decree is to issue. The Act of Approbation, to which the treaty is not usually appended must however be itself published within 15 days.

[291] Even the constatation of a failure of reciprocity, a condition for internal effect under Article 55, appears to be the domain of the government: Luchaire 1991b, p. 352.

best be treated as ancillary to and confirming what the treaty already provides. The technical nicety of Parliament amending or revoking its Act of Approbation, while not directly operating on the treaty itself, remains an academic hypothetical.[292] First, Parliament has not yet attempted to do such a thing. Second, it bears the considerable risk under the French constitutional settlement and its reading of the separation of powers that such a deed would be deemed an impermissible and unconstitutional interference with the executive's foreign affairs powers. Perhaps a risk, but nevertheless accepting that would fail to distinguish between the internal effect of a treaty and its international bindingness. It is the boundary between legislation and international rules imposed by the French Constitution in light of Articles 52–55. And it is that division which is recognised by the Conseil Constitutionnel and, after its 1998 *Sarran* decision, the Conseil d'Etat as well.

Be that as it may, is there anything in this list of negatives, of "cannot, may not", that Parliament actually can do? Quite obviously, it can refuse to approve a treaty or international compact, with all the internal party political and international repercussions this may generate.[293] It can also attempt to cut or reduce funding for foreign policy ventures supported by or created by treaty and compact, subject to a finding by the Conseil Constitutionnel of an interference in executive foreign relations jurisdiction.[294] Parliament can also pass a motion of non-confidence to bring the government down.[295] Under Article 54, the president of either House, or at least 60 members of either House, may petition the Conseil Constitutionnel for review of the treaty, in the hope of drawing greater attention to perceived constitutional inconsistencies and putting greater pressure on the government's plans and policy.[296] Last, the Members of both Houses may put questions to the government in the course of its debates or committee work.[297] On the other side, too, the government does engage Parliament by keeping it apprised on a regular basis (every 2 to 3 months[298]) of current negotiations and signed agreements. For particularly important issues and plans, the government may also involve Parliament in its foreign policy decisions.[299]

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[292] Luchaire 1991b, p. 343, and considering also Pellet 1987.

[293] It is difficult to locate any instance of Parliament refusing to approve a compact or the ratification of a treaty, even during a period of "cohabitation".

[294] Luchaire 1991b, p. 353 citing °86–210 DC, 29 July 1986 and °86–217 DC, 18 Sept. 1986. Tampering with EU related funding is prohibited: °75–60 DC, 30 Dec. 1975.

[295] Needless to say, no session of Parliament yet has deemed an international agreement significant enough to pursue such a course.

[296] As with the 1985 Schengen Accord: °91–293 DC, 23 June 1991 on which see e.g., Luchaire 1991a, and his summary in English in Luchaire 1991b, pp. 355–357.

[297] The answers given by the government are non-binding for the interpretation of international instruments: CdE 2 November 1955.

[298] Eisemann and Kessedjian 1995, p. 7.

[299] Luchaire 1991b, pp. 354–355, citing, e.g., the 1991 decision to participate in "Operation Desert Storm", the liberation of Kuwait.

In light of this arrangement of authority between Legislature and Executive, the application of separation of powers considerations to international law tends to play itself out at that political level. The French courts, administrative and general jurisdiction, have been content with their passive role, along the sidelines, under the conventional, strict French reading of the separation of powers. As to the place of the *Cour Constitutionnel*, we will come to that presently. In general both streams of judicial power have confined themselves to identifying and interpreting valid law. Inasmuch as the process of identifying whether treaty provisions or those of an international agreement are properly "French law" draw the courts close to constitutional considerations, the courts have taken care to emphasise formal criteria and avoid thereby any substantive considerations. That is, both streams of judicial power will consider whether the preconditions for law have been met, but will go no further in examining the content of the law or the international compact as it may bear upon its enactment or incorporation into the French legal system. Stepping beyond mere formalistic criteria into the substantive domain presents the tangible risk of overstepping (or being seen to overstep) the boundaries set by strict reading of the separation of powers.

3.5.1 The Limits of the Institutional Strategy

In the French administrative and general jurisdiction courts, the liminal question of whether a treaty or compact establishes judicially enforceable rights and obligations is answered by publication of the instrument in the *Journal officiel de la République française*, the Official Journal. Article 3 of the *Decree on Ratification and Publication* mandates publication for those international instruments which, by their application "might affect the rights and obligations of individuals".[300] Since 1986, the publication requirement extends equally to reservations, interpretative declarations, denunciations, deletions, and so on with like effect. The Decree exempts from this rule of publication certain rules and decisions of international organs. The exception is conditioned upon the treaty, binding on France and by which the entity is created, stipulating that publication of those in the organ's publicly accessible, official bulletin is sufficient to implement them as binding upon individuals.

Beginning with the *Dame Caraco* decision in 1926, the Conseil d'Etat has considered publication in the Official Journal to be a critical element validating the legal force of a treaty provision. It reiterated and confirmed that position in 1965 with its *Société Navigator* decision, and subsequently.[301] Likewise, the courts of ordinary

[300] Decree No. 53–192 of 14 March 1953 on the Ratification and Publication of International Agreements concluded by France (as amd. by Decree 86–707, 11 April 1986). Relying on the translation given in Eisemann and Kessedjian 1995, p. 23. And see also Burdeau 1986, pp. 836–856.

[301] CdE 13 July 1965 (*Société Navigator*) (failure to publish a 1954 France–Monaco Accord on War Reparations). See also CdE 23 Dec. 1981 (*Commune de Thionville*) (1978 France–Luxembourg Treaty on Nuclear Facilities along the Moselle River).