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UNCONSTITUTIONAL TREATIES

BY WM. W. BISHOP, JR.*

I. THE PROBLEM

In recent years there has been much discussion over the relation of treaties to the United States Constitution, and much debate as to whether various proposed Constitutional amendments might be desirable. Up to the present time, no treaty made by the United States has ever been held unconstitutional, the record of the treaty-making organs in this respect being considerably better than that of Congress in legislating; but it is at least conceivable that on some future occasion a treaty might not conform with our Constitution. Such a situation has not been unknown in some other countries, and has at times involved treaties made by those countries with the United States. Under such circumstances, would a treaty bind a nation internationally, though found not to be in conformity with its constitution?

There seems little doubt that domestic courts, both here and abroad, would hold an unconstitutional treaty void and ineffective as national or "internal" law. A few foreign constitutions so proclaim. As a matter of American constitutional law, and when viewed by American federal or state authorities, it seems clear that treaties are on a par with federal statutes in this respect, and that both would be held invalid when unconstitutional, under the principles laid down by the Supreme Court in Marbury v. Madison and many cases since. The Supreme Court has repeatedly said that this would be the case with an unconstitutional treaty:

It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument.

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1. 5 U.S. (1 Cr.) 137 (1803).
2. The Cherokee Tobacco, 78 U.S. (11 Walth.) 616, 620-21 (1870). See also Doe v. Braden, 57 U.S. (16 How.) 635, 656 (1853); Downes v. Bidwell, 182 U.S. 244, 370 (1901); In Geofroy v. Riggs, 133 U.S. 258, 267 (1890), Mr. Justice Field amplified this statement, saying:
The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.

In 1854 Secretary of State Marcy wrote:
The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable
What do we mean by treaties which do not conform to national constitutions? Constitutions, whether written or found largely in practice and convention, usually specify the organs by whose action the state enters into treaty obligations, and may specifically or by inference prohibit the making of certain types of treaties. Under most contemporary constitutions, international agreements are concluded by the chief executive (or on his responsibility), but must receive the approval of a legislative body such as our Senate or a Parliament. Although this process of approval by a legislative organ is popularly called "ratification," in precise legal terminology ratification is an executive act by which the provisions of the treaty are formally confirmed and approved by the state. The Senate of the United States does not "ratify," but advises and consents to the ratification by the President. Many of the disputes over the effect of unconstitutional treaties have arisen from disregard of constitutional provisions requiring legislative approval. Added complications occur when the state may enter into some types of international agreements by one procedure but must use a more formal or difficult process for other kinds.

In concrete terms, what international obligations, if any, would the United States have undertaken if President Wilson in 1919 had deposited an instrument of ratification, in proper form, of the Treaty of Versailles without obtaining the advice and consent of the Senate? Would it have made any difference in such case if, in the instrument of ratification or in a public statement, the President had formally announced either that no action by the Senate was necessary, or that approval of the Senate had been obtained although in fact the Senate had not taken favorable action? Or suppose a President, having failed to get the requisite two-thirds vote in the Senate, submits the same agreement to both Houses of Congress for

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3. See 5 Hackworth, Digest of International Law 48 (1943); J. Jones, Full Powers and Ratification 136 (1946).
4. Cf. our American practice under which we make "treaties," in the narrow sense of the word, by President and Senate, acting by two-thirds vote; but make "Presidential" executive agreements by the executive alone, and "Congressional" executive agreements by authority of the President plus both Houses of Congress acting by mere majority vote.
approval as a "Congressional" agreement, and then after both Houses approve by a bare majority and the President notifies the other party, the Supreme Court declares this a "treaty" which could only be made by the method of Senate approval by a two-thirds vote? In similar fashion, the Swedish Constitution authorizes the King to make treaties after consultation with the Council of State, but requires that treaties "of major importance" be approved by the Riksdag (Parliament). What would happen if the King deems the treaty not one "of major importance," but after exchange of ratifications it is authoritatively held that as a matter of Swedish constitutional law approval of the Riksdag was required?

Some constitutions specify that no treaties of a certain kind may be made, such as the Costa Rican Constitution, which in Article 7 declares that,

> No authority may conclude pacts, treaties, or conventions which are in conflict with the sovereignty or independence of the Republic.

What happens if the President and Legislative Assembly believe that a treaty for some type of Central American unification does not contravene this provision, but the treaty is afterwards held unconstitutional as repugnant to Article 7?

Other constitutions, like that of the United States, do not so explicitly forbid the making of treaties, but it seems clear that the Supreme Court would, for example, hold invalid a treaty violating rights guaranteed by our Constitution. What would happen internationally if the Supreme Court should strike down as unconstitutional a hypothetical treaty with State X providing for trial by a three-judge federal court *without jury* of all persons accused of plotting in the United States a revolution against the Government of X, in violation of our laws against steps to overthrow friendly foreign governments? Or what if the Supreme Court should hold unconstitutional, as in violation of the sixth amendment right of accused persons "to have compulsory process for obtaining witnesses in his favor," the application of a treaty exempting foreign consular
officers from compulsory process to give testimony on behalf of defendants in an American criminal proceeding?

There seems no need to multiply such conceivable examples, but one may well ask whether it makes any differences in each of the foregoing cases if we are dealing with an unwritten constitution rather than a written one, and whether the ease or difficulty of a foreign treaty negotiator obtaining authentic information about the constitution is relevant.

II. SUGGESTED SOLUTIONS

This problem has been discussed by many writers, and a number of possible solutions have been suggested. Some stress the importance of upholding constitutional provisions, and, like Professor C. C. Hyde in the first edition of his treatise, would say that "an unconstitutional treaty must be regarded as void." Others would


The Harvard Research, and the studies by Vitta and de Visscher, *supra*, contain extensive bibliographies on this topic, as does also I Oppenheim's *International Law* § 497 (8th ed., Lauterpacht 1955).

7. 2 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 9 (1922), de Visscher, *op. cit. supra* note 6, concludes that constitutional restrictions have full international effect. Wayne Williams succinctly gives the reason why many advocate this view, saying:

The central difficulty with the argument for validity is that instances of international usage, accepted as law, are too fragmentary and inconclusive to be of much value.

He adds:

[L]et us fully sense the vital importance of maintaining the integrity and sanctity of national constitutions, written and unwritten. This, after all, is the cornerstone-principle of sovereignty in the people, and of representative government. (Michigan Summer Institute, *supra* note 6, at 200-01).

Professor Hyde's second edition (1945) changed from this view, to read:

[I]t may be said that where a contracting State holds out to another assurance that the terms of a proposed agreement are not violative of the fundamental laws of the former, and does so through an agent who is supposed to know the requirements thereof by reason of the character of his connection with the particular department of his government to which is confided the management of foreign affairs, and when
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follow the somewhat similar view of the Harvard Research in International Law, which under the leadership of Professors Manley Hudson and J. W. Garner concluded in 1935 that,

A state is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a state may be responsible for an injury resulting to another state from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty.8

In an intermediate position we find Professor A. D. McNair (now Lord McNair) writing:

It seems more reasonable... to say that in concluding a treaty if one party produces an instrument 'complete and regular on the face of it' (to borrow an expression from another department of law) though in fact constitutionally defective, the other party, if it is ignorant and reasonably ignorant of the defect, is entitled to assume that the instrument is in order and to hold the former to the obligations of the treaty.9

no written constitution is involved, and no published and authoritative instrument notoriously proclaims an opposing view, there is ground for the conclusion that the contracting State holding out such assurance is not in a position to deny the validity of the agreement which has been concluded in pursuance thereof. (2 Hyde, op. cit. supra at 1385).


In I Oppenheim's International Law § 497 (8th ed. 1955), Prof. Lauterpacht expresses somewhat similar views. He qualifies his statement that unconstitutional treaties do not bind the state by adding:

That principle must not, however, be allowed to operate so as to enable Governments to conduct themselves in a manner prejudicial to the sanctity of treaties and obligations of good faith. For these reasons, although a treaty is voidable, at the option of the State concerned, if it has been entered into in disregard of the limitations of its constitutional laws and practice, that State must be deemed to have waived its right to assert the invalidity of the treaty if for a prolonged period it has failed to do so, or if it has acted upon it, or has obtained advantage from it. Moreover, in cases in which a treaty must be held invalid on account of disregard of constitutional limitations of a contracting party, principle demands that that party must be responsible for any damage to the other contracting party in cases in which the latter cannot properly be expected to have had knowledge of the constitutional limitations in question.

9. McNair, Constitutional Limitations upon the Treaty-Making Power, in Arnold, Treaty-Making Procedure 6 (1933). This is not far from the view expressed by Prof. Hyde in his second edition, op. cit. supra note 7. Likewise, Jules Basdevant had said that if the treaty were ratified "in manifest violation of the constitution" it should not be treated as internationally valid. La Conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités, 15 Académie de Droit International, Recueil des Cours 535, 581 (1926-V).

A variant on this idea is the conclusion by G. Balladore Pallieri, that the question depends on the "principle of good faith," according to which "the treaty is effective in the international sphere when a state can believe in good faith that the organ with which it has dealt was competent." He regards this
Some would say that treaties are internationally invalid if they do not conform to constitutional provisions described variously as "procedural," or "directly concerned with treaty-making," but are valid when they conflict with constitutional provisions described as "remote" or "substantive," or as concerned with the execution or performance of the treaty. In this group we might place J. M. Jones, who concludes after a careful study emphasizing procedures and particularly full powers as evidence of authority, that:

From the evidence of American and South American practice we are entirely justified in saying that upon the American and South American continents constitutional limitations are deemed to be fully operative in international law. A treaty which is constitutionally invalid is internationally null and void. . . . With regard to States outside the American and South American continents the evidence tends in the same direction, but is not of such a character that it can be confidently regarded as conclusive. Restrictions relating to procedure bear on the formal validity of the treaty and must be complied with. Those relating to the content of the treaty are internationally ineffective. . . . A State may lawfully organize and distribute power as it wishes. The competent authority to make treaties is determined by its law, since it is for it to prescribe through what organs, and by what procedure, it shall make treaties. But a treaty perfect in point of form cannot be declared null or be affected by reason of a conflict between its provisions and the laws of one of the parties. 10

Yet other international lawyers would go as far as G. G. Fitzmaurice (now Sir Gerald) of the British Foreign Offices, who wrote in 1934:

[It] is submitted that the only rule which is both logical and readily applicable from the practical point of view is to the effect that states have no concern whatsoever with, and cannot as a general proposition be held to have any knowledge of each other's laws or constitutions; that a state which purports to become regularly bounded by an international agreement, by giving its international ratification thereto, or otherwise, must be presumed to have complied with all necessary internal constitutional requirements, and that other states are entitled to assume that this is so. If it afterwards turns out that such requirements have not in fact been complied with, the state must nevertheless be regarded as being internationally bound and cannot plead the failure in question as absolving it from its obligation; any state

as close to Basdevant's position, "for the fact that a constitutional provision is notorious is often a decisive element to exclude any possibility of good faith on the part of the other contracting party in the cases where it [such provision] has been violated." La Formation des traités dans la pratique internationale contemporaine, 74 Académie de Droit International, Recueil des Cours 463, 483-86 (1949-1).

state whose executive has placed it in this position must seek its remedy by proceeding internally against the executive in question or its individual members, and externally by denouncing the treaty at the earliest possible moment: but it cannot plead that the treaty is void *ab initio.*

Some support this position on the ground that national law, including constitutions, and international law operate in separate and distinct spheres, with international law superior in the "international forum." Others refer to the great difficulty or impossibility of one government's getting authentic information about the constitution of another except through the latter's own executive. Others emphasize the need for States to be able to rely on each other's usual organs of doing international business if there is to be any stability of international relations and mutual respect among nations. And yet others point to the increasing importance of being able to rely on

   Similarly, W. W. Willoughby wrote:
   "Peculiarities of constitutional structure of one State are without international significance to other States. Each State, as a member of the international society of States, has an organ of government through which it communicates with and enters into contractual and other relations with other States. Whatever undertakings are entered into by such organs are internationally binding upon the States which they represent." (Fundamental Concepts of Public Law 315 (1924)).

In his Treaties and Federal Constitutions (1955), Prof. James Hendry finds that violations of constitutional requirements, of whatever kind and whether or not "notorious" or "clear," do not affect the international validity of agreements entered into by Heads of States or organs having patent or apparent authority to act for and bind the state in foreign affairs.

In the Michigan Summer Institute, *supra* note 6, at 205, Prof. John Dalzell likewise suggested that the real question was whether there was "apparent authority, based upon conduct and communications for which the state is responsible, to make the agreement in question." If there was reasonable ground to believe that the representative acting for the state had authority, that should suffice to obligate the state.


13. See, *e.g.*, Quincy Wright's endorsement of Fitzmaurice's views, to which he added: "The only avenue for a foreign state to get authoritative information about the Constitution of the United States is through the President, and if the President says that under the Constitution the United States is capable of making this kind of treaty, I think a foreign government is bound to accept that statement and that in international law the treaty is valid." Michigan Summer Institute, *supra* note 6, at 198-99.

14. Referring to the reasons back of recent support for the view that treaties may be internationally valid though unconstitutional, Prof. Jay Murphy said, Michigan Summer Institute, *supra* note 6, at 202:
   "Another factor possibly contributing to change in some views is that the United Nations has both intensified relations among nations and furthered the habit of representation by agents with responsibility to act. Perhaps the growth of administrative agencies among modern nations will give force to this habit. . . . It would appear increasingly important that nations be able to rely upon each other's agents since damages and compensation are generally inadequate remedies."
another nation's agents as compared with the relatively slight risk to the other nation in following this rule.\(^\text{15}\)

On two relatively minor points there seems to be less doubt and confusion. Most would agree that from the international standpoint a treaty which was valid and properly constitutional when made is not thereafter invalidated by any subsequent change in the constitution of a party.\(^\text{16}\) There also seems little doubt about the effect of a practice, frequently followed in recent years, of specifying in a treaty that it "shall be ratified by the signatory states in accordance with their respective constitutional processes,"\(^\text{17}\) or similar wording. In such a case the treaty itself has conditioned its international obligatory force upon compliance with the constitution. With such an article in the treaty, failure to comply with a State's constitution would invalidate the treaty as to that State.\(^\text{18}\)

The foregoing represent the widely differing conclusions on this problem drawn by various writers. How far can we say any one of the rules or principles is really the international law rule? In asking this, we are in effect trying to predict the answer which would be given by an impartial international court having jurisdiction over the case. Such a court, charged with the application of international law, would find that law in relevant treaties, international customary law, and perhaps in any pertinent "general principles of law recognized by civilized nations"; and would be aided by the views of writers and previous judicial decisions.\(^\text{19}\) There is no general treaty in force laying down a rule of law on this question, so we must turn to international custom, or "general practice accepted as law," finding this both as expressed in the few relevant international judicial and arbitral decisions, and in the practice of nations in instances which have not come before any courts.

III. International Decisions

The earliest international decision treating this topic appears to be President Cleveland's award of March 22, 1888, in the boundary

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\(^{15}\) Hendry, \textit{op. cit. supra} note 6, urges that other international legal rules and practices regarding treaties afford sufficient protection. Among those mentioned are the normal requirements of ratification to permit "sober, second thought" before the state is bound, the inclusion of appropriate language in the treaty to ensure constitutional processes or the making of reservations to like effect, and the requirement of full powers or other evidence of authority, since "if the agents act outside this authority, or with no authority, the state is not responsible."

\(^{16}\) Cf. remarks by Wayne Williams and John Dalzell, Michigan Summer Institute, \textit{supra} note 6, at 200, 205.

\(^{17}\) United Nations Charter, art. 110, para. 1.

\(^{18}\) Cf. J. Jones, \textit{Full Powers and Ratification} 120-22 (1946).

\(^{19}\) On sources of international law, see Statute of International Court of Justices, art. 38.
dispute between Nicaragua and Costa Rica. Costa Rica relied on a treaty signed by the two countries on April 15, 1858, which Nicaragua had, since 1870, claimed invalid. The treaty was signed while a Nicaraguan Constitutional Assembly was preparing a new constitution, adopted August 19, 1858. This Constitutional Assembly had authorized the Executive to make the treaty, specifying that approval by the legislative body was not necessary. The Nicaraguan President exchanged ratifications of the treaty with the President of Costa Rica on April 26, 1858, the treaty having specified that ratifications should be exchanged within 40 days after signature. Thereafter, on May 28, 1858 (43 days after signature), the Nicaraguan Constitutional Assembly approved the treaty, and no question of validity was raised until 1870. The dispute which then ensued was submitted by Costa Rica and Nicaragua to arbitration by President Cleveland of the United States, who was asked to rule on the validity of the treaty and its interpretation if valid.

Nicaragua claimed that the treaty was invalid because her 1838 Constitution, said to be still in force when it was concluded, laid down Nicaragua's boundaries and could only be altered by an amending procedure which was not followed in making the treaty of 1858. Nicaragua also claimed that the 1838 constitution made approval by Congress a prerequisite to ratification, stating that there had never been any approval of the treaty by Congress, and that the approval by the Constitutional Assembly was further defective because it took place 43 days after signature rather than within the 40-day period for exchange of ratifications.

President Cleveland's award interpreted the treaty after very briefly finding that it "is valid," in which he relied on a report by Assistant Secretary of State Rives, to whom he had delegated the task of fuller study as authorized by the arbitration agreement. Rives found untenable all the Nicaraguan arguments for invalidity of the treaty. In an often cited passage, he said:

The general doctrine that in determining the validity of a treaty made in the name of a state, the fundamental laws of such state must furnish the guide for determination, has been fully and ably discussed on the part of Nicaragua, and its correctness may certainly be admitted.

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20. Moore, History and Digest of International Arbitrations to Which the United States Has Been a Party 1945-68 (1898).

21. Rives rejected as irrelevant the Nicaraguan contention that the treaty was ineffective between the two parties to it, Nicaragua and Costa Rica, because it provided that they would accept the mediation of Salvador but Salvador had not ratified the treaty.
The effect of this statement is somewhat qualified by the next two sentences:

But it is also certain that where a treaty has been approved by a government, and an effort is subsequently made to avoid it for the lack of some formalities, the burden is upon the party who alleges invalidity to show clearly that the requirements of the fundamental law have not been complied with. In my judgment, Nicaragua has failed in establishing a case under this rule.

Rives doubted whether the 1838 constitution was actually in force in 1858, and found that even if in force it did not prescribe Nicaragua’s boundaries in such a fashion that the boundary treaty was in conflict. He treated approval by the Constitutional Assembly as sufficient legislative approval, and held that Nicaragua could raise no objection because such approval came after exchange of ratifications and 43 days after signature. These irregularities of procedure were immaterial if Costa Rica “by its acquiescence has seen fit to waive delay.”

In view of this finding that the treaty did not violate the Nicaraguan constitution, the Rives opinion is hardly strong authority for the proposition that unconstitutional treaties are internationally void. Nevertheless, it does remain important for the statement that the “correctness may be admitted” of the doctrine that a State’s constitution determines the validity of a treaty made in its name.

The next international decision to consider was that in the dispute over the Consular Residence at Rio Martin, in Morocco. By a treaty of 1783 the Maghzen of Morocco had agreed with Great Britain to build at Rio Martin a house, part of which was to be used as a residence for the British Consul. After this house was built and long occupied, the British Diplomatic Agent in Morocco sought to exchange the house at Rio Martin for one in or near Tetuan. In an exchange of notes, the Maghzen of Morocco agreed, but for one reason or another the new residence was never provided. Spain assumed a protectorate over that part of Morocco, and the dispute over the new residence was submitted by Great Britain and Spain to the famous Swiss jurist Huber, then President of the Permanent Court of International Justice, for “examination and report.” Spain denied that as protecting power she had assumed any Moroccan obligation in this matter, and asserted that under the Moroccan Constitution in force at the time of the exchange of notes the British proposal to substitute a residence at Tetuan could only have been

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accepted by Morocco in the form of a Sherifican decree and not by a note from the Maghzen.

Reporting in favor of Great Britain, Judge Huber ruled that Spain was liable under the Moroccan obligation. He stated that the Moroccan failure to accept the British proposal in the form of a Sherifican decree was not important:

The Rapporteur does not believe that he had to inquire into this point of Moroccan constitutional law. It was enough, to establish that the aforesaid exchange of notes, which took place between the authorized agents of the two governments, established in clear fashion the accord of their wills to transfer to a house at Tetuan the rights which the British government had over the house at Martin under the terms of a treaty in force.

While this was only a "report" rather than, strictly speaking, an arbitral award, it does show a distinguished international judge adopting in an actual case before him the position that a State may become bound by an international agreement, whether or not the proper constitutional forms have been followed.

The "World Court" has not passed on this question of unconstitutional treaties, but in both the Free Zones case in 1932 and the Eastern Greenland case in 1933 it dealt with closely analogous situations. The former case grew out of the "free zones" established in 1815 in favor of the commercial interests of Geneva, Switzerland, in what became part of France. Article 435 of the Treaty of Versailles, to which Switzerland was not a party, recognized the need to modify the regime of the free zones; and in 1921 Switzerland and France signed a convention for abolition of the free zones in exchange for certain compensations in favor of Switzerland. However, in the referendum of 1923, required by the Swiss Constitution for certain types of treaties, the Swiss voters rejected this convention. In 1924 the controversy between France and Switzerland over the free zones was submitted to the Permanent Court of International Justice.

In the course of oral argument before the Court, the Swiss agent on April 22, 1932, declared that if France would so agree, Switzerland would agree that the question of exchange of goods between Switzerland and the free zones should be regulated by experts, who would be named by the Court if the parties could not agree upon

23. P.C.I.J., ser. A/B, No. 46. On this case see also de Visscher, op. cit. supra note 6, at 183-93.
24. Before the court France relied on Article 435 of the Treaty of Versailles, and on the alleged termination of the 1815 treaty obligation by change of circumstances.
them. He said Switzerland would accept this, "without reservation of later ratification." The French agent, Professor Basdevant, in his oral statement to the court on April 26, replied that this was a proposal for a new agreement which should be dealt with through diplomatic channels. He said he had no authority to negotiate or to accept such an offer, and expressed doubts whether under Swiss law the Swiss agent had any power to bind Switzerland in the proposed manner, since under Swiss law the agreement would have to be approved by the Federal Assembly or by popular referendum. Therefore, he said, the Swiss agent’s declaration was "unacceptable." Several days later the Swiss agent reiterated that he could entirely reassure the French on this matter of Swiss law; the question as to approval by the Federal Assembly or referendum was an internal matter: "Vis-a-vis France, Switzerland will be definitely bound by the declaration which I have read in my argument."

The Court thereafter found for Switzerland by a vote of six to five, and inter alia, ordered that the declaration by the Swiss agent be placed on record. Referring to this declaration, the Court said:

It is true that, in the course of the recent hearings, the French Agent declared the Swiss proposal to be unacceptable; but it is also true that he regarded it as an offer to conclude a Special Agreement, an offer which, in this form, he had no power to entertain. It is also true that the French Agent expressed certain doubts as to the binding character, from a constitutional point of view, of the Swiss declaration; having regard to the circumstances in which this declaration was made, the Court must however regard it as binding on Switzerland.

It may be noted that, of the five dissenting judges, only the French national judge, Dreyfus, regarded the Swiss declaration as not offering France "any effective guarantee." After the judgment, the French Government in 1933 accepted the Swiss agent’s proposal.

It is true that this decision related to the authority of an agent before the Court to enter into an agreement in settlement of the litigated controversy, rather than a disregard of constitutional provisions in concluding an ordinary treaty. One may argue that such an agent has fuller and less restricted powers with respect to such an agreement than do the normal treaty-making organs. Nonetheless, this case shows a judicial attitude clearly in favor of the international validity of an agreement without regard to whether the constitution of one party is complied with. This is particularly

26. Id. at 563-65.
27. Id. at 616-17.
The Eastern Greenland case was brought by Denmark when in 1931 Norway issued a decree asserting sovereignty over portions of eastern Greenland. Denmark claimed that she had previously established territorial sovereignty over all Greenland, while Norway argued that the part annexed by her was terra nullius at the time of the 1931 decree. One phase of the controversy related to the "Ihlen Declaration." On July 14, 1919, the Danish Minister to Norway expressed to the Norwegian Minister for Foreign Affairs, M. Ihlen, his hope that the extension of Danish control over all Greenland "would not encounter any difficulty on the part of the Norwegian Government." M. Ihlen replied that the matter would be considered. On July 22d, M. Ihlen told the Danish Minister that "the Norwegian Government would not raise any difficulties in the settlement of this question." Before the Court, Norway contended that the Ihlen Declaration did not bind Norway, since the Norwegian Constitution required that propositions relating to "matters of importance" be dealt with by the Council of Ministers. Denmark denied that the Norwegian Foreign Minister had exceeded his competence.

The Court found in favor of Denmark, relying in part on the Ihlen Declaration, as a result of which it found that "Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and a fortiori to refrain from occupying a part of Greenland." Not passing specifically on the question whether this was a matter "of special importance" within the meaning of the Norwegian Constitution, the Court said:

The Court considers it beyond all dispute that a reply of this nature given by a minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

M. Vogt, the Norwegian national judge, did not disagree with this position but found that M. Ihlen's Declaration was vitiated by mistake. Judge Anzilotti dissented on the question whether Denmark

31. Id. at 876-77, 884.
33. Id. at 118.

M. Ihlen, it is true, when making his declaration of July 22d, was speaking on behalf of the Norwegian Government and promised that Norway would raise no difficulty in the future settlement of this matter. Such a
had established sovereignty over all Greenland, but held the Norwegian occupation decree unlawful because it violated an obligation validly assumed by Norway in the Ihlen Declaration.\textsuperscript{3} Both the majority and dissenting opinions found Norway obligated because the Declaration had been made by the Minister for Foreign Affairs and fell within his general province, without deciding whether or not he was authorized under the Norwegian Constitution to obligate Norway without formal action by the Council of Ministers. This approach indicates that the Court would in all probability have found a treaty internationally binding despite constitutional defects, if made by the usual organ for the conduct of foreign affairs.

\textbf{IV. LEAGUE OF NATIONS PRACTICE}

Additional light may be found in the practice of the League of Nations as an international political organization in two cases. Luxembourg, whose constitution provided for perpetual neutrality, sought membership in the League in 1919 and 1920, but on the understanding that the question of her neutrality be reserved. Discussion in the League subcommittee indicated doubts whether the League would accept such a condition or understanding. Consequently on November 26, 1920, the Luxembourg delegate wrote to the subcommittee that Luxembourg would withdraw the condition or understanding, ask unqualified membership, and seek to have the requisite change made in the Luxembourg Constitution afterwards. Luxembourg was admitted to membership on December 16, 1920, and her executive sought, but could not obtain, the changes in the Luxembourg Constitution believed necessary to bring it into compromise made by the Minister for Foreign Affairs is, in principle, valid and binding. But in the present case there are special circumstances. M. Ihlen, when making his declaration, was labouring under a fundamental and excusable misapprehension.\textsuperscript{34} Judge Anzilotti stated, \textit{id. at 91-92:}

No arbitral or judicial decision relating to the international competence of a Minister for Foreign Affairs has been brought to the knowledge of the Court; nor has this question been exhaustively treated by legal authorities. In my opinion, it must be recognized that the constant and general practice of States has been to invest the Minister for Foreign Affairs—the direct Agent of the Chief of the State—with authority to make statements on current affairs to foreign diplomatic representatives, and in particular to inform them as to the attitude which the government, in whose name he speaks, will adopt in a given question. Declarations of this kind are binding upon the State.

As regards the question whether Norwegian constitutional law authorized the Minister for Foreign Affairs to make the declaration, that is a point which, in my opinion, does not concern the Danish Government: it was M. Ihlen's duty to refrain from giving his reply until he had obtained any assent that might be requisite under the Norwegian laws.\textsuperscript{34} Anzilotti's attitude, note 12, supra.
formity with the League Covenant. Thereupon, on April 25 and June 2, 1921, the Luxembourg representative asked the League Secretary-General about the temporary status of Luxembourg pending constitutional change. As a result, the League Council considered the matter, and on June 21, 1921, adopted a resolution, in which the Secretary-General concurred, declaring that Luxembourg had been admitted categorically and definitively on her own request, and without the reservation; therefore Luxembourg's rights and duties were the same as those of other League Members, and from the League's standpoint there could be no question of special provisional status.\(^3\) In this situation, then, Luxembourg was treated by the League Council and Secretary-General as having assumed obligations under a treaty, the League Covenant, even though there may have been a conflict between these treaty obligations and what was permitted by the Luxembourg Constitution.

Argentina's membership in the League involved a similar question, since the Argentine Constitution provided that the President makes treaties but the Congress has power to approve or reject them. In 1920, the President of Argentina notified the League of Argentina's accession to the Covenant, but not until 1933 was any formal law passed by the Argentine Congress to approve accession. Meanwhile, Argentina had been treated as a member, though there appears to have been no formal determination by the League that Argentina had become a party to the Covenant through the 1920 accession.\(^3\)

V. DIPLOMATIC CONTROVERSIES

In so far as evidence of international customary law can be found in the diplomatic discussions over treaties alleged to be unconstitutional, the general situation was well summarized as of 1935 in the commentary of the Harvard Research in International Law, as follows:

\(^{35}\) On this case see de Visscher, *op. cit. supra* note 6, at 165-72. Ultimately Luxembourg appears to have concluded that the Covenant, as interpreted by League practice, did not impose obligations which were in conflict with her constitution.

\(^{36}\) See Hudson, *The Argentine Republic and the League of Nations*, 28 Am. J. Int'l L. 125 (1934). Commenting on this situation, Prof. Hudson (later Judge of the Permanent Court of International Justice), wrote:

If the clear indications of the Eastern Greenland Case are to be followed, there could be little doubt that the telegram addressed by the President of the Argentine Republic to the President of the Peace Conference on January 16, 1920, constituted a binding accession, even though the Argentine Constitution required previous assent by the Congress.\(^{36}\)

(Id. at 132.) He added that even if this position were not acceptable, there may have been the equivalent of an accession by estoppel or by "tacit acquiescence."
It may be stated that generally States have denied the binding force of treaties concluded in violation of their own constitutions, although they have sometimes insisted upon execution of those which had been ratified by the other parties in violation of their constitutions.\textsuperscript{37}

When diplomatic controversies have arisen involving allegedly unconstitutional treaties, neither party has usually been willing to admit that the other was correct in law. There would seem little point in discussing many of these incidents in great detail,\textsuperscript{38} but it may be well to refer to some in which the United States has participated.

In 1835 the United States Chargé in Santiago, Mr. Pollard, believed that a treaty recently signed between Chile and Peru would jeopardize certain American rights under a treaty between Chile and the United States. He therefore argued to the Chilean Foreign Office that the Peruvian ratification was void because it was by a general who had usurped the Peruvian presidency and without

\textsuperscript{37} 29 Am. J. Int'l L. 1002 (Supp. 1935).

\textsuperscript{38} Brief accounts of typical incidents will be found in the Harvard Research in International Law, 29 Am. J. Int'l L. 439, 992 (Supp. 1935); McNair, \textit{op. cit. supra} note 6; and J. Jones, \textit{Full Powers and Ratification} 134-157 (1946). Full accounts are given in de Visscher, \textit{De la conclusion des Traités} (1943).

Among the examples often discussed are the Ecuadorean claim of invalidity of its treaty of August 20, 1860 with Peru; the action of the South African Republic (Transvaal) in rejecting a boundary arbitration award of October 17, 1871 in favor of a group of native chiefs in Western Griqualand, in which the agreement to arbitrate had been signed by President Pretorius on behalf of Transvaal but never approved by the legislature as required by the constitution (in this case the Governor of the British Cape Colony had acted on behalf of the chiefs, and strongly protested the repudiation of the agreement by a new President of Transvaal, but for political reasons the British Government allowed the award to lapse); the Ecuadorean denunciation of the Industrial Property Convention of 1883 to which her executive had acceded without obtaining the Congressional consent required by her constitution; the Rumanian repudiation in 1921 of a commercial agreement of 1920 with Austria which had not been approved by the legislature; the protocol of 1924 for protection of Bulgarian minorities in Greece signed by M. Politis, Greek delegate to the Council of the League of Nations and then acting President of the Council, and the League Secretary-General, which was rejected by the Greek National Assembly; and the boundary dispute of 1935 between Iran and Iraq before the League Council which involved a treaty of May 31, 1847 between Persia and Turkey, but which was withdrawn by the parties from the Council's consideration. In none of these instances does there appear to have been any agreement reached between the parties to the dispute, as to whether the allegedly unconstitutional treaty was or was not internationally valid if in fact unconstitutional.

Some writers have also discussed the supposed analogy of concession contracts granted to aliens by governments, which have generally not been held valid unless granted in conformity with the national law of the grantor state; since such contracts are far more closely connected with the state's own law, and on orthodox theory are governed by national law rather than international, the analogy may be of doubtful pertinence or value.
the legislative approval required by the Peruvian Constitution.\textsuperscript{39} The Chilean Foreign Minister replied that this was not a question in which foreign nations were concerned, and that the general governing Peru had sufficient \textit{de facto} authority.\textsuperscript{40} Although Chile rejected the American Chargé's argument, the treaty was soon repudiated by Peru in the troublesome revolutionary days which followed.\textsuperscript{41}

In late 1835 the President of Bolivia, General Santa Cruz, invaded Peru and took the title of "Protector of the Confederation of Peru and Bolivia." As such, he caused a commercial treaty to be signed with the United States, November 30, 1836.\textsuperscript{42} Though trying to get approval for the treaty from a conference which he called in 1837, Santa Cruz went ahead and ratified the treaty himself on January 17, 1837, the ratifications being exchanged May 28, 1838. Santa Cruz was defeated by regular Peruvian forces, and exiled in January, 1839. On November 23, 1839, the new Peruvian Congress adopted a law declaring that Peru did not recognize the treaties concluded with the United States and Great Britain by Santa Cruz; but this law was not published until 1845. Only in

\textsuperscript{39} 5 Manning, Diplomatic Correspondence of the United States, Inter-American Affairs (1831-1860) 44-81 (1937). Though expressing his awareness that "much may be said as to the right of Chile to decide upon the authority of those with whom she may make contracts," Mr. Pollard said that in this case the rights of a third party, the United States, were involved. Stating that General Salaverry, who had ratified on behalf of Peru, had not been recognized and could not be considered the \textit{de facto} head of the Peruvian executive, he said:

[T]he Ratification of the treaty on the part of Peru, by General Salaverry, is null and void, being without authority against the constitution of the Country. By the constitution of Peru the Legislative body is to have the action on treaties. General Salaverry has not revoked the constitution by decree or proclamation therefore it is in full force and virtue, even as concerns his acts. If General Salaverry was rightfully the Executive of Peru he could not ratify the treaty, because the constitution secures that power to the Legislative body. But all the power that General Salaverry has is the power of force and not legitimate. The treaty therefore is an invalid instrument. Both parties to a contract must have the power of contracting otherwise the contract is void and can have no legal operation. \textit{Id.} at 80-81.

\textsuperscript{40}  The Chilean Foreign Minister stated:

Whether General Salaverry is or is not a legitimate chief magistrate is not a question in which foreign nations have a right to intervene. At the time when the treaty was presented to him for his ratification, and in which such ratification was authorized by that Chief, nearly all Peru was subject to his authority. . . . If, in order to treat with a foreign government, its titles had to be examined and proved in the crucible of written constitutions, how many of the treaties which are to-day in force would there be? De facto possession is all that foreign nations verify in order to conclude commercial conventions among themselves. \textit{Id.} at 85.

\textsuperscript{41}  \textit{Id.} at 97.

\textsuperscript{42}  4 Miller, Treaties and Other International Acts of the United States 71 (1931). On this incident, see also de Visscher, \textit{op. cit. supra} note 6, at 201.
1847 was it brought to the attention of the United States by a note from the Peruvian Minister in Washington, which said that the so-called Peru-Bolivian Confederation was nothing more than a "project" and never attained the character of a body which could make treaties; even if it had existed as such a body, General Santa Cruz, under the project of federal compact of 1837, could not enter into treaties without the consent of the Senate, which was never appointed and never assembled. However, Peru had no objection to the substance of the treaty and was willing to conclude a new one along the same lines. Secretary of State Buchanan replied that a long period had elapsed without Peruvian objection, Peru's conduct having conformed to the treaty provisions, and that General Santa Cruz had actual power when the ratifications were exchanged. He added:

It is not the intention of the Undersigned at present to reply to the argument. If this were his purpose, he might contend with great force that the long acquiescence of the Peruvian Government in the terms of this Convention, without any notice or intimation to the contrary, precluded it at this late date from objecting to the authority by which the Convention was concluded.

Preferring to avoid discussion of the legal issue, he was willing to conclude a new convention with Peru and "leave the validity of the present convention undecided."44

Venezuela signed a protocol with the United States August 21, 1909, agreeing to pay the United States in settlement of a claim of an American company for violation of a 1900 Venezuelan concession. On August 4 a new Government Council had come into existence in Venezuela under a new constitution, and some urged the Venezuelan executive to refer the protocol to this new Council for

43. 4 Miller, Treaties and Other International Acts of the United States 103; also in 10 Manning, op. cit. supra note 39, at 553.
44. 4 Miller, op. cit. supra note 43, at 105; 10 Manning, op. cit. supra note 39, at 239-41. Concurrently with signature of a new treaty, Secretary Buchanan and the Peruvian Minister signed a declaration on February 9, 1848, that any rights under the old treaty which any American citizen may have acquired should be decided "as if the said treaty were in force with the approbation of both Governments." 4 Miller, op. cit. supra at 106.

A similar question arose in 1843 as to a Claims Convention of March 17, 1841 between the United States and Peru, which was first ratified by Peru without approval of Congress as required by the Peruvian Constitution and specified in the treaty. Though the United States Chargé remonstrated that this ratification was internationally valid, the United States did not object to a subsequent Congressional approval, new Peruvian ratification, and second exchange of ratifications in 1846. In view of the treaty stipulation for approval by the Peruvian Congress this seems the natural result. See id. at 329; de Visscher, op. cit. supra note 6, at 204-05.
its approval. The American Minister reported to Washington that the Venezuelan Government had insisted that, as the negotiations had been completed prior to installation of the new Government Council, there was no need to submit the protocol to it. The American Minister suggested, however, that the protocol be submitted to the Council in order to avoid question. As to this suggestion, the Department of State responded:

Protocol is a fait accompli, internationally speaking. In signing the protocol as a finality and not ad referendum, the Venezuelan Foreign Office gave assurances that it either had or would obtain power to make its action good. Upon these assurances this Government is, internationally speaking, entitled to rely, and behind them it is not entitled to go. With the steps, if any, which the Venezuelan Government should take to regularize its action according to Venezuelan municipal law, this Department has no concern and can tender no advice.45

In 1931 President Moncada of Nicaragua suggested that the 1914 Nicaraguan Canal Treaty with the United States violated a provision in the Nicaraguan Constitution forbidding treaties "which are opposed to the independence and integrity of the nation or which affect in any way its sovereignty, excepting those which tend to union with one or more of the republics of Central America." He urged this as a reason why Nicaragua should adopt a new constitution. Secretary of State Stimson replied:

To discuss at this time the question of the constitutionality of the Canal Treaty of August 5, 1914, seems to me of doubtful utility. It is self-evident that the provisions of this treaty were not regarded by the Nicaraguan Government which negotiated it as being in conflict with the Constitution. . . . I am confident that when and if the United States Government decides to exercise the option granted it under the Treaty, the Government of Nicaragua will not fail to take whatever action may be considered necessary on its part to insure the proper realization of the objectives of the treaty.46

The above were instances in which the United States has discussed the possible effect of violation of some other nation's constitution. With the exception of Chargé Pollard's protest in 1835 concerning the Chilean-Peruvian treaty, which does not appear to have been under instructions from the Department of State, the

45. 5 Hackworth, Digest of International Law 157 (1943).
46. 5 Hackworth, Digest of International Law 155 (1943). It may be noted that in 1914 the Department of State had received a paraphrase of a cable from the Nicaraguan Minister for Foreign Relations to the Nicaraguan Minister in Washington, which stated that the argument of unconstitutionality of this treaty was absurd. Ibid.
United States took the position that the treaty was internationally effective. In the *Dillon* case a French consul objected to being subpoenaed as a witness for a defendant in a United States federal court, claiming that he was given an immunity from legal process to compel his appearance as a witness by the consular convention between the United States and France. However, the counsel for the consul, the judge, and Secretary of State Marcy were all in agreement that in an American court the Constitution would prevail over the treaty if in fact the immunity given was in conflict with the sixth amendment to the Constitution. However Judge Hoffman ruled that the sixth amendment was intended only to place the accused in the same position in making his defense as the government occupied in trying to prove his guilt, and thus the object of the amendment was obtained despite the exemption granted the consul by treaty. Therefore the consul was ruled exempt. However, the French Government was dissatisfied because the consul had been brought into court against his will, and after a long disagreement the United States and France arranged in May, 1855, that by way of amends the United States would salute a French national ship or squadron when one next came to San Francisco. In the interpretation by Judge Hoffman of the sixth amendment, and the willingness of the United States to give the salute, some have seen an indication that the United States would consider the treaty to be internationally valid despite conflict with the Constitution.

While the Dillon incident is inconclusive on this point, a clear and important statement that the United States might be internationally liable under a treaty found to be unconstitutional occurred in connection with the St. Lawrence Waterway proposals. After a treaty between the United States and Canada for construction of the Waterway failed to obtain a favorable vote in the Senate, much the same provisions were embodied in an agreement submitted to Congress for approval by majority vote of both Houses. Some Senators doubted whether such a "Congressional agreement" could constitutionally be used instead of a treaty. In hearings before a subcommittee of the Senate Commerce Committee, November 29, 1944, G. H. Hackworth, then Legal Adviser of the Department of State and now President of the International Court of Justice, said:

47. Unless, of course, the treaty itself stipulates that there must be compliance with constitutional requirements, as in the Peruvian claims convention of 1841, note 44 supra. Cf. note 18 supra.

48. 5 Moore, Digest of International Law 78-81, 167-68 (1906); *In re Dillon*, 7 Sawyer 561, 7 Fed. Cas. 710, No. . . . (C.C.N.D. Cal. 1854).

49. Cf. Wright, Michigan Summer Institute, *supra* note 6, at 197.
In international law the head of the government is entitled to speak for the state, and if the President enters into an obligation with a foreign government, that foreign government is entitled to rely upon it. It is not under the obligation of inquiring into our constitutional processes. It takes the word of the head of the State.

If the obligation is violated, it is a violation of an international obligation pure and simple, whether the President exceeded his authority or not. He is supposed to act within his authority, but if he gets outside of that, the other government is entitled to rely upon his action. . . .

I am inclined to think that if you went before an arbitration tribunal, the tribunal would say that the foreign government had the right to rely upon the word of the Chief Executive, and whether he has or has not exceeded his authority is a domestic issue here. But the other foreign government is entitled to rely upon what he agrees to do.50

As this statement was made almost a decade after the Harvard Research in International Law had come to the contrary conclusion, it may be considered a strong factor in support of the view that international agreements may be internationally binding even though they have been entered into in a way which is held to be contrary to the constitution of a party.51

VI. INTERNATIONAL LAW PREVAILS OVER CONFLICTING NATIONAL LAW

Closely connected with the view that constitutional limitations do not invalidate the international effect of a treaty, is the rule stated by the Permanent Court of International Justice in its advisory opinion on Treatment of Polish Nationals in Danzig:52 “[A] State

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50. *Hearings Before the Subcommittee of the Senate Committee on Commerce*, 78th Cong., 2d Sess. at 230 (Nov. 29, 1944).

51. That there seems to be a trend in the direction of recognizing the international validity of treaties which do not conform to national constitutions, note the change in Prof. Hyde’s views (notes 7 and 8 supra); Murphy’s suggestions in note 14 supra; and Prof. Rice’s suggestion that with the constitutions of a number of nations such as France, Germany, and The Netherlands giving treaties priority over national laws even in national courts, an international organ is encouraged to give priority to international law in these matters both as to such states and as to those whose courts do not give treaties priority internally. *Michigan Summer Institute*, supra note 6, at 208-09. Prof. Rice also alluded to the concurring opinions of Justices Reed and Jackson in the United States Supreme Court with respect to conflicts between interstate compacts and state constitutional provisions, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 32, 35, 36 (1951).

cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." It is well recognized that a State's obligations under a treaty are not altered or diminished by the fact that the appropriate legislative body has failed to appropriate funds or to take any other necessary legislative action to implement the treaty, or terminates its internal effect as national law.53

By analogy, some argue that constitutional provisions are equally ineffective in avoiding the obligation of a treaty which has been accepted by the Executive, as the normal organ of the State for the conduct of foreign affairs. This argument may be particularly appropriate when it is a question of constitutional restrictions on the types of treaty which may be made, rather than as to what organs may bind the state by their acts. Instances often relied on in these discussions include the controversy between the United States and France over French failure to pay money promised in their treaty of July 4, 1831,54 and the Swiss-French arbitration of 1912. In

53. In the United States, and most other countries, appropriations required for performance of treaty obligations must be approved by legislation. Though in the United States, and a considerable number of other countries, many treaties are "self-executing" in national courts without the need for further legislation, in some countries all treaties require legislation to make them effective as domestic law. The same is true in the United States as to "non-self-executing" treaties. Failure to implement a treaty which is not "self-executing" would entail international responsibility for non-performance of the treaty, even where this failure is due to the constitutional incapacity of the national legislature to do so, as when it was held that the Canadian federal government lacked constitutional power to implement international labor conventions. Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326 P.C. In this case the Privy Council recognized with respect to treaties that "once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default." Id. at 348.

In the United States, when a treaty and an Act of Congress are wholly inconsistent with each other and cannot be reconciled, the courts hold the later in time as prevailing over the earlier. Under these circumstances, Secretary of State Hughes well pointed out in a letter of February 19, 1923, to Secretary of the Treasury Mellon:

[A] judicial determination that an act of Congress is to prevail over a treaty does not relieve the Government of the United States of the obligations established by a treaty. When this obligation is not performed a claim will inevitably be made to which the existence of merely domestic legislation does not constitute a defense and, if the claim seems to be well founded and other methods of settlement have not been availed of, the usual recourse is an arbitration in which international rules of action and obligations would be the subject of consideration. 5 Hackworth, Digest of International Law 194-95 (1943).

54. By this treaty of 1831 France promised to pay a certain sum in compensation for damages suffered by Americans at the hands of the French Government. Though under the French Constitution of that time the king could make treaties, only Parliament could impose taxes and appropriate money. When the French executive could not get from Parliament approval of the necessarily legislation to carry out the treaty, the United States insisted on performance, taking the attitude that the treaty, having been constitution-
neither of these cases, indeed, did the non-performing party contend that the treaty was unconstitutional or internationally invalid, and the settlement in the former and arbitral award in the latter are not directly relevant as international precedents in favor of the validity of unconstitutional treaties. At most they may serve as supporting analogies.

In the Swiss-French case\textsuperscript{55} the question was whether France was entitled in 1910 to modify her tariff on certain steam turbines imported from Switzerland, in view of an agreement (called commercial convention and regulations) signed by the parties in 1906. Switzerland claimed that this agreement stabilized the existing tariff on such imports, while France argued that for many years her policy had been based on retaining her own control over her tariff and that her tariff could be modified only by legislation. The resulting dispute was submitted to arbitration, and in an award by Lord Reay (Great Britain) as umpire, in favor of Switzerland, he said:

Considering that the treaty of commerce and the regulations are international conventions governed by the sanction which the contracting parties, represented by their plenipotentiaries, have given thereto; 

The tribunal is not called upon to consider whether or not the regulations must be submitted to the sanction of the legislature; that is a matter pertaining to internal law.

The award interpreted the agreement in favor of Switzerland, and in its application clearly treated the agreement as valid.\textsuperscript{56}

VII. CODIFICATION ATTEMPTS

The only multilateral treaty dealing with the question appears to be the Pan-American Convention on Treaties,\textsuperscript{57} signed in 1928 as part of the Pan-American efforts toward codification of international

\textsuperscript{55} See 5 Moore, Digest of International Arbitrations to Which the United States Has Been a Party 4447, 4463-68 (1898); see also 7 Moore, Digest of International Law 123-30 (1906).

\textsuperscript{56} One should note the comment in McNair, Constitutional Limitations upon the Treaty-Making Power, in Arnold, 1 Treaty-Making Procedure 8 (1933).

It will be noted that France does not appear to have contended specifically that the Convention was not binding upon her by reason of the non-compliance with a constitutional limitation. The argument was rather that the French Government could not have agreed to what Switzerland claimed they were bound to do, because that could only be done by legislative action, which, it is to be inferred, was outside their control.  

\textsuperscript{57} 4 Hudson, International Legislation 2378 (1931).
law and ratified by six states, as of 1939, but not yet in force because of insufficient ratifications. Article 1 of this convention reads: "Treaties will be concluded by the competent authorities of the States or by their representatives, according to their respective internal law." The usual analysis of this convention is that given by Professor Hudson: "This would seem to require compliance with a state's constitutional requirements before a valid treaty [or engagement] can be concluded."

In its work toward codification of the law of treaties, the United Nations International Law Commission has also struggled with this problem; but the Commission has not yet agreed upon a draft on the law of treaties nor definitively settled its own attitude on this particular question. Professor J. L. Brierly, in his first and third reports on the law of treaties, submitted to the Commission April 14, 1950 and April 10, 1952, favored giving international effect to constitutional restrictions in the treaty field. At its Third Session (1951), the Commission provisionally adopted an article to the effect that the competence of a State to make treaties is exercised by the organs which its constitution designates to that effect, and then provisionally altered this to a statement that, in the absence of a contrary disposition in its constitutional law and practice, the capacity of a State to make treaties is presumed to lie in its chief of state.

Thereafter Professor Lauterpacht became the special rapporteur on treaties, and in his report of March 24, 1953 discussed the problem at length. He agreed that constitutional restrictions had some international effect, and said that the article provisionally adopted would be acceptable to a certain extent, if in all countries constitutional limitations on the treaty power were clearly defined, well-known, and easy to verify. But he believed that just the contrary was the case with respect to these limitations. He urged that it was important to prevent any rule adopted in codification being used as an excuse to escape treaty obligations, and therefore emphasized that provision must be made for international judicial determination of claims that treaties were invalid for unconstitutionality. In this

58. Brazil, Dominican Republic, Ecuador, Haiti, Nicaragua and Panama, according to J. Jones, Full Powers and Ratification 149 (1946).
report, and in a later one, Lauterpacht proposed a text to the effect that a treaty concluded without regard for the limitations imposed by a party's constitutional law and practices may be annulled at the request of that party, though not on the request of some other State. Any party seeking to nullify on this ground would be obligated, in case of dispute, to bring the case before the International Court of Justice. Furthermore, any contracting party would be considered as having renounced this right of annulment if it had during a long period refrained from alleging nullity, or if it had put into effect the provisions of the treaty or had derived a benefit from it. In any event, the party escaping the treaty obligations on this ground of nullity would be responsible for all prejudices caused the other party in so far as the latter could not reasonably be considered aware of the constitutional limitation in question.

When Lauterpacht went on the International Court of Justice, he was in turn succeeded as special rapporteur on treaties for the International Law Commission by Sir Gerald Fitzmaurice, Legal Adviser of the British Foreign Office. Fitzmaurice took a somewhat different position in his first report on the law of treaties, of March 16, 1956, proposing as a part of a code on the law of treaties an Article 9, reading:

(1) Treaty-making and all other acts connected with treaties are, on the international plane, executive acts, and the function of the executive authority. Whatever legislative processes have to be gone through in order to make such acts effective on the domestic plane, on the international plane they are authentic.

(2) On the international plane, therefore, the treaty-making power is exercised:

(a) In the case of a State, by the competent executive authority (Head of State, government): it is for each State to determine for itself what constitutional processes are necessary in order to place the executive authority in a position, on the domestic plane, to exercise this power; but, on the international plane, its exercise is the act of the executive authority.

(3) No State is obliged, or, strictly speaking, entitled, to accept as internationally the acts of another State in relation to a treaty, unless they are acts of the executive authority; but because a State is bound to accept them if they are of this character, they necessarily bind the State whence they emanate, which,

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66. The omitted paragraph 2(b) deals with treaties made by international organizations, such as the United Nations.
having performed them through its executive authority, may not then deny their international authenticity.

Commenting in his report upon this draft, Sir Gerald declares that a State may not subsequently deny the international authenticity of the acts of its executive authority, thus reiterating his earlier position and departing from the views expressed by the previous special rapporteurs on treaties.

What will prove to be the final attitude of the International Law Commission on this point remains uncertain, as does the possible effects of any drafts which the Commission may report to the General Assembly. In the discussions there has been sharp difference of opinion among the Commission members. In comparing the approaches of the successive special rapporteurs on treaties, it may be of interest to note that Sir Gerald, like Judge Hackworth, spoke on this problem with a long background of service as the legal adviser of a foreign office, and was thoroughly familiar at first hand with the practical difficulties of ascertaining just what another State's constitution may be interpreted to mean, and aware of the need to be able to rely on the competence to bind the State of the organs through which international relations are normally carried on and agreements entered into.

VIII. Conclusions

After seeing what the problem is, the differing solutions suggested, and the rather sparse yet conflicting evidence as to any rule of customary international law on the point, what may we conclude? Honest appraisal confirms Lauterpacht's statement that "there is a wide and unresolved divergence of views and practice as to the effect of the disregard of constitutional limitations" with respect to treaties, and compels agreement that the subject indeed falls under the rubric of "absence of agreed law." But we can perhaps go a little further and reach some tentative conclusions.

In the first place, we must bear in mind that States will be reluctant to admit, in abstract discussion or codification attempts, that they can be bound by agreements made in violation of their own constitutions, though often ready enough to insist that other States may be obligated by agreements not conforming to such other States'
constitutions! This is only a natural reaction, but it must be reckoned with when we try to determine what is the present rule of international law. There is little need to reiterate the importance of respect for and observance of constitutional provisions if nations are to maintain democratic governments. Those familiar with the conduct of foreign affairs will be quick to see the counter-balancing needed to be able to rely on the pledged word of a foreign government given through its normal organs for conduct of foreign relations, if we are to have any hope of international stability and if treaties are to accomplish the purposes for which they are made. The most desirable rule would appear to be one intermediate between the two extremes of saying either that any conflict with the constitution makes a treaty internationally void, or that violations of the constitution never affect the international validity of international agreements.

Examining the evidence as to customary law, it appears too strongly opposed to the theory that an unconstitutional treaty is necessarily void internationally, for that theory to be acceptable. Such a theory appears untenable when, to the powerful practical and theoretical arguments in opposition, we must add the weight of the Rio Martin arbitration, the analogy of the Free Zones and Eastern Greenland cases before the Permanent Court of International Justice, the League of Nations practice concerning Luxembourg and Argentina, the Hackworth statement in the St. Lawrence Waterway hearings, and the well-settled rule that in the "international forum" conflict with national law or constitution is no excuse for non-performance of international obligation.\(^7^0\)

If we approach the problem \textit{de lege ferenda} and seek what we think would be a good rule, there is much to be said for the distinction between constitutional limitations readily known by a foreign negotiator, or which relate directly to treaty-making, from the relatively obscure or "remote" types of limitations. We might favor

\(^7^0\). It may well be, as was asserted in the passage quoted in note 7 \textit{supra}, that the "instances of international usage, accepted as law, are too fragmentary and inconclusive to be of much value" in establishing clearly the contrary extreme rule that violation of constitutional restrictions never invalidates treaties internationally. But the evidence in support of the rule that unconstitutional treaties are void internationally—found chiefly in the combination of the Cleveland award in the Nicaraguan-Costa Rican dispute, the Pan-American Convention on Treaties (largely unratified), national assertions in unsettled diplomatic controversies which were countered by national assertions of the contrary rule by the opposite side, and the probable preponderance of opinions of writers (if one makes an arithmetical count of those who have supported various views)—would not appear to suffice to overcome the evidence that unconstitutional treaties may at least sometimes be valid in international law.
stress on good faith reliance on the statements or implied\textsuperscript{11} assurances of competence given by the normal organs of foreign affairs. Such suggested rules would probably guide us well in many of the cases that can be imagined, and may help us select the situations where most students would say that \textit{at least} under the circumstances of such a case constitutional difficulties should not invalidate treaties. However, the great difficulty with saying that any of them \textit{is} the actual rule of international law lies in the fact that the evidence we have as to customary international law does not support the distinctions which these rules would draw between the cases where unconstitutional treaties are void, and those where they are internationally effective.

For example, it has been suggested that \textit{written} constitutional provisions always invalidate treaties in conflict with them, probably because it is assumed to be easy for a foreign treaty-maker to become aware of written constitutions. Nevertheless, it may be seen that in at least\textsuperscript{72} the \textit{Free Zones} case, the \textit{Eastern Greenland} case, and the League practice concerning Luxembourg and Argentina, written constitutions were involved but the written nature of the constitution was not held to make the international agreement void. If the test were reasonable possibility of finding out about the constitutional provision, or conversely the unreasonableness of relying exclusively on the treaty-makers' express or implied assurances concerning competence, we would find that such a rule breaks down in at least\textsuperscript{73} the \textit{Free Zones} case, \textit{Eastern Greenland} case, and the League action concerning Luxembourg and Argentina, in each of which there was apparently as much opportunity as could be expected in any ordinary situation for the foreign negotiator to find out independently about the constitution involved; and yet the international validity of the agreement was upheld. When tested against the record of cases and controversies, it is hard, indeed, to remain convinced that these several suggested rules do in fact represent the existing law.

\textsuperscript{71} Cf. Prof. Rice's statement, Michigan Summer Institute, \textit{supra} note 6, at 206: "a country, by dealing, warrants that it has authority to deal, and for any person or court outside of the nation to question what its agent or organ of communication represents to be its power is to intrude into internal affairs."

\textsuperscript{72} The United States, of course, also has a written constitution, but the unwritten character of the rules concerning "Congressional agreements" may prevent our classifying it as such when studying the St. Lawrence Waterway question.

\textsuperscript{73} Probably, indeed, the British Diplomatic Agent in Morocco who exchanged notes with the Maghzen of Morocco was familiar with the distribution of governmental power in that country, and one would expect that Canada's treaty-makers were not wholly uninformed about the controversy south of their border concerning the scope and limits of the "executive agreement" power.
These rules suggested by the writers or codifiers seem more like propositions upon which it is hoped that a maximum of agreement might be obtained, than like statements of existing customary law supported by the statements of foreign offices or international judges, or rules distinguishing between the cases in which unconstitutional agreements have been held void and those in which they have been internationally effective. Nevertheless, and perhaps for that very reason, they may help us predict the rules upon which international judges would be likely to operate, since these suggested solutions and the reasoning back of them would appeal to such judges as much as to anyone else. In this way, they may guide us in trying to find "the law" when "law" is defined as the prediction of what judges or officials will be most likely to do about disputes with which they have to deal.

Thus, it is probably true that the more "notorious" and clear-cut the constitutional provision, the quicker we would be to feel that its violation ought to result in a void treaty. Conversely, the greater the degree of reasonable reliance on assurances of constitutional competence, especially if they are express, the more just it seems to uphold the treaty. Attempting to predict the reaction of international tribunals, most would probably believe that an international court confronted with the hypothetical ratification of the Treaty of Versailles by the President without Senate advice and consent, would say that the United States should not be bound. On the other hand, when it is a choice between Senate approval as a "treaty" in the narrow constitutional sense of the word, and approval by both Houses of Congress acting by majority vote as a "Congressional agreement," there is enough current opinion (right or wrong) holding that whatever can be done by the former method can likewise be done by the latter, to make it very difficult for an international court to say that a foreign nation is unreasonably wrong in relying on the decision of our President and Congress that a "Congressional agreement" is proper—even though it is also quite conceivable that the Supreme Court might later hold that such a "Congressional agreement" could not be the proper constitutional means

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74. When we think of a constitutional provision the violation of which would render a treaty invalid, we tend to imagine an experienced foreign negotiator looking at one of the obvious provisions of the United States Constitution. When we think of the reasonableness of relying on the foreign government's assurances, the picture which comes to mind is often that of the difficulty which we or a South American negotiator might have in making independent verification of the extent of power of the treaty-making organs of Yemen or Outer Mongolia.
of making the particular agreement.\textsuperscript{75} It might be equally probable that an international court would uphold a treaty made by the Swedish King without concurrence of the Riksdag, though it should afterwards have been held in Sweden that the agreement related to a "matter of importance." The same would seem likely with a Costa Rican treaty which did not appear to "conflict with the sovereignty or independence of the Republic," but which Costa Rican authorities later held to be in such conflict. In the case of Mexico it might be hard to get an international court to uphold as internationally effective a Mexican extradition treaty which "on the face of it" stipulated the extradition of those whom the treaty called "political criminals." On the other hand, if the treaty provided for the surrender of a class of anarchists or political assassins whom the treaty-makers did not consider "political criminals" but whom the Mexican courts later held to come within the protection of the constitutional provision, an international court would be likely to hold Mexico obligated.

Many would agree that the United States might be obligated internationally, at least to the extent of an obligation to pay damages for non-performance,\textsuperscript{76} if we entered into a treaty which was later held unconstitutional for violation of such a guarantee in the Bill of Rights as the defendant's right to jury trial or to compulsory process to obtain witnesses. The probability of such an international decision would be enhanced if the question of constitutional interpretation were generally regarded as a doubtful one at the time the treaty was concluded and ratified.

All in all, we must recognize that international law is far from certain and settled in this field. We must admit the possibility that states may be found to be obligated internationally by treaties which are in conflict with their constitutions, though we may not be able

\textsuperscript{75} Although there would seem little or no question that such an agreement as that involved in the St. Lawrence Waterway situation could constitutionally be made either by the President-and-Senate method, or by the President with both Houses of Congress as a "Congressional agreement," it is quite possible that an agreement dealing with matters falling within the reserved powers of our States so far as Congressional action is concerned, could not be dealt with by "Congressional agreement" though it might properly be handled by the treaty-making power of the President and the Senate.

\textsuperscript{76} Generally speaking, damages for non-performance seem as far as international law remedies go; we have little as yet in the way of international tribunals or agencies compelling specific performance of treaty obligations. Note also that though the Harvard Research in International Law suggested that the treaty would be void but damages would be awarded for misleading assurances, neither the statements nor practices of governments and international tribunals in this field of unconstitutional treaties bear out this suggestion. If there is liability internationally, it is regarded as liability because of the treaty obligation, and not delictual liability based on false or negligent misrepresentation.
to conclude safely that in all circumstances constitutional limitations lack international effect. Much may depend upon the role in which we envisage the lawyer giving an answer to this question, whether as an advocate for one side or the other in a controversy, or as an adviser to government or (say) private investor about to act in reliance on a treaty whose constitutionality may be questioned. So long as there may be a possibility of the result turning on the degree of reliance on assurances, there may be a very practical problem for the legal adviser, public or private, as to whether he should pursue independent investigations into the other country's constitutional law, which might later be held to disprove his reliance! At present we must rely more on common sense and "desirable policy" than upon "general practice accepted as law" in efforts to ascertain and estimate whether or not in a particular case a State will be regarded as obligated by an unconstitutional treaty. Of course, it is always easy to point out that the problem will not arise if those who make treaties do in fact succeed in keeping within the constitution involved.

So far as the future of the law is concerned, it will help greatly in the progressive development of this field of international law if we can learn far more than is now generally known about the actual practice and attitudes of most States of the world regarding this problem. Our evidence of practice may be far from complete, and our information as to the attitudes of foreign offices is very scanty. Despite the great difficulty of getting foreign offices to commit themselves on such a problem as this, the question would seem to be one on which there would be great value in obtaining honest and careful answers from as many governments as possible to a well-designed questionnaire from the United Nations International Law Commission, covering both their past practice and their present beliefs. When we know more of what the nations of the world have done in this matter, and more of what they think is the proper solution, we will be in a better position to predict what an international tribunal seized of the question would actually decide, and thus to say what the international law rule on it is.

77. Cf. Murphy, Michigan Summer Institute, supra note 6, at 203.