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International Law - Treaties - Inclusion of Purely Domestic Matters in Reservations

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INTERNATIONAL LAW—TREATIES—INCLUSION OF PURELY DOMESTIC MATTERS IN RESERVATIONS—In consenting to the ratification of the treaty between the United States and Canada concerning uses of the waters of the Niagara River, the Senate attached a reservation which stated that "no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress."[1] On

[1] Treaty Between the United States and Canada Concerning Uses of the Waters of the Niagara River, February 27, 1950, 1 U.S.T. 694 at 699. It is noteworthy that there was considerable question in the legislative history of this treaty whether the subject of the reservation was a proper one for inclusion in a treaty. Thus, the President in transmitting the treaty to the Senate pointed out that it "would not be appropriate either for this country or Canada to require that an international agreement between them contain the solution of what is entirely a domestic problem." 96 CONG. REC. 6128 (1950). The Foreign Relations Committee favorably reported the Treaty, subject to the reservation. 96 CONG. REC. 12094 (1950). The Senate accepted the committee's recommendation and consented to the treaty

the basis of this reservation, the Federal Power Commission denied the application of the Power Authority of the State of New York for a license under the Federal Power Act[2] covering the new flow of water made available under the treaty. On appeal to the Court of Appeals for the District of Columbia Circuit, *held,* order set aside and remanded. The subject covered by the reservation was purely domestic in nature and thus not proper for inclusion in a reservation. Not being a reservation, it was not part of the treaty and did not remove the new flow of water from the jurisdiction of the Federal Power Commission. *Power Authority of the State of New York v. Federal Power Commission,* (D.C. Cir. 1957) 247 F. (2d) 538, revd. for mootness sub nom. *American Public Power Assn. v. Power Authority of the State of New York,* (U.S. 1957) 78 S. Ct. 142.

Although the issue in the instant case has meanwhile become moot,[3] the problem of the relation between the treaty-makers and Congress is one of continued importance[4] and warrants a critical look at the disposition of the issue in the instant case. The provision inserted in the treaty was intended to be a "reservation" as its legislative history indicates.[5] A reservation to a treaty is, by analogy to contract law, the refusal of an offer and the proffering of a counter-offer.[6] If accepted by the other contracting state, the reservation becomes part of the treaty and "will, when in force, limit the effect of the treaty as between that State and the other party or parties to the treaty."[7] On the basis of these definitions the court in the principal case held that the Senate's proviso did not constitute a reservation inasmuch as it did not change the effect of the treaty as to either party. The treaty became wholly executed on its effective date, i.e., each party became entitled to a particular quantum of water, it being of no concern to either party how the other proposed to make use of its share. In thus interpreting the Senate's proviso as not constituting a reservation the court avoided the necessity of passing on the question of whether such a reservation, as part of the treaty, could be constitutional. As pointed out in the strong dissent of Judge Bastian,[8] there can be no doubt that the Senate intended the proviso to be a reservation and part of the treaty, in that it conditioned

with the reservation. 96 CONG. REC. 12095 (1950). In the protocol of the ratification, Canada inserted the statement on Oct. 10, 1950, that it would accept the reservation inasmuch as "its provisions relate only to the internal application of the treaty within the United States and do not affect Canada's rights or obligations under the treaty."

2 41 Stat. 1063 (1920), 16 U.S.C. (1952). §791a et seq.

3 An act has been passed to authorize the construction of certain works of improvement in the Niagara River for power and for other purposes, P. L. 85-159, 71 Stat. 401 (1957), approved Aug. 21, 1957.

4 See generally, Henkin, "The Treaty Makers and the Law Makers: The Niagara Reservation," 56 COL. L. REV. 1151 (1956); 51 AM. J. INT. L. 606 at 610 (1957).

5 See note 1.

6 1 OPPENHEIM, INTERNATIONAL LAW, 8th ed., Lauterpacht, 914 (1955).

7 29 AM. J. INT. L. SUPP. 843 at 857 (1935).

8 Principal case at 544.

its consent to the treaty on its acceptance.[9] Yet in spite of the lack of authority on the point, it would seem that the doctrine of separability of provisions, employed in cases of unconstitutional legislation, is inapplicable in the case of an invalid reservation, inasmuch as a reservation is the Senate's way of conditioning its consent to the entire treaty. Striking down a reservation would therefore seem to require striking down the entire treaty as well. In this context, then, the extent and nature of the treaty-making power become important. In his well-known discussion of this question in *Missouri v. Holland*,[10] Justice Holmes questioned whether the extent of the treaty power might be limited by constitutional prohibitions apart from the formal requirements for its exercise. Without answering the question[11] he sustained the treaty because it related to a "national interest of very nearly the first magnitude" which "can be protected only by national action in concert with that of another power."[12] Previously it had been said that the treaty power extends to any matter which is properly the subject of negotiation with a foreign country,[13] but we have recently been assured that it does not extend to matters "which do not essentially affect the actions of nations in relation to internationl affairs, but are purely internal."[14] Nor would a treaty "abrogating the functions of the Supreme Court of the United States or of the legislative or executive bodies" be valid.[15] Whether such domestic matters can appropriately be included in a treaty by reservation becomes important because by this means previous bicameral congressional acts can be modified.[16] It is no longer doubted

9 See note 1 supra.

10 252 U.S. 416 (1920).

11 Justice Black gave an affirmative answer to Justice Holmes' question in Reid v. Covert, 354 U.S. 1 (1957).

12 Note 10 supra, at 435.

13 Ware v. Hylton, 3 Dall. (7 U.S.) 199 (1796); Geofroy v. Riggs, 133 U.S. 258 (1890).

14 Secretary of State Dulles before a subcommittee of the Senate Judiciary Committee, Hearings on S. J. Res. 1, 84th Cong., 1st sess., 183, May 2, 1955. The Supreme Court, in Santovincenzo v. Egan, 284 U.S. 30 at 40 (1931), held the treaty power broad enough to cover all subjects that properly pertain to foreign relations; to this the recent holding in United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), should be applicable, viz., that a constitutional power granted for a special purpose cannot be used to make law on a matter unrelated to that purpose. If it were otherwise, there would be a situation, as Elihu Root put it, where "under pretense of exercising the treaty-making power, the president and the senate might attempt to make provisions regarding matters . . . which would be only a colorable—not a real—exercise of the treaty making power." Quoted in 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 5 (1943). For a fuller discussion of the law, reference should be made to the widely circulated Opinion by Prof. Philip C. Jessup (of counsel for the Power Authority of the State of New York in the instant case) and Prof. Oliver J. Lissitzyn, prepared for the Power Authority of the State of New York in 1955.

15 Senator Kellogg, later Secretary of State, during the debate on the Treaty of Versailles, 58 CONG. REC. 3680 at 3685 (1919).

16 E.g., in the instant case, the reservation would have served to supersede the Federal Power Act and to remove the administration of the new flow of water from the Federal Power Commission. For a view upholding the Senate's power to thus affect prior domestic legislation, see Henkin, "The Treaty Makers and the Law Makers: The Niagara Reservation," 56 COL. L. REV. 1151 (1956).

that a treaty *covering appropriate subject matter* can "repeal" previous bicameral legislation.[17] If the reservation in the principal case were held valid, however, it would allow the President and the Senate, by a purely *domestic reservation,* to modify existing domestic legislation,[18] a process in which the House of Representatives must normally participate under our Constitution.[19] The dissent in the principal case argued that this is appropriate since the Senate could accomplish the same result—leaving the treaty water without the jurisdiction of the Commission—by rendering the treaty executory (non-self-executing)[20] which it clearly has the power to do.[21] While it is true in this case that the same result would follow—the treaty water would not be under the jurisdiction of the Commission—it seems incorrect to equate a reservation with the Senate's power to render a treaty non-self-executing. This difference is made clear by supposing a reservation which authorized the construction of a power plant to utilize the water, a result which clearly could not be reached by leaving the treaty executory.[22] Thus, while the interesting constitutional question remains unanswered, the court's failure to reach it in the principal case seems proper since the holding rested on the sound technical ground that the proviso was not a proper reservation.[23]

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17 See Cook v. United States, 288 U.S. 102 (1933).

18 Compare the problem present when Congress passes an act providing that its provisions shall terminate on the passage of a joint resolution. This, in effect, is a method of repeal which by-passes the President's veto power. See Ginnane, "The Control of Federal Administration by Congressional Resolutions and Committees," 66 HARV. L. REV. 569 (1953), and Jackson, "A Presidential Legal Opinion," 66 HARV. L. REV. 1353 (1953).

19 U.S. CONST., art. I, §1. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

20 A non-self-executing treaty is one which, although already a binding international obligation, is of such nature that it cannot "be given effect as law *ex proprio vigore*" domestically without further legislation. Secretary of State Hughes to Representative Porter, March 3, 1924, MS. Department of State, file 711.419/94, 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 177 (1943).

21 See United States v. American Sugar Refining Co., 202 U.S. 563 (1906).

22 It is interesting to consider the effect the holding may have on Senator Bricker's Senate Joint Resolution 3. [See 103 CONG. REC. 259 (1957).] Section 2 of his resolution would give the Senate the power to prevent a self-executing treaty from superseding prior inconsistent acts of Congress, and conversely, would give it power, by affirmative vote, to determine that the treaty shall have self-executing effect. See 51 AM. J. INT. L. 606 at 610 (1957). It would seem that the decision in the principal case is evidence of the close scrutiny with which the judiciary will examine the exercise of the treaty making power by both the Senate and the President, thus eliminating much of the necessity for further safeguards.

23 But see 71 HARV. L. REV. 368 (1957).