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The Biden Condition: Interpreting Treaty-Interpretation

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Este trabajo se realizó en Harvard Law School en 1990, cuando Joe Biden era Presidente de la Comisión de Relaciones Exteriores del Senado de Estados Unidos. Ya por entonces al senador Biden se le consideraba uno de los pesos pesados en cuestiones de política exterior y derecho internacional de la política norteamericana. La investigación que ahora publicamos analiza la "condición Biden", introducida por el senador en la cámara alta con motivo de la ratificación del tratado INF en enero de 1988. El debate planteado, tanto de derecho constitucional como de derecho internacional público, se aborda con un enfoque analítico que incorpora elementos de Teoría del Derecho, lógica matemática y realismo jurídico, para llegar a conclusiones que siguen vigentes hoy en día. Hace treinta años este episodio crucial en la labor legislativa de Joe Biden merecía un estudio de ochenta páginas de un joven académico español, supervisado por los profesores Abram Chayes y Richard Parker. Hemos querido dar a conocer su contenido justo en el momento en el que el nuevo presidente Biden comienza su mandato y las cuestiones planteadas en el estudio sobre equilibrio de poderes, respeto a las reglas del juego de la democracia y amenazas a la seguridad global son si cabe aún más acuciantes.

Índice

"What is uttered, so runs this credo, is finished and done with. If the whole world could be expressed, it would be saved, finished and done...Well and good. But I am not a nihilist-".

(Thomas Mann, *Tonio Kroger*)

1. Introduction[1]

The debate in the 1980's about the reinterpretation of the Anti-Ballistic Missile (ABM) Treaty led to a more general discussion on treaty-making and treaty interpretation powers. The Biden Condition, attached to the INF Treaty, promoted the final and crucial part of that discussion.

In this paper, we analyze the arguments for and against the Biden Condition looking at the political process of constitutional interpretation. Many authors have written already with occasion of the reinterpretation debate, interpreting treaty-interpretation powers.[2] We try here to interpret their views, relating them to the political context of their arguments about interpretation. This is not a paper written as a result of new facts found, but as a result of new analysis done on the way those facts are contemplated. We have tried to combine an international law practical perspective with a constitutional law political one.

Glennon, in his book about the foreign relations law of the U.S. introduces a dichotomy that we have tried to develop and apply to the Biden condition context: "Diplomacy clashes with constitutionalism. The policies undertaken by the U.S. in conducting its foreign relations could be formulated more efficiently and carried out more consistently without domestic legal constraints.[3]"

We live in a world changing fast towards more interdependence. That is probably all what we should retain from Fukuyama's famous theory about the end of History,[4] a well-intentioned joke that many commentators took very seriously.[5]

The implications of this growing interdependence for the legal systems are clear: there is no fixed boundary between domestic and international law. Domestic politics have increasingly international implications. We try to exemplify all of this in the study of the Biden Condition and of the treaty-interpretation powers.

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1 This is a good place to thank Professor Chayes and Michael Molitor for their guidance and advice in the field of International Law, Professor Parker, for his patience and especially for his views on Constitutional Law, which have heavily influenced the outcome of this paper, Jose M. Beneyto, for his support and criticism on my views about interpretation and Ulrike Drees, Franz Drees and Juan R. Muñoz-Torres, for their invaluable word-processing and printing assistance.

2 See 137 U.Pa. Law Review, (1989), with seven articles about this suject.

3 Glennon."Constitutional Diplomacy", Princeton, (1990).

4 See F. Fukuyama, "*The End of History?*",. The National Interest, Summer 1989.

5 See Marques de Tamaron, "*El acabose*", Nueva Revista, n.1, feb. 1990, for an explanation of Fukuyama's "joke".

2. Background of the ABM treaty reinterpretation debate and of the Biden condition

In 1983, during a nationally-televised address, President Reagan revealed his vision of anti-missile technology that would render nuclear weapons "impotent and obsolete."[6] The next days arms control experts pointed out the inconsistency between the President's declared intent to seek such technology and U.S. international legal obligations under the ABM Treaty.

The Treaty on Limitation of Anti-Ballistic Missile Systems was signed by President Nixon and Soviet Union Secretary General, Brezhnev in 1972, along with the SALT I Interim Agreement. Under the ABM Treaty, the parties agreed "not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land base" (art. V) and to restrict their deployments of fixed land based ABM systems to just two sites each. Also in an agreed statement "D" within the treaty, the parties provided that if ABM systems and components "based on other physical principles" were created in the future, they could be deployed only after the parties had formally discussed them and agreed on specific limitations. That regime for "exotic" ABM systems and components,such as high-energy lasers, had yet to be created and would perform the same function of ABM interceptor missiles or radars.

After Reagan's speech the controversy began between those who read art. V and Agreed Statement "D" restrictively or broadly. The ones who read restrictively, claimed that it prohibited the development, testing or deployment of all but fixed land-based systems, whether or not those systems relied on technologies of the time in which the ABM Treaty was signed. The other ones found in their broad reading that the parties had anticipated the creation of ABM systems and components based on "other physical principles" than those in use in 1972 and that the parties had not agree the to restrain the necessary research, development and testing for those new systems.[7]

The President's Space Defense Initiative (SDI), known popularly as the Star Wars project, would clearly involve space-based devices after the initial research had been finished. If the other party to the Treaty, the Soviet Union, read narrowly that part of the treaty, the US would be in trouble, for no easy amendment could be negotiated to replace that essential part. Abrogation of the treaty or withdrawal could be the only alternative for the U.S.

In October 1985, National Security Adviser, Robert McFarlane, disclosed the position of the Reagan Administration, clearly in favor of a broad interpretation of the treaty, allowing the development and testing of new anti-ballistic missile technologies. Only the development was banned.[8] In a strong language, the soviets called McFarlane statement "a deliberate deceit".[9] The newly-installed Legal Adviser of the Department of State, Abraham Sofaer, carefully studied the issue and supported the Executive explaining: "under international law, as under US domestic law, when an agreement has been found to be ambiguous, an interpreter must seek guidance in the circumstances surrounding the drafting of the agreement. Proponents of the restrictive reading of the ABM Treaty have asserted that the treaty unambiguously supports their interpretation; therefore, they argue, the treaty's negotiating record need not be consulted(...). However, the broader interpretation of the treaty is certainly strong enough to warrant consideration of the negotiating record."[10] Sofaer used then the negotiating record among other materials to show that the broader interpretation was actually more accurate than any others. His opponents referred to the negotiating record as an "obscure, undefined, nebulous collection of thirteen year old memoranda."[11] Also, according to the

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6 Biden and Ritch, *The Treaty Power: upholding a constitutional partnership,* 13 7 University of Pennsilvanya Law Review 1530 n. 83 (1989).

7 Sofaer, *The ABM Treaty and the SDI,* 99 Harvard Law Review, 1973, (1986).

8 See Biden, supra note 6, at 1531.

9 Id. at 1531.

10 See Sofaer, supra note 7, at 1978.

11 See Biden, supra note 6, at 1532.

ones who read the treaty narrowly, most of the senior members of the US SALT I negotiating delegation denounced the new interpretation as a misreading of the ABM Treaty's text and negotiations, which they said had produced a more comprehensive ban on ABM systems."[12]

Senators Nunn and Levin, of the Armed Services Committee, were able to have access to the classified negotiating record and criticized the broad interpretation. In the spring of 1987, senator Nunn argued, in a detailed study, from the negotiating record that there had been no failure to obtain consent from the soviets on the restrictive interpretation. He went on and looking at the ratification proceedings (Senate's advice and consent on the Executive's representation about the meaning of the treaty) but he could not find any ambiguity which could support the broad interpretation.[13]

The purpose of the treaty and the subsequent interpretation of it were also arguments used against the broad reading of the ABM Treaty. An article by Chayes and Chayes in 1986[14] showed that a simple prohibition of deployment was not enough for the purpose of each side, assurance that the other was not working to achieve an effective territorial defense against ballistic missiles. It also explained that "each year since 1978 the Arms Control and Disarmament Agency has been required by law to prepare an Arms Control Impact Statement for presentation to Congress. Through fiscal year 1985, each of those statements, without exception, including those prepared by the Reagan Administration, explicitly endorses the traditional interpretation."[15]

At this time the debate was not just about a factual claim –do the negotiating record and the ratification proceedings support a broad interpretation?– but about a legal assumption, no matter what the meaning of the treaty originally was, –can the President change it unilaterally? Sofaer implied that this Executive reinterpretation was permissible in his declaration before the Senate Foreign Relations and Judiciary Committees: "when the Senate gives advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations the Senate is provided".[16] The Executive could disregard its own representations about the meaning of the treaty when asking the Senate for advice and consent. As Prof. Rostow explained, when the President sent the ABM Treaty to the Senate for its advice and consent to ratification, Executive Branch officials had told the Senate that the Treaty prohibited the testing in space of exotic ABM systems (i.e., those based on 'other physical principles' than those existing in 1972 like lasers). Thirteen years later, the Reagan Administration reinterpreted the treaty to permit the testing in space of exotic ABM systems.[17]

This new legal doctrine came just in time to replace the factual claim about the negotiating record, badly damaged by Senator Nunn careful study. A powerful reaction came from many senators, some of them fearing "grave and far reaching implications for all U.S. treaty-making –not only for the Senate's role but for the conduct of American diplomacy.[18] Presidential reinterpretation of treaties was seen as "a menace and a question never before posed in 200 years of constitutional history".[19] Senator Biden urged his colleagues to treat this constitutional issue as "paramount over the substantive arms control question."[20]

When in March and April of 1987 the Senate Foreign Relations Committee and Judiciary Committee held Joint Hearings to discuss this issue, testimonies of professors Louis Henkin and Laurence H. Tribe supported the original meaning view.[21] Both Senate Committees drafted Senate Resolution number 167, which provided

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12 Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties,* 137 U. Pa. L. Rev., 1371, n.83 (1989).

13 See Biden, supra note 6, at 1533.

14 Chayes and Chayes, *Testing and Development of 'Exotic' Systems Under the ABM Treaty: The Great Reinterpretation Caper,* 99 Harvard Law Review, 1966, (1986)

15 Idem at 1969.

16 *The ABM Treaty and the Constitution: Joint Hearings Be/ore the Senate Committees on Foreign Relations and on the Judiciary,* 100 th cong. ist Session, 130, (1987).

17 Rostow, *The Reinterpretation Debate and Constitutional Law,,* 137 U. Pa. L. Rev., 1451, **n.** 83, (1989).

18 See Biden, supra note 6, at 1533.

19 Idem at 1535.

20 See Rostow, supra note 17, at 1563.

21 See *Joint Hearings,* supra note 16, at 81.

that "during the period in which a treaty is in force, the meaning of that treaty is what the Senate understands the treaty to mean when it gives its advice and consent (...). The Constitution permits only that interpretation [as presented by the Executive Branch and as understood by the Senate], unless the treaty is formally amended with the advice and consent of the Senate."[22] This was a strong reaction; to limit all possible interpretations of a treaty to the one understood by the Senate at the time of advice and consent.

The Foreign Relations committee passed the Resolution in September 1987 and sent it to the Senate, with an attached report accusing Legal Adviser Sofaer of "disservicing" his office and naming the reinterpretation effort as "the most flagrant abuse of the Constitution treaty-power in 200 years of American history"; moreover, the report concluded, "corrupting our institutions and constitutional processes is not an effective way to defend the United States of America."[23] In the meantime, Judge Sofaer relaborated his arguments. He moderated the complete freedom of treaty interpretation that he had attributed to the President: "the Executive is free to depart from a previously-held treaty interpretation unless three conditions had been met (...). The Executive's representation to the Senate can be relied upon only if it had been *generally understood, clearly intended and relied upon* by the Senate during the treaty ratification process."[24] Sofaer justified these three conditions with Restatement Rules 314[25] and, of course, the original or restrictive interpretation of the ABM Treaty failed all three of these standards with respect to the 1972 ratification process.

Opponents of Sofaer's Doctrine argued that it did not have constitutional basis: "no reference to the intent of the framers, to historical precedents, to case law –no reference to any source of constitutional authority, these alleged 'principles' were simply invented."[26] They expressed the fear of the Senate loosing its constitutional role in treaty-making. Since it was very hard to prove that the three conditions posed by Sofaer had been met in any process of ratification, the only recourse of the Senate to protect itself would be "to attach elaborate and numerous conditions to treaties in order to ensure that its understanding became an integral and explicit part of a treaty's ratification documents."[27]

Senate Resolution number 167 was never discussed on the floor. Instead, the "constitutional" discussion focused on the Levin Nunn Amendment prohibiting any reinterpretation in practice of the ABM Treaty and especially it focused in the upcoming consideration by the Senate of the new arms control treaty, the INF. In January 1988, it was submitted to the Senate for advice and consent before ratification. The Foreign Relations Committee formulated a condition stating that the meaning of the INF Treaty would be "what the Senate understands the treaty to mean when it gives its advice and consent."[28] It aimed at repudiating the reinterpretation claim by exercising the Senate's prerogative to give conditional consent to the ratification of a treaty. Senator Biden was the principal inspirer of the condition. He explains that "in design it was phrased positively to affirm the principle that in implementing a treaty the Executive must honor the interpretation shared by the Executive and the Senate at the time of ratification. But the Biden Condition's implicit purpose was negative: to lay permanently to rest the Legal Adviser newly spawned legal doctrine -a doctrine that threatened not only the ABM Treaty, but the very foundation of the executive-legislative partnership in treaty-making as mandated by the Constitution".[29]

Supporters in the Senate of the SDI Project wanted to vote against the Condition because it could be used against the legal claim (Sofaer's reinterpretation) and the factual claim (a broad reading of the negotiating record), both made to include the SDI in the boundries of the ABM Treaty. The Condition advocates argued that it would not resolve the ABM Treaty interpretation debate, but it would confine it to the discussion about

22 *Senate Resolution number 167,* 100th Congress, ist Session, (1987).

23 See Biden, supra note 6, at 1535.

24 See Koplow, supra note 12, at 1374.

25 See infra note 52.

26 See Biden, supra note 6, at 1538.

27 ldem.

28 See Koplow, supra note 12, at 1374.

29 See Biden, supra note 6, at 1536.

the facts of the negotiating record and ratification proceedings. The Republican Administration moved to include the Sofaer Doctrine in the Condition or at least to delete in it any mention to the Constitution.[30] Some Senators also tried unsuccessfully to introduce in the Condition a reference to international law, with the implication that the US has two sets of obligations under a treaty and might have to subordinate constitutional obligations to the international ones.[31] The Foreign Relations Committee adopted the Condition in April 1988 and reported it with the full INF Treaty to the Senate. Senator Byrd amended it "to protect it form further amendment"[32]: the Biden Condition was transformed into an amendment to the resolution of ratification, a 'second-degree' amendment that precluded change in the Condition. Senator Cohen, a republican, offered a corollorary to help other pro-SDI senators vote for it. The final vote in May 26th of 1988 was 72-27 in favor of the Condition. In its final version it read as follows:

> "The Senate advice and consent to ratification of the INF Treaty is subject to the condition, based on the treaty clauses of the Constitution that:
>
> A. The United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Executive at the time the Senate gave its advice and consent to ratification;
>
> B. Such common understanding is based on:
>
> 1. First, the text of the treaty and the provisions of this resolution of ratification; and
>
> 2. Second, the authoritative representations which were provided by the President and his representatives to the Senate and its Committees, in seeking Senate consent to ratification, insofar as such representations were directed to the meaning and legal effect of the text of the treaty; and
>
> C. The United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty, or protocol, or the enactment of a statute; and
>
> D. If, subsequent to ratification of the Treaty, a question arises as to the interpretation of a provision of the treaty in which no common understanding was reached in accordance with paragraph (B), that provision shall be interpreted in accordance with applicable United States law".[33]

The INF Treaty was ratified in the Moscow Summit in June 1988 by President Reagan and Soviet Union Secretary General Gorbachev. President Reagan wrote a letter to the Senate on June 10th declaring that he could not "accept the proposition that a condition in a resolution of ratification can alter the allocation of rights and duties under the Constitution."[34] The answer from the Senate to this final episode was simple: "the President cannot act upon the Senate consent without honoring this condition (...) If the President brings the INF Treaty into force, the Biden Condition takes effect."[35]

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30 Idem, at 1549.

31 See Biden, supra note 6, at 1549.

32 Idem.

33 *134 Cong. Record,* S6937, May 27, 1988.

34 See Biden, supra n ate 6, at 1551.

35 *134 Cong. Record,* S8034, June 16, 1988.

3. Treaty-Making powers

The only explicit reference to treaty-making in the Constitution is in Article II, section A: "[The President] shall have power by and with the advice of the Senate, to make treaties, provided two-thirds of the Senators present concur." Those treaties, according to the Supremacy Clause in art. VI are, along with the Constitution and statutes, "the supreme law of the land".

However, Presidents have acquired for the Executive Branch wide discretion in the conduct of foreign affairs. Article II simple statement, "the Executive Power shall be vested in a President of the United States of America" is the textual source that has allowed it. This discretion has been also frequently imagined as an implied power and it includes the making of other international agreements than treaties, called "executive agreements", involving a different participation of the Legislative Power than in Article II treaties or none at all.[36]

The Executive Agreements have been instruments for major international commitments: "article II is not anymore the article for treaty-making; the most important treaties are not made under art. II. Executive Agreements, whether fashioned by the Executive alone, pursuant to a prior treaty, or with the approval of the Congress, have essentially the same status under both international and domestic law. Even though their constitutional basis is different, the two types of documents have become almost interchangeable."[37]

U.S. law does not call those Executive Agreements "treaties", because it reserves that name for the agreements concluded by the President with the advice and consent of two-thirds of the Senate. But for purposes of international law, which contemplates a variety of treaty-making processes, both kinds of international agreements are "treaties". They both fit in the description given by Carter and Trimble: "under international law, a treaty creates international legal obligations, with corresponding duties of compliance and remedies, including rights of retalia on in the event of a breach."[38]

There is not always a clear constitutional criteria to guide the President in his or her choice of making an international agreement under the form of art. II or as an Executive Agreement. Each form has different implications and political channels. However, some important matters have been traditionally left to art. II heavy interaction. Arms control has been one of them, a matter in which the Legislative has understandable interest, due to its big impact in public opinion and in the economy.

The President has the initiative to create any new treaty. He is also responsible as Chief of the Executive for conducting the negotiations, although members of the Congress have increasingly been present in them, in spite of their growing technical complexity. Once the treaty has been negotiated and drafted, if it is under art. II form, the Senate considers it during the advice and consent period. The Senate may attach then reservations or particular understandings to the text of the treaty, or it may even ask the Executive to renegotiate it before giving its consent. The President has to take into account any changes made by the Senate and even communicate them to the other party when it affects the negotiated content of the treaty. He still can decide about ratification, that is, if he wants to "make the treaty" by exchanging the instruments of ratification. After it, the President has the responsibility of "faithfully implementing" the ratified treaty.[39] Congress balances this presidential prerogative in two ways: it controls the purse strings as well as the power to pass necessary implementing legislation.[40]

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36 There are certain Executive Agreements that Congress as a whole authorizes, by delegation or by direct approval of the treaty by the majority of both houses. Other Executives Agreements are signed under the President's independent constitutional authority, although the Congress passed the Case Act in 1972 in an effort to control Presidential powers in Foreign Affairs and provided in section #1126 that the Secretary of State has to communicate the content of this kind of Executive Agreements to the Legislative Branch no later than 60 days after the agreements come into force.

37 See Koplow, supra note 12, at 1391.

38 Carter and Trimble, International Law Casebook, III, 1, (1990).

39 See Koplow, supra note 12, at 1394.

40 Idem.

The domestic procedure is quite irrelevant in the international law sphere. As it was said in the Goldwater v. Carter case, "it is thus well to distinguish between treaty-making as an international act and the consequences which flow domestically from such act."[41]

Treaties are not just another kind of law. They have a "*sui generis*" status, because of this double domestic and international perspective. In the same case we find this suggestion: "the fact that the Constitution, Statutes and Treaties are all listed in the Supremacy Clause as being superior to any form of state law, does not mean that the making and unmaking of treaties can be analogized to the making and unmaking of a constitutional amendment."[42] Moreover, as some commentators underline, "the profound difference between a legislative process and a treaty process also is demonstrated easily by the fact that the President has unilateral authority to terminate a treaty, thus ending both domestic and international obligations stemming from that treaty."[43]

The complexity of the treaty-making process invites different readings of it, as a presidential function, as a shared-power and the as an agent (President)-principal (Senate) relationship.

As a shared-power process some authors call it a "constitutional partnership". The President would be witheld to enter treaties all by himself. A cooperational scheme of separated powers is offered, with an underlying assumption of bargaining and adjustment between the Executive and the Legislative. Under this approach, Senator Biden attacked Sofaer's Doctrine and "faulty premise": "the Senate is not an integral part of establishing the meaning of a treaty under US constitutional law, except insofar as the Senate does so through affirmative steps which impose restrictions on executive latitude. In relying on this premise, the Doctrine was inconsistent with the basic model of US treaty-making, where in the Executive negotiates a treaty, explains its meaning to the Senate and on that basis is accorded consent to ratify the treaty. Instead, the Doctrine called for the Senate to demonstrate a specific understanding, intent and motivation concerning every treaty provision, less that provision be subject to any interpretation a President might later prefer."[44] The Steel Seizure case shows this unavoidable overlap between the Executive and the Legislative, as Professor Rostow notes: "the treaty law is a classic example of one of Justice Jackson categories, the twilight zone of concurrent and uncertain executive and legislative authority and shared functions. This overlap is obtained not only in the making of treaties, but also in their subsequent interpretation."[45]

A different view is adopted by the ones who imagine treaty making power as an agent-principal relationship. They depart from the process of sharing power imagination but they limit that vision to the domestic sphere. In the international arena, the principal (the Senate) is bound by whatever the agent (the Executive) agrees with the third party. "The analogy suggests that the President, as agent, signs the treaty and the Senate, as principal, consents to its ratification. Even if the President misrepresents the content of the agreement, the innocent third party is entitled to rely upon the Agreement that was duly negotiated."[46] The question then is how to act against the unfaithful agent; the answers are all to be found in domestic law terms and in the political process.

The third view, of treaty-making as completely under presidential implied powers, is usually presented with many historical references: "Thomas Jefferson, who generally disfavored an expansive view of presidential powers, in construing the Constitution wrote that 'the transaction of businesses with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specifically submitted to the Senate. Exceptions are to be construed strictly...'

Arguably, treaty-making is the paramount foreign relations power because it bounds sovereign nations to future courses of action. Historically, this treaty-making power has been seen as quintessentially an executive

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41 *Goldwater* v. *Carter,* 617 F.2d.. 697, (D.C. Cir. 1979).

42 Idem.

43 Block, Casey and Rivkin, *The Senate's Pie-in-the-Sky Treaty Interpretation Power and the Quest for Legislative Supremacy,* 137 U. Pa. L. Rev, 1481, n. 6, at 1497, (1989).

44 See Biden, supra note 6, at 1539.

45 See Rostow, supra note 17, at 1458.

46 See Koplow, supra note 12, at 1383.

function."[47] Senate's advice and consent function, these same authors would argue, was based in the original small size of the organ and its characterization as a privy council, with senators acting like ambassadors from their states. Since those days, the argument goes, the complexity of foreign affairs has required that the Executive virtually take over. Moreover, "the final ratification of a treaty lies within the power of the President and not, as commonly misconceived, the Senate. He is the official who issues the formal statement indicating that the US considers a treaty in effect and binding."[48] The basic idea of the Presidential view is that internationally the Senate is part of a whole, the United States, represented only by the Executive.

47 See Block, supra note 43, at 1483.

48 L.K. Johnson, *The Making of International Agreements*, 35, (1986).

4. Reflections on Treaty-Interpretation

After having explored the background of the Biden Condition and the general scheme of treaty-making powers, it is time to ask broad questions like who interprets treaties? and how that interpretation is done?

The Vienna Convention on the Law of the Treaties (1980) offers a "comprehensive set of rules governing the conclusion, interpretation and termination of treaties". As of December 1986 fifty-two states were part of it. The United States II is not a party to the convention, so its treaties are not covered by it. Nevertheless, State Department officials have stated that "its provisions represent customary international law and U.S. courts have frequently applied its terms."[49] The Restatement of the Foreign Relations Law of the U.S. also refers to the Vienna Convention as 11 presumptively codifying the customary international law governing international agreements[50] and the American Law Institute, that has revised the Restatement cited, has taken the Vienna Convention as a central reference to find the principles related to the Law of the Treaties.[51]

Article 31 of the Vienna Convention provides:

> "l. A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose".

The article explains in section 2, 3 and 4 what it understands as "context" and what is the role of subsequent agreements and practices in shaping it. Article 32 brings in some "supplementary means of interpretation", "in order to confirm the meaning resulting from the application of article 31", or when this meaning is ambiguous or leads to an unreasonable result. These means include the preparatory work of the treaty and the circumstances of its conclusion.

The preference of the Vienna Convention for the text and context and subsidiarity of the preparatory works, including the negotiating record, does not fit with the U.S. legal practice. As the Restatement of the Foreign Relations Law explains in comment "e"of its section 325, "the Convention inhospitality to 'travaux' (preparatory works) is not wholly consistent with the attitude of the International Court of Justice and not at all with that of the U.S. Courts (...). Courts in the U.S. are more willing than those of other states to look outside the instrument to determine its meaning."[52]

If we applied the rule of interpretation of art. 31 of the Convention to our controversy, the internal debate of the Executive and the Senate before ratification would not be easily taken into consideration, unless the interpretation of the terms in their context, as defined by the same article, was unclear. The Senate would have to make sure that in occasion it gave consent to a treaty each word of it expressed the Senate's intent. This is a task that could only be accomplished by attaching explicit understandings to almost every term of the treaty. In any case, under the false simpleness of article 31, the question to ask is not how interpretation is done, but who does it.

In the U.S. this hierarchical, yet subjective, frame for treaty interpretation is replaced by a much more flexible approach. As Carter and Trimbe note, an american official "called upon to interpret an agreement would normally look to the negotiating record, subsequent practice of the parties, the purpose of the agreement and, in the case of a treaty or an agreement approved by the Senate or the Congress, to Executive branch submissions and the legislative record."[53] Interpretation of treaties in the U.S. is done following only in part the Vienna Convention, as international customary law.[54]

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49 M. Jarvis, *"An Jntroduction to American lnternational Law"*, 15, (1988).

50 Idem.

51 M. Frankowska, "The Vienna Convention on the Law of the Treaties before the Courts", 28 Virginia Journal of International Law, 286, winter.1988.

52 *Restatement (Third) of the Foreign Relations Law of the United States,* (1986).

53 Carter and Trimble, supra note 38, at 54.

54 In articles 31 and 32 of the Vienna Convention three different approaches to treaty-interpretation overlap, as Frankowska clearly identifies (see supra note 51): the textual approach, looking at the text of the treaty as the expression of the intention of the parties, the intentional or subjective approach, stressing the difference between the intention of the parties and the text and the teleological or functional approach, focusing on the object and preparation of the treaty. The textual approach was favored by the Commission

Textual ambiguities of a treaty often lead to a careful study of the negotiating record. In the ABM interpretation controversy both Legal Adviser Sofaer and Senator Nunn did it, with different results."The negotiating story of a treaty is usually far less tangible and less reliable than, for instance, the legislative story of a congressional enactment. This is because in the international arena there are ordinarily no recording secretary, no official minutes and no agreed committee reports to convey consensus understandings" (...). Evenmore, "the negotiating story of an arms control treaty is particularly uneven and uncomplete". [55] Senator Nunn proved, however, that his reading of the nebulous called negotiating record in the ABM case was more persuasive than Sofaer's and made him move to a legal argument about presidential reinterpretation.

Let us now focus on the key question of who interprets treaties. The Restatement provides in section 326. (1) that the President "has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states." In the Reporter's notes no role is given to the Senate in the interpretation of treaties. But as Glennon explains: "Yet it is clear that the President's interpretive power is limited. He cannot make an altogether new treaty and dispense with the requirement of Senate advice and consent by calling that treaty an 'interpretation' of an earlier one. Nor can he amend an earlier treaty and escape the requirement of Senate approval (to what it is in reality a new treaty) by calling amendment an 'interpretation'. The President's denomination of his act cannot by itself control the procedure constitutionally required. At some point, his authority ends and the Senate's begins; at some point, an interpretation becomes a new treaty or an amendment to the old one. But when?"[56]

The Executive's interpretation of a treaty has immediate practical effects, for the President conducts foreign relations. And the Senate's is important too, as it was shown in the ABM reinterpretation debate. Congress after all holds the purse strings and can conditionate funding to agreement on interpretation. It is also partially responsible for any domestic legislative development required by treaties. Moreover, in the case of art. 11 treaties, Senate can claim that its role of advice and consent would be meaningless if the Executive remains free to change the meaning of the document.

When the Senate consents to a treaty, it does so relying upon the Executive's representation. The content of a treaty is evaluated according to what the Executive says about it to the legislative body. The Senate once it has given its consent, interprets the treaty like it did when it voted for it. A priori, the Senate plays a passive role, watching over any possible presidential reinterpretations. However, the meaning of a legal document is not a fixed one and as we will see in the next pages, to the danger of presidential reinterpretation one could oppose the fear of a Senate's new reading of a treaty, with the claim that it was that the meaning to which it consented.

This passivity of the Senate is often altered by itself, expressing approval through amendments, reservations, understandings and declarations. Some of these require that the Executive communicates them to the other party, for they affect the obligations of the treaty. Often, the resolution of ratification is used by the Senate as the most explicit device for affecting interpretation.[57] The Senate asks for changes before it consents to the treaty or it consents while declaring its specific understanding of the text. Sometimes, "the treaty report from the Senate Foreign Relations Committee, for example, or statements made by leaders on the floor of the Senate may serve as expressions of the Senate's collective position."[58]

If the Senate remains silent about its understanding of the treaty and only expresses consent to it, many authors would affirm that there has not been total deferment to the Executive free interpretation and thus, possible future reinterpretations of the treaty. The silence, as Professor Koplow explains, "may indicate that

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drafting the Convention, but the two others were included in the hierarchy or articles 31 and 32. Interpreting these two articles about interpretation with flexibility, "one could take recourse to the preparatory works not only when the text is ambigous but also in arder to confirm the text unambiguous meaning"(see Frankowska, supra note 51) Professor Me Dougal of the US delegation proposed an amendment to eliminate the hierarchy of means of interpretation and it was rejected by the Commission.

55 Koplow, supra note 12, at 1385.

56 Michael J. Glennon, *Constitutional Diplomacy*, 134, Princeton, (1990).

57 See Koplow, supra note 12, at 1401.

58 Idem.

the Senate shared an understanding so basic that no elaboration was required. A particular matter may be thought to be so obvious or so well-accepted that it attracts no controversy and, in the tumult of the legislative process, inspires no explicit time and attention, yet subsequently emerges as a point in contention."[59]

In controversial cases, an essential inquiry would be then to determine if the Senate understood in a particular and silent way the Executive's representation of the treaty. It is not easy to prove that tacit way of understanding. If we look at the Restatement in section 314. (2) we will only read: "when the Senate gives advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding." The Restatement comment on this paragraph is the following: "Although the Senate's resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate Foreign Relations Committee or in the Senate's debates. In that event, the President must decide whether they represent a general understanding by the Senate and if he finds that they do, must respect them in good faith."[60] This section of the Restatement was used by Legal Adviser Sofaer to construe his "means test" and limit the scope of the Executive's representation binding effect. It is true that complete silence by the Senate does not entitle it to call for a tacit understanding and that the Restatement gives the final word to the President, to decide if there's a general understanding in the Senate's debate for consent and advice. But the defenders of the Senate role in treaty making would argue that the Restatement does not authorize the President to arbitrarily conclude that there's no general understanding and would surely find one in the Senate's records in a case when it wanted to debate a presidential interpretation.

Glennon reads the rule in section 314 as if it imposes "no requirement that the Senate's understanding is not reduced to a formal condition. It is reiterated in comment *d*. The opposite rule would seem illogical. The reason that the understanding is not reduced to a formal condition is that the Senate considers the meaning of the treaty obvious; formal conditions are appropriate where the meaning is not obvious. The Administration position would require that the Senate clarify –indeed, clarify formally, through an explicit condition to its consent– precisely what is that the Senate views as beyond reasonable disagreement. Normally, of course, the Senate conditions its consent to a treaty to make some changes in the treaty. There is thus no reason for the Senate to condition its consent to a treaty that believes that the treaty's meaning is clear."[61]

The Senate's view on the treaty counts, even if it is implicit:

> "In effect, the Senate gives its advice and consent to a particular treaty regime, not a blank check for any other type of arrangements that the President may desire."[62] Before we ask who gets the blank check, the President or the Senate, let's look at the four scenarios of hypothetical disagreement between the Executive and the Senate on treaty-interpretation presented by Koplow.[63]

1. Knowing misrepresentation: the Executive presents a treaty to the Senate and deliberately conceals or misrepresents one of the terms, that later emerges and the Executive takes it into account when interpreting the treaty.
2. Subsequent alteration: the President does a fair job advising the Senate about the content of a treaty. A subsequent president unilaterally decides to reinterpret it, maybe arguing that the factual record was ambiguous and thus, the new interpretation is legitimate.
3. Clear Unclarity: the parties consciously incur into an omission, ambiguity or imperfection when signing the treaty and decide to deal with that issue at a later time.
4. Unforeseen ambiguity: the same scenario, but the parties are not fully conscious of the ambiguity.

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59 Idem at 1402.

60 See Restatement, supra note 52.

61 See Glennon, supra note 56, at 141.

62 See Koplow, supra note 12, at 1405.

63 Idem, at 1413.

In scenarios 1 and 2, the other party to the treaty is bound only by the agreed treaty. In scenarios 3 and 4, there is room for both sides reinterpreting the treaty and maybe agreeing in new obligations. The ABM reinterpretation controversy could be place in scenarios 2, 3 and 4 and that leaves the debate open.

Any unilateral reinterpretation by the Executive or by the Senate would not bind the other party: "the only internationally binding treaty is the one that both sides created at the time of the ratification."[64] Only if the doctrine of "*rebus sic stantibus*" would apply, an unilateral reinterpretation would have effect on the other party, but very unlikely the other party would agree that the circumstances in which the treaty was made have changed substantially if it is to its disadvantage. Also, this allowed reinterpretation would still have to be undertaken by the Executive respecting as much as possible the Senate's consent and understanding of the meaning of the original treaty.

Some authors would justify presidential reinterpretation by limiting the role of the Senate just to advice and consent, as it was done in the case Fourteen Diamond Rings v. United States in 1901: "the meaning of a treaty cannot be controlled by subsequent explanations of some of those who may have voted for it".[65]Interpretation would have then the broad meaning of determining what the obligations of the U.S. are for purposes of international law.[66] But it is quite artificial to separate domestic obligations (e.g. the Senate v. the Executive) from international ones (between the. U.S. and the other party). Section 314 of the Restatement clearly asserts that the Senate can impose on the Executive obligations in the process of treaty-making, which will have international consequences. The Executive can react by using to his advantage the privileged position of representing internationally the U.S. as a whole –including the Senate–. This raises the "two treaties issue". If the Executive has two different sets of obligations, domestically and internationally, it may arrive a situation where they enter in conflict. To move more freely and protect better internationally the general interest of the U.S., the argument goes, the Executive could ignore the short-shigted domestic limitations. Legal Adviser Sofaer tried this line several times: "in light of the principle of reciprocity(...) we could not credibly assert that our internal proceedings on advice and consent have binding effect without conceding the same for the internal proceedings of other states. Such a result would be contrary to our interests and would produce a chaotic situation far treaty interpretation." In particular, "it would not be consistent with U.S. interest to allow the soviets to govern their SDI program by the bread interpretation, while the U.S. program is governed by the restrictive view."[67] This argument was not a powerful one in the ABM reinterpretation debate, because the majority of the U.S. Senate and the Soviet Union shared the same restrictive interpretation of the treaty. Moreover, the Soviet Union was not using its domestic proceedings to reinterpreted the treaty. In a hypothetical case of divergence between the Senate and the Executive on the influence of domestic obligations over international ones, the Executive would be in a better position if at least the other party to the treaty agreed with him about what international obligations the U.S. had. In fact, this last case would be like negotiating a new treaty and ratifying it without the participation of the Senate. And even in the solid argument of the U.S. v. Curtiss-Wright case[68], the President is required to observe his obligations under the Constitution: "it is important to bear in mind that we are dealing not alone with an authority vested in the President by an exertion of legislative power, but with such authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations –a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power must be exercised in subordination to the applicable provisions of the Constitution."

In a way, we are back to the principal-agent relationship. The Executive may bound the U.S. to an agreement different that the one the Senate consented to, not just in the moment of ratification but through later reinterpretations, if the other party does not denounce them.

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64 Idem, at 1405.

65 183 us 176 (1901).

66 See Block, supra note 43, at 1481.

67 Sofaer: "Treaty Interpretation: A Comment." 137 U. Pa. Law Review, 1440, (1989).

68 299 U.S. 304, (1936).

The authors that side with the Executive in this controversy portrait this presidential reinterpretation as natural or inevitable. Professor Trimbel criticizes the notion that a "correct" interpretation of a treaty ca be "frozen". The idea of "entrenchment", portraying treaties as "a set of static, legal rules, unchanged in meaning from their inception and unchangeable except through the same formal process that produced the rules in the first place" is inconsistent with the basic notion that "law changes in response to new circumstances" (...) "the correct interpretation of a treaty is no exception".[69] To this author, President reinterpretation is legitimized just by Senate acquiescence, with no need for formal action. He understands by "acquiescence" many different situations –Senate passivity, ignorance, partial or total disagreement–, all of them lacking enough articulation and formality to deter presidential *de facto* reinterpretation.

Another way of making sure that interpretation of treaties is an Executive power is to focus on the Executive representation and not just on the consent given by the Senate. One could argue that Senate consent has to be clear, with explicit understandings to bind the Executive. But also that only certain Executive's representations of the meaning of a treaty when asking for Senate consent bind the President. This was the "means test" designed by White House Counsel Arthur Culvahouse and popularized by Sofaer. As we have already explained before, Executive testimonies would only be self binding if they had been:

1. Authoritatively communicated to the Senate;
2. Clearly intended by the Executive and;
3. Generally understood and relied upon the Senate in its advice and consent to ratification.

As Senator Nunn notes, this means test "afforded the Executive Branch a virtually unlimited set of options for disavowing the binding effect of ratification testimony presented by previous administrations."[70] Also in the New York Times the test was criticized: "since it's hard to know what this mumbo-jumbo means, Presidents would be free to do with treaties as they wish."[71] The President could use this test and deny that the Executive speaker who had made the representation of the treaty before the Senate was authoritatively communicating it or clearly intending to communicate what the Senate understood, or he could decide that it was not "generally understood" by the members of the legislative body. The "means test" was just another attempt of one of the sides of the debate to obtain a blank check from the other side, as we will later see.

A third way of promoting presidential reinterpretation is to broaden the meaning of this term. Rostow does it identifying "reinterpretating" with the President "executing" and even with "reading" any treaty. He looks at President Washington decision in 1793 of remaining neutral in the war between France and Great Britain in spite of the Treaty of Perpetual Alliance with France as the first time the presidential power to reinterpret treaties became evident.[72] From those days to the 1990s, every time the Executive e.g. sent instructions to U.S. representatives at an international conference he was reinterpreting treaties. Rostow claims that "laws evolve around the broad policy purposes sought by their progenitors. But the progenitors can never freeze the law into a static pattern, nor anticipate exactly how it should be applied in all future circumstances. Nor it can be assumed that every lawmaker voted for the reasons advanced by one or a number of his or her colleagues in debate, or by representatives of the Executive Branch in testimony before committees."

If we look briefly to the cases in which the Courts interpret the dispute over treaty-interpretation, we will find all the arguments used to allow presidential reinterpretation and some of the reasons to limit it.

Sofaer cites the Japanese Whaling Association case and the National Resources Defense Council case[73] to show how law gives "substantial leeway to the President to reinterpret statutes and his special authority and function in foreign and military affairs strongly supports the application of no less flexible a rule with regard

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69 Philip R. Trimble:"The *Constitutional Common Law of Treaty Interpretation: A Reply to the Form alist"*, 137 U. Pa. Law Review, 1463, (1989).

70 Sam Nunn: *"A Common-Sense Definition of 'Common Understanding'"*, 137 U. Pa. Law Review, 1524, (1989).

71 The New York Times, *The Doctrine or the Treaty?*, A 30, col. 1, May 5, 1988.

72 See Rostow, supra note 17, at 1457.

73 Japanese Whaling Association v. American Cetacean Society, 478 US 221, (1986) ; Chevron v. National Resources Defense Council, 467 US 837, (1984).

to treaties."[74] In the first of the two cases, the Court gave deference to the Executive interpretation of a statute, "unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress". The second case also allowed reinterpretation by the Executive, against a general standard of reasonableness.

In U.S. v. Stuart[75] the Court focused on treaty-interpretation and not just statutes. The majority of the Court simply relied on previous cases to say that "the clear import of treaty language controls, unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories" [Sumitomo v. Avagliano, 457 US 176, (1980)] (...) "A treaty should be generally construed... liberally to give effect to the purpose which animates it... except when a provision of a treaty fairly admits two constructions, one restricting, the other one enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred" [Bacardi Co. of America v. Domenech, 311 US 130, (1940)].

The concurring opinion written by Scalia is more powerful than the majority's. He clearly distinguishes between referring to preratification materials (even to confirm an unambigous text) that reflect the mutual agreement of the two parties to the treaty and referring to extra-textual materials that just do not[76]: "The question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to. And to answer that question accurately, it can be reasonably be said, whatever extra-textual materials are consulted must be materials that reflect the mutual agreement (for example the negotiating story) rather than an unilateral understanding. Thus, we have declined to give effect, not merely to Senate debates and committee reports, but even to an explicit condition of ratification adopted by the full Senate, when the president failed to include that in his ratification". Professor Vagts underlines in his comment of the opinion[77] section 314 of the Restatement of the Foreign Relations Law of the U.S., which approves the use of the materials that Scalia rejects, mentioning this section of the Restatement as "a proposal for change rather than an existing doctrine".

Justice Scalia adopts the same position that Sofaer, Block or Rostow had adopted in the ABM reinterpretation controversy to favor the Executive. The Senate only has a saying on the meaning of a treaty when it clearly and explicitly shows a particular understanding at the time of advice and consent, that the President agrees with and presents to the other party. These authors put the burden to show an explicit understanding in the Senate and give a blank check to the Executive to decide what materials should be used for interpretation in each case, as we will later study with some detail.

Two federal decisions about the same controversy, Rainbow Navigation Inc. v. Department of Navy[78], contradict presidential free reinterpretation. The Court quoted Professor Henkin to say that government representations to the Senate regarding the meaning of a treaty are binding as to the treaty interpretation: "The Dept. of Justice disavowed in court the representations made by the Navy and the Dept. of State during treaty ratification proceedings as merely "precatory" and "non-binding". This position is disturbing, since it undecuts the foundation upon which Senate ratification was based, at least in part. As Professor Henkin recently testified: 'The President can only make a treaty that means what the Senate understood the treaty to mean when the Senate gave consent... The Senate's understanding of the treaty to which it consent is binding on the President. He can make the treaty only as so understood he cannot make the treaty and insist that it means something else... The Constitution clearly implies that it is what the Senate understands the treaty to mean –that is what the treaty means for purposes of its consent. "Henkin and the Court are focusing on

74 See Sofaer, supra note 67, at 1446.

75 109 SCt. 1183, (1989).

76 As Professor Detlev Vagts shows in a comment to the case, Justice Scalia was not able to find for his concurring opinion all the precedent cases on treaty-interpretation in which the Supreme Court consulted for that purposes senate debates, committee hearings or committee reports. None of these cases, however, is decisive or gives a full answer to what materials should be used for treaty-interpretation. (see *"Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court"*, American Journal of International Law, vol.83, 3, July 1989).

77 Idem.

78 686 Fed. Supp. 354, (1988); 699 Fed. Supp. 339,. (1988).

the relevance of Senate consent. Without it there is no treaty. And it is not a blind consent, so it has to bind the Executive to his own representation or, as it is argued in this case, to the Senate's understanding of the representation. The problem is that neither of this options is "clearly implied" in the Constitution.

A quite similar controversy over treaty-interpretation was examined in the case Coplin v. U.S.[79], dealing with an Implementation Agreement of the Panama Canal Treaty between the U.S. and Panama. This implementation was done in the form of an executive agreement (without Senate participation), which included a tax exemption never written in the Treaty. Citizens employed by the Panama Canal Commission were free from income taxes as a result of their employment. As Frankowska notes, "it was a rare case where the U.S. takes the position that the President has exceeded his authority in the area of foreign relations"[80]. In effect, the U.S. argued that the Internal Revenue Code referred to a Treaty obligation as the means for exempting income from taxation. An Executive Agreement could not create such an exemption or imply it from the silence of the Treaty. The Executive had not include this possibility in its representation of the meaning of the treaty to the Senate. The legislative body did not explicitly ban the option of a future exemption, but, implicitly, it did not consider it part of the meaning of the treaty to which it consented. The practical outcome of the case, however, favored the Executive reinterpretation or creation of the new obligation, because the Court protected the third party affected by this new international obligation of the U.S., even if **it** was domestically unauthorized. The court felt that "a ruling that the President lacked authority to bind the U.S. to a portion of the Implementation Agreement would not, as the government pointed out in Weinberger, relieve the U.S. of its obligation to comply with its terms". The court was following art. 27 of the Vienna Convention on the Law of Treaties: "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty", which presents a typical principal-agent rationale of protection the third party and allowing the principal to ask for compensation or damages in the internal relationship. Both the U.S. government and the Panama executive agreed on the "reinterpretation" or new obligation, whereas in the ABM case the two executives did not agree on the broad interpretation. Since there was no agreement between these two "agents", a same court would very unlikely act the same way in the ABM case, because there was no third party to protect.

Also the Court in Coplin v. U.S. justified its decision by looking at the nature of Executive Agreements. As in Dames & Moore v. Reagan[81], it held that the President has significant power to bind the U.S. into international agreements without the advice and consent of the Senate. That presidential authority could even include the capacity of changing domestic law by an executive agreement with another state, if under Justice Jackson analysis in the Youngstown case[82], the situation was one of a "twilight zone" where executive and legislative functions would overlap.

79 6 Cl. Ct. 115 (Dist. Ct. 1984).

80 See Frankowska, supra note 51, at 323.

81 435 U.S.654, (1981).

82 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, (1952).

5. A general view on interpretation

Once we have identified and introduced the two principal questions of treaty-interpretation, ("whose interpretation is it?" and "how is it construed?"), we will try to approach them more abstractly in this chapter. From an interpretativist perspective, the texts of the Constitution and of the Restatement are probably not enough to find a clear answer. If we supplement both documents with their contexts, we would still find the same limitations of textualism: overinclusiveness, underinclusiveness, changed circumstances...[83] Following a interpretativist list of possibilities, one could try to perceive a "constitutional structure" and point out the general legislative deferment or delegation to the President in foreign relations matters, although one could challenge this historical view after recent episodes like the Vietnam War or the Iran Contra scandal. We could also try to discover a purpose or a function of this distribution of power between the Executive and the Senate and work with it to set clear boundries in foreign relations competences. We would face then the same problem of choosing an interpretation of treaty-interpretation that could always be contested. Triying to find a legislative intention, like the framer's intent in the constitution would be "largely a fiction in hard cases –a problem aggravated by the extraordinary difficulties of aggregating the 'intentions' of a multimember body."[84] As Sunstein notes, "sometimes structure, purpose intent and history may lead to interpretative mistakes. Although it would be foolish to dispense with these tools, they cannot generate a workable approach to interpretation without considerable supplementation."

The need of supplementation increases when we ask why should we try to read the original meaning of the Constitution to solve present political controversies. Even more, the Constitution can be imagined as a changing norm, like Chief Justice Marsall did in the Me Cullock v. Maryland opinion: "this provision is made in a constitution intended to endure for ages to come and, consequently, human affairs. To have prescribed the means by which a government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[85]

Of all the dinamic constitutional process theories the one drawn by Ronald Dworkin is maybe among the most influentials. He writes his general theory on interpretation focusing on what judges ought to do in hard cases. Hart and Llevellyin, as Sunstein notes[86], worked before Dworkin on a legal process theory, prescribing that the courts should "strive to make sense as a whole out of our law as a whole."[87]

Dworkin starts his theory adopting the internal point of view or the participant's approach to find what the law is. He claims that just focusing on the social function of law and its ideology would give less critical power to a theory of interpretation.[88] Interpretation for him has a lot to do with an artistic attitude, where one creates a view that it is both one's own and the best possible one. He selects two levels of abstraction. The first one, the level of concept, contains what the different practices have in common, like the versions of a general feature. The second level, the conceptions, contains the different historical paradigms created by historical legal practice. With the two levels he forms a "chain-novel" model where interpretations find not "total creative freedom" but neither "mechanical textual constraint."[89] The principle of integrity, as one's obligations to the community and its principles, would guide adjudication. Acts and affairs should be judged then in accordance with the best view of what the legal standards of the community required

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83 See Cass R. Sunstein,:"lnterpreting Statutes in the Regulatory State", Harvard Law Review, vol 103, n.2, 405, (1989).

84 Idem, at 433.

85 4 L.Ed. 579, (1819).Starting with the interpretation of this case, the different constitutional imaginations of the following pages were suggested by Professor Parker in his Constitutional law course, in the spring of 1990.

86 See Sunstein, supra note 84, at 434.

87 Idem.

88 See Ronald Dworkin, "Law's Empire", Belknap-Harvard, 13, (1986).

89 Idem, at 225.

or permitted at the time.[90] To see these standards coherently, they are imagined as created by one single author, the personification of the community. Dworkin applies his profuse analysis of interpretation to the Constitution, noting that "the Constitution is foundational of other law, so interpretation of the Constitution as a whole must be foundational as well"; he asks constitutional interpreters to look to "what makes the community better off as a whole".[91] One clearly perceives in Dworkin effort to promote interpretation within "a complex matrix of intersecting political and moral principles"[92] a reaction against unreasonable results, arbitrariness and lack of coherence in the legal system.[93] But in his flee from political ideology towards legal neutrality he empties his theory. He fails in his attempt to atenuate the different and conflicting emotions of political thinking with such a non-neutral political concept as "what it is better for the whole". As Sunstein puts it, "Dworkin's approach is marred, however, by the open-ended character of its guiding interpretative principle".[94] He devotes hundreds of well-written pages to promote interpretation of what-the-law-is, but finally bases it on the legal agent hopefully abstract view of what-the-law-should be. However, we find more than just aesthetical value in his theory. It is a complex explanation of why after the political bargaining over interpretation, the practical outcome (taking into account the meaning of a treaty for a certain decision) seems reasonable and non-conflictive, with an atractive "*in medio virtus*" appeal. Dworkin expresses a hope for quick political compromise, thus convergence about interpretation, that will allow abstract "legal" thinking. Instead of describing the ideological arena he focuses on the legal process, but probably he would accept our labeling it as a description of the outcome of the political process.

We can identify three main political imaginations of treaty interpretation throughout the ABM controversy and INF's Biden Condition debate. The first would give the treaty interpretation power nominally to both the Senate and the President, but in practice the Senate would retain control over the interpretation of its own understanding of the Treaty when giving consent to the Executive. In doing so, the Constitution and the Restatement are approached with an interpretative eye, looking for fixed rules of transcendent meaning. The second view would give the President control over treaty-interpretation, using the same approach to find immutable rules in the Constitution, but also using a contradictory one of justifying the Executive primacy on more dynamical, historical and *de facto* basis, like complexity, efficiency or prudence. The third imagination would just see the Constitution as a reference for a political process, where the two branches compete in a fair market over interpretation and bargain until a practical compromise is found.

The first one is introduced by the Senate Foreign Relations Committee report on the INF Treaty: "under the Constitution, the President may ratify only a treaty to which the Senate advised and consented. And it must be taken as axiomatic that the Senate cannot consent to that to which it did not understand. Accordingly, the operative principle of treaty-making under the Constitution must be that, as co-makers of a treaty for the U.S., the Executive and the Senate share a common understanding of a treaty which has binding significance domestically as the treaty, upon ratification, becomes an integral part of U.S. law".[95] The Senate and the Executive disagree upon the extent of what it is binding and how it becomes binding. The Senate would say that the representation of the Executive is binding as understood by the legislative body. This understanding would not necessarily be an explicit one.

As Koplow argued: "if Congress had a specific intention and a court can deduce from these secondary sources what the intent was, then that intent is binding and becomes part of the statute or treaty."[96] In order to make sure that the Senate plays its article II constitutional role in treaty-making, the reasoning goes, the Senate must also participate in the interpretation of the treaties. By doing this, it is only making the Government comply with its own rules.

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90 Idem, at 177.

91 Idem, at 385.

92 Idem, at 261.

93 See Sunstein, supra note 84, at 436.

94 Idem, at 437.

95 See INF Treaty Report, at supra note 33, at 92-93.

96 See Koplow, supra note 12, at 1406.

The Senate must be able to bind the Executive with its representation and to interpret those representations, with explicit understandings and even with implicit ones. The power to reinterpret is given then to the Senate, although the Senate would not admit it. With an entrenched vision of the meaning of a treaty, the legislative body imagines the power to create treaty obligations as a set of rules transcendent from politics and as a shared one: "once an interpretation has become entrenched in U.S. domestic law trough the joint action of the Senate and the President, it cannot be altered unilaterally by a reinterpretation sponsored by either branch alone."[97] Nevertheless, the Senate would reserve the capacity of deciding which interpretation is entrenched and which is not; the treaty, after all, would be what the Senate says it is the treaty. Senate understanding of the meaning of the treaty would not have to be explicit, although in the ABM reinterpretation case, Congress placed limitations on SDI activities in the Department of Defense, as an indirect technique to protect the original meaning of the treaty.[98] Block puts it in a very simple way: "essentially, adopting the construct advocated by the ulta-whigs only supports the Senate's ability, under the guise of treaty-interpretation, to force its foregin policy preferences upon the President at a later date"(...) "What it is completely illegitimate, however, is to search for unconstitutional shortcuts. Yet this is precisely the approach preferred by legislative supremacist: create an all-purpose legislative story, treat every statement by the Executive Branch witnesses as binding, and declare yourself to be the ultimate arbiter of what the original 'entrenched' interpretation is. As a result, the ultimate responsibility is avoided while ultimate power is retained."[99]

The second perception of how treaties are interpreted and by whom refers to the President as the only authorized source of interpretation. His capacity is read both in the Constitution text, as a fixed rule, and in the constitutional process, as a changing one. The fear of international embarrassment by Congress short-shigtness and interference in foreign relations is balanced against the conservative faith in an articulated, enlightened and prudent presidency. Professor Rostow uses both set of emotions in his argument for presidential primacy: "one of the principal objectives of the Constitution of 1787 was to establish a strong, independent President for a country which had been floundering badly under congressional government. Since the President necessarily interprets and reinterprets every statute and treaty each time he applies them to new fact situations, the constitutional authority about which Koplow and the report wax so indignant is an essential part of the executive power entrusted to the President under Article II of the Constitution. Section 326.(1) of the Restatement fully recognizes *(sic*) that the authority to determine the interpretation of an international agreement is an executive function reserved to the President." What the Senate has been seeking is not to reaffirm the power of Congress to overrule a President's construction of a treaty, which needs no reaffirmation, but to acquire an entirely new and clearly unconstitutional senatorial veto over the exercise of an important aspect of the President's executive powers. Accepting the position would support its bold and unconstitutional effort to evade the President's veto power, and seize executive power itself."[100] Rostow goes on and evokes the fear of a constitutional crisis by the Senate attempt to overtake presidential powers, "more ominous even that the Court Packing Plan of 1937".[101] Madison's warning in the Federalist Papers is repeatly quoted: "the greatest danger to the constitutional order and to the liberty of the citizen... was not the risk of a presidential tyrant..., but the possibility that Congress would take over the powers of the other two branches of government."

Another argument used to enhance this vision is the identification of implementation and interpretation (or reinterpretation).[102] Since the President's task is to implement treaties, it is also to interpret them. Schemes to determine if a particular interpretation has become "entrenched" by the Senate are too complex: "it is the actual language of the enacted legislation that it is the law, not the unaccented intent of the legislators"(...). "Only the Senate as a whole, or at least, two-thirds of that body, can insist that a reservation or an understanding be

97 Idem, at 1407.

98 Idem, at 1428.

99 See Block, supra note 43, at 1501.

100 See Rostow, supra note 17,at 1497.

101 Idem.

102 See Block, supra note 43, at 1501.

attached to a treaty." The Senate would then have only two options when approving a treaty. First, to consent "without paying too much attention to the fine print and rely in the Executive's good sense to have struck a good bargain for the U.S.". Second, attach "an endless list of conditions, clarifications and understandings, which should be communicated to and accepted by the other treaty party."[103]

The third political imagination of the controversy over treaty interpretation is the one which looks at interpretation as a result of a fair checks and balances process. The Executive and the Senate bargain about the meaning of the treaty giving more or less importance to their past explicit and implicit understandings about it. The clash is a successful way of balancing each side positions. Both sides have enough power and resources to compete efficiently. Trimble describes pictures it saying: "Congress and the Executive Branch interaction and joint decision reflect a kind of constitutional law"(...) "Informal amendment processes are legitimate. As Senator Lugar noted, the reinterpretation controversy showed that 'checks and balances' worked. Indeed, it also showed how the process of treaty interpretation can work, through presidential initiative and congressional reaction, whether formal or informal."[104]

Legal Adviser Sofaer, a main character in the ABM reinterpretation play, shifts in his position of trusting interpretation only to the presidential wisdom (using the two-treaties issue) to concede that through political bargaining in a well-functioning self correcting market-place the Senate cooperates in ascertaining the meaning of a treaty: "the President and the Congress are dealing with the ABM issue through the political process as it is proper and, in any event, inevitable"(...) "In fact, no crisis has at any time existed"(...). During the Senate's consideration of the INF Treaty, both the Administration and the Senate acted cooperatively to resolve questions about the interpretation of the treaty. By performing in this manner, the Senate was playing its proper role in our constitutional process."[105]

But maybe the most clear statement of Sofaer in support of a checks and balances imagination is the following: "I realize that disputes between the political brances will not be always fought by the Roberts' Rules". "[No] formula will provide clear, objective answers to all situations likely to arise. A considerable element of judging will always have to be exercised, and when such issues evoke intense feelings they will be resolved through the political process, rather than by application of neat legal criteria."[106]

Sofaer not only embraces the third imagination, but also makes here a bold move of erasing the line separating law from politics, as he abandons the common aspiration of neutrality. To interpret involves choosing between different values. Treaties do not change in meaning due to natural causes.

Aided by this sudden revelation, we could reformulate now the third imagination, making it more confrontative and less cooperative and broadening it to include the first and second imagination as rhetorical tools of the political process. The authors writing to defend the formal entrenchment of the meaning of a treaty as a result of a shared understanding between the two branches, and leaving the interpretation of that common understanding to the Senate, could be described as adopting an extreme and advantageous position previous to a bargaining. The same could be said about the opposite imagination of allowing only presidential interpretation of treaties. Someone teaching Negotiation would see both moves as logical starts for minimizing the loss in the later process approaching positions by finding common interest. To us, it seems like a confrontation without a theoretical and abstract solution. We refered to it before as the "blank checks dilemma".

Both the Executive and the Senate may present the aspiration of fully interpreting or reinterpreting treaties without the participation of the other branch of government. The Executive would want the Senate not just to consent to its representation of any treaty, but also to defer to the President any future interpretation of it. It would be just like asking the Senate to sign a blank check to the Executive, which will use it conveniently, only facing the limitation of the other international treaty party. If the Senate decided to consent but

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103 Idem.

104 See Trimble, supra note 69, at 1475.

105 See Sofaer, supra note.67, at 1449.

106 Idem, at 1447.

make explicit its own understanding of the treaty, the check would not be a blank one anymore, unless the Executive is allowed to be also the only interpreter of those understandings, reservations or declarations and they have ambiguities opening room for interpretation. If the Senate claimed that not only its formal and explicit declarations but also its implicit understandings should be taken into account by the Executive interpretation, the check could hardly then be described as "blank", although the Senate would have a chance of gaining total control over interpretation againif it could arrogate to itself the interpretation of all the informal and implicit understandings of Senate.

But the Senate could also be the one who asks the Executive to sign a blank check and give up treaty-interpretation, following the same pattern just described. The Executive explicit representations of the meaning of a treaty would threaten the blank check. The Senate would argue that its constitutional role is also to interpret those representations, to which the Senate consented. The Executive implicit understandings of the treaty would be even a bigger problem for the Senate obtaining the blank check. The legislative body would then want to interpret those implicit understandings, as part of a shared one between the two branches of government.

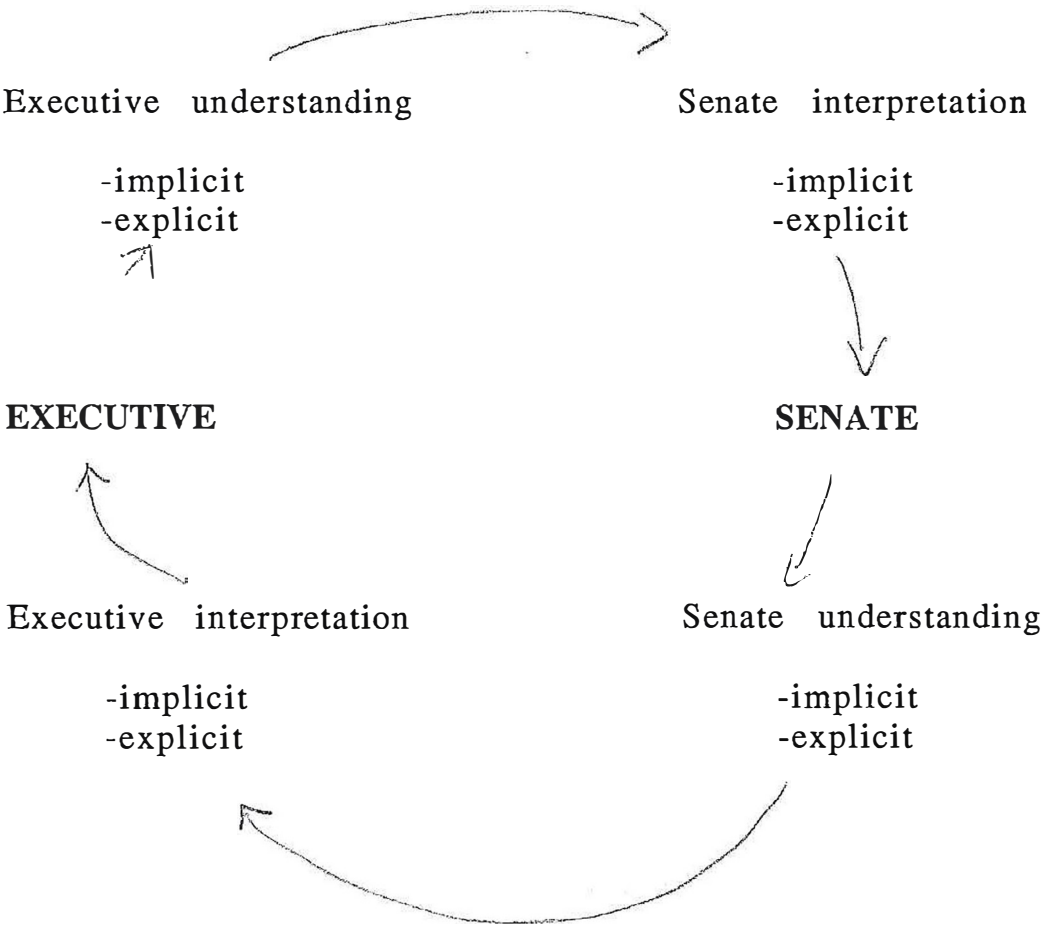
The Senate has the additional problem of the international effect of its interpretation. Only if the Executive transmits to the other party the Senate's interpretation, the other party to the treaty is bound by it, something that implies an even greater hypothetical submission of the Executive to the Senate. There is an advantage in this respect for Presidential reinterpretation, although in cases like the ABM one, the other treaty party may agree with the Senate interpretation instead of with the President's. The possible different political orientation of the Senate's majority and the President increases the possibilities of this attempts of reinterpretation.

The dilemma appears if both sides try to get a blank check from the other at the same time (see graphic 1). When the Senate **(S)** and the Executive (E) attempt to be the only interpreters of a treaty simultaneously, S interprets explicitly and implicitly the treaty and the E 's explicit and implicit understandings and E interprets explicitly and implicitly the treaty and S 's explicit and implicit understandings, then S and E both interpret each others interpretations, and then the interpretations of each others interpretations and so on, both formulating explicitly but also implicitly their views of the other implicit and explicit views. This would be a theoretically endless dispute. Even if we formalized it in abstract logical and mathematical terms, we would find under Godel Theorem[107] that no system of language is justified within itself and can prove its total lack of contradiction, like not finding a language –an interpretation– in which to finish the dispute of the other previous languages –e.g., interpretations about interpretations of interpretations.

Yet, our description departed from political reality long ago. Our circle slows down and eventually stops apparently due to the bargaining process. The extreme positions of total control over treaty interpretation of the Senate or of the President, could then be described as rhetorical instruments to obtain a better outcome in the dispute over the meaning of a treaty. On the other hand, this imagination of competing views over a treaty, that eventually converge, could be challenged as too cooperational. In reality, this argument would go, an open confrontation with emotions guiding it, does not always end in a compromise, where both sides give in something to obtain a bigger common benefit, like in the rug merchant bargaining style. Moreover, if there is no common benefit but one side clearly wins, it is most probable that it will offer to comfort the loosing side the third imagination of a checks and balances process and a politically negotiated outcome.

107 See E. Nagel and J.R. Newman, "Godel's Proof', N.Y., U.Press, 1958.

Graphic 1:


Executive understanding
-implicit
-explicit
Senate interpretation
-implicit
-explicit
EXECUTIVE
SENATE
Executive interpretation
-implicit
-explicit
Senate understanding
-implicit
-explicit

6. Interpreting the Biden condition

The roles of the Senate and the Executive in treaty interpretation were discussed during the drafting and proposal of the Condition. The Condition originated in the Senate desire to maintain control of the meaning of a treaty after it had consented to it. It expressed the Senate view of the binding nature of Executive representations and thus, the notion of a shared or common understanding between the two branches. Senate's efforts to play a substantive role in treaty-making lead the legislative body to struggle for the capacity of interpreting treaties. Its possibility of attaching understandings, declarations or making reservations was never denied by the Executive, probably due to the Executive's capacity of interpreting them and to the Senate's difficulty of anticipating with such explicit statements all the future problems in the meaning of a treaty.

The Biden Condition goes further. It is not a specific understanding about any of the articles of the INF Treaty. It is a prescriptive and general dec1aration of the role of the Senate in treaty-interpretation. Because it is attached to a treaty in the form of a Condition, Senator Biden and others thought, the Executive agrees to it when it ratifies the treaty, accepting this imposition if it wants the treaty to come into force.

Senator Nunn, one of the main contenders in the ABM reinterpretation debate, explains the Condition as "a more comprehensive and common sense definition based on the treaty clauses of the Constitution of what constitutes binding testimony."[108] By enacting the Condition, the Senate rejected the most drastic version of the Sofaer Doctrine, known as the Culvahouse means test, which in practice gave the Executive the capacity of deciding unilaterally what was a shared understanding. According to its authors, the Condition after the INF treaty ratification has the force of U.S. law. Since the Senate and the Executive both agreed on the principle that a shared understanding was required to bind the Executive to a particular interpretation of a treaty, the Condition focuses in determining what a "shared interpretation" is: "the Condition simply aimed to express and affirm a long-standing, if never before articulated, principle: to wit that the shared understandings of the Executive and the Senate, as reflected in the Executive's formal representations, is indeed fully binding, as opposed to binding only with regard to those provisions and interpretations that the Senate has gone to extraordinary lengths to brand as crucial to its consent, by a formal condition or some other means."[109] The proponents of the Condition clearly worked from what we have described as the first view, a fixed rule of cooperation and partnership between the two branches, where the meaning of a treaty is entrenched and, implicitly, revealed by the Senate's view on what it was commonly shared. Nevertheless, the Condition is presented as a way of trascending the political bargaining process over the meaning of a treaty. But it is not a neutral proposal, because it gives the advantage to the legislative body of using all its understandings, expressed or not when consenting to the treaty, whereas the Executive is bound by its only representation to the Senate before ratification. Senator Biden justifies the Condition as the expression of a "never-articulated principle", not just an *ad hoc* declaration and he considers the reference to the Constitution as essential[110]. By making this move towards a constitutional principle, it is possible to extend the Condition to every future treaty that the Senate will ever advice and conset to.

Koplow has a similar understanding of the Condition, yet he is more doubtful about its reach of past and future treaties; maybe it should be just attached to every new treaty. He decides that since "the Condition simply states a truism of international and constitutional law."[111] It would be legally redundant to repeat it in every treaty, "for even without its language in the resolution of ratification the principles it spouses would be read into the treaty by the force of the Constitution." The Condition was just politically necessary "a reassertion of enduring principles that had recently been called into question by the Executive Branch."[112]

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108 Idem.

109 See Biden, supra note 6, at 1529.

110 Idem, at 1545.

111 See Koplow, supra note 12, at 1429.

112 Idem.

Unlike Biden who thinks the Condition leads to a restrictive reading of the ABM Treaty, Koplow understands this particular reinterpretation case as not solved by the Condition, but open for discussion, under the Condition assumption that Executive's statements before the Senate are binding.

Trimble, on the other side of the spectrum, denies that the Senate expressed any constitutional principles of treaty interpretation in the Condition, The "old entrenchment principles" were rejected by the Foreign Relations Committee in the Senate, which objected that "the Senate cannot change the Constitution by an unilateral resolution or condition."[113] This author notes that "on the floor of the Senate, a substitute condition, now called the Byrd Amendment, deleted the language (...) that indicated that the entrenchment principles were general principles of constitutional law. Instead, entrenchment principles were applied as a condition to the INF Treaty, and were by their terms limited to that Treaty."[114] Trimble bases his claim on the changes introduced in the Biden Condition after the Senate did not approve Senate Resolution number 167. It is difficult to accept his approach entirely; amendments and changes are common when looking for consensus for a document that will be subjected to a legislative body approval.

A better argument for the presidential supremacists devaluation of the condition is to deny that the U.S. is internationally bound by it. Using the two-treaties line, one could say that because the President did not communicate the Condition to the Soviet Union, the parties to the treaty did not agree on it as part of the treaty. With regard to the President failing to communicate the true meaning of Senate declarations to the other party, the Reporter of the Restatement (3rd) explains only one similar case: "In connection with the Treaty of Friendship and Cooperation with Spain of 1976[115], the President communicated five Senate declarations separately from the ratification. The Department of State viewed those declarations as 'statements of hope and expressions of opinion' and as 'statements of domestic United States processes'". In those declarations, the Senate had wanted to condition its consent to the treaty to the future development of democracy in Spain's constitutional monarchy. Later in 1979, the Senate Foreign Relations Committee in its report on the SALT II Treaty expressed its "dissatisfaction with the manner in which the Executive Branch had communicated Senate declarations" at that time and in another recent cases. Also, in the Panama Canal Treaty in 1978, the Senate was concerned about the President not formally communicating to the other party all amendments, conditions, and reservations that the Senate had included in the resolution of ratification.[116] The legislative body decided to make an express understanding requiring the President to do so. However, the Restatement gives discretion to the President of communicating the Senate understandings separately from the Treaty or with it. It would seem logical that if the Senate declaration or understanding modifies the terms of the treaty, it would have to be transmited with it. In the Panama Canal case, the understandings of the Senate did not refer directly to the treaty, but to future treaties with third parties allowing the construction of new canals.

In the case of the Biden Declaration, the Senate conditioned its consent to the treaty upon the "entrenchment" of the meaning of the INF treaty, according to the Executive representation of it and the Senate implicit understanding. The President did not transmit this Condition to the other party, but it was part of the resolution of ratification. When the parties to the treaty exchanged instruments of ratification, the treaty came into force. Glennon, looking at the binding force of the Condition on the other treaty party, notes: "the legal effect of Senate conditions in the U.S. instrument of ratification depends on the response to the other signatory."[117] But the Restatement, focusing in the internal effects of any condition (as domestic U.S. law) clearly says in its comment to section 303: "a condition having a plausible relation to the treaty or to its adoption or implementation, is not improper and if the President proceeds to make the treaty, he is bound by the Condition". It seems, then, as if the Biden condition forces the President to give up all hopes of unilateral reinterpretation, unless he argues that the domestic effect of the condition depends on the international

113 See INF Treaty Report, supra note 33, at 433.

114 See Trimble, supra note 67, at 1469.

115 Signed on January 24th, 1976, by U.S. Secretary of State Henry Kissinger and Spain's Minister of Foreign Affairs Jose M. de Areilza. (27 U.S.T. 3005, T.I.A.S. No. 8360).

116 See Glennon, supra note 56, at 125,for a detailed study of the Panama Canal Treaty case.

117 Idem, at 130.

consent to it, a weak argument if one considers that the Condition is aimed to settle a domestic problem of separation of powers and that the President would not be able to make the treaty and exclud from it the condition without firt accepting it.

If we wanted to look for new dilemmas, we would ask who interprets the condition? And how is it interpreted? Some would find its text not sufficiently clear, e.g. the meaning of the word "authoritatively" or of the expression "common understanding". The Condition is about treaty-interpretation, but since it was attached to a treaty it could be either imagined part of a treaty or not. If it was part of a treaty, we could reproduce all the different imaginations cited to interpret it, or we could even apply the Condition to itself, as an empty tautology. If the Condition was not consider part of a treaty for purposes of finding its meaning, once we decide that its text is not clear, the result would be the same as if it was part of a treaty. We could discuss how declarations about treaty-interpretation should be interpreted and by whom. Different constitutional imaginations would be used and also applying the condition to itself would lead us nowhere.

Finally, it is possible to explain the condition as part of a checks and balances process. Biden was just trying to create a new bargaining tool for the majority of the Senate in its political struggle with the Executive. He probably did not really believe in the neutrality and immutability of the principles contained in his declaration. It was a way of positioning for future conflicts and it involved, like all conceptions of what the law is, a choice of how democracy should be. Biden knew too well how the separation of powers and foreign relations disputes are solved, to trust blindly in a final settlement where one side wins all thanks to such an abstract condition. He gained some strenght with this "tool" for later negotiations over interpretation of treaties. Regarding the ABM reinterpretation case, the Congress felt strong to veto the financing and practical development of the SDI Project.

7. Judicial review on treaty-interpretation

The Judiciary has not intervene often in cases involving foreign relations and separation of powers. It would not be hard for a Court to use the arguments of either side of the debate and, thus, protect one side over the other. Glennon in his review of the Supreme Court formal approaches in these cases finds textualism, framer's intent, custom and functionalism, but not "a principled one."[118] The Court seems reluctant to draw clear and immutable lines in this field. Although recognizing some difficulties for line-drawing and fixed rules, Glennon criticizes the Court restraint: "the imprecision, uncertainty and complexity inherent in the resolution of a separation of powers dispute –particularly acute for disputes over international issues– are not sufficient reasons for the Court to avoid the process of resolving such controversies. To do so would be to abandon process for outcome, to substitute power for law, by rewarding that branch that it is best able to work a '*fait accompli*'. It would sabotage any notion of the rule of law."[119]

This approach of not deferring in this field to the political process as a checks and balances self-correcting mechanism is a call for judicial activism. Glennon proposes reliance in the text of the Constitution as the primary source for the Court decisions, and also cites precedent cases and constitutional custom as subsidiary sources. None of this sources provides neutral and clear guidance for the Justices, as we have seen partially through these pages. The invitation for the Court to interpret them would bring into play different political imaginations also from the Judges, with their advantage of final review. Invariably, they would be protecting the Senate or the Executive and, thus, manipulating what before looked like a fair fight.

But until today, the Judiciary has neither completely adopted the Presidential hegemonic view, nor the formalistic approach of the Senate. It has often treated this subject as a political question, with its own self-resolution process. Koplow notes that "effective judicial review of the issue [the ABM reinterpretation case] seemed unlikely because, even with the precedent set by Rainbow Navigation, the hurdles of standing and the political question doctrine probably precluded a court from resolving the merits of these national matters."[120] About the impact of the Rainbow case, the same author does the following analysis: "as encouraging as the case may be for recognizing the shared responsibilities of the Congress, the Judiciary and the President, it is unlikely to be a harbinger of future increase judicial activism in the national security area. Only rarely will a Court be presented with such egregious circumstances, and the Executive Branch will not ordinarily replicate the Navy's heavy handed attempts of unilateral reinterpretation. Judge Greene's decision, however, also illustrates the converse point, that courts' traditional deference to the executive decisions is only a limited self-restraint."[121]

This present attitude depends in the way the Judges imagine democracy and, in particular, judicial review. According to one of the famous and influentials statements of Bickel, "courts have certain capacities for dealing with matter of principle that Legislatures and Executives do not posses. Judges have, or should have, the insulation to follow the ways of the scholar in pursuing the ends of government" (...) "This is what Justice Stone called 'the opportunity for the second sober thought'."[122] Under this first approach, judges should intervene in treaty-interpretation disputes; those who invoke principles when arguing different interpretations and different theories about interpretation, would gladly see their views upheld by a Court. Yet it seems that there are no evident principles for the Court to intervene. Bickel would then explain: "when the Court, however, stays its hand and makes clear that it is staying its hand and not legitimating, then the political processes are given relatively free play".[123] This author quotes Justice Brandeis saying, "the most important thing we do is not doing" and would reject that there is just no principle; the court would be

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118 See Glennon, supra note 56, at 40.

119 Idem, at 51.

120 See Koplow, supra note 12, at 1427.

121 Idem, at 1401.

122 Alexander Bickel, *The Least Dangerous Branch,* Yale U.P., 2nd. Ed., 25-26, (1986).

123 Idem, at 70.

allowing expediency through a principle of no-intervention, grounded in tradition, "so far as tradition speaks with relevance and so far as it suits the times."[124]

Maybe he would describe the Courts deference as an implicit delegation of the court principled-power to the legislature, which according to him should decide in the first instance the most fundamental issues, and also to the President, due to the tradition of presidential initiative in the field of foreign affairs. But we would not be back to our market place imagination, because he would not see the views of the two branches as competing and conflicting and highly political.

If we turned to other influential justifications of judicial review, we could also proclaim the Courts' self-restraint in matters of foreign relations and separations of powers. In John H. Ely's theory, for instance, the Constitution would be read as a text commited to process values and "ensuring a durable structure for the ongoing resolution of policy disputes". His "approach to constitutional adjudication might be called an 'antitrust' as opposed to a 'regulatory' orientation to economic affairs –rather than dictate substantive results, it intervenes only when the market, in our case the political market, is malfunctioning."[125] In the struggle about treaty– interpretation we would have to look for a disadvantaged player and we would not find it. Representation of different views is promoted in the debate over interpretation. Under Ely's theory, adjudication would not happen in this field, because the political bargaining process would be well-fitted to take care of interpretation.

From a perspective of self-restraint like Bork's theory of original understanding of the Constitution, one could come out either way with a more or less general purpose to give authority or the President or to the Senate.[126] Only very unlikely we would defer to the political interaction of the two branches.

Finally, some authors would rationalize treaty-interpretation in the following way: the Supreme Court is not the only branch of government suited to interpret the Constitution, even if it is its last interpreter. What the Senate or the President reads in the Constitution about treaty-interpretation is also a legitimate interpretation. Louis Fisher explains this position: "in our political system, the Executive and Legislative branches necessarily share with the Judiciary a major role in interpreting the Constitution. Under the doctrine of 'coordinate construction' the President and the members of Congress have both the authority and the competence to engage in constitutional interpretation, not only before the courts decide, but afterwards as well."[127] Fisher quotes from the writings of Jefferson "each branch has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action."[128] As with the amendment process, "constitutional change can occur without any judicial involvement."[129]

However, in the Senate debates over the ABM reinterpretation "several Senators and commentators indicated that the Supreme Court would or could have the final word."[130] It was not the case, but it is not difficult to find arguments against all the theories that proposed the Court's deference over treaty-interpretation to the political process or to one branch. Professor Koplow even suggests that "in establishing an authoritative interpretation of a treaty for purposes of domestic law, the U.S. should not overlook the possibility of authoritative international adjudication."[131] Although highly improbable for it to happen, it would be a good way of avoiding unilateralism in this field of foreign relations, where *de facto* the U.S. hasn't got the last word.[132]

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124 Idem, at 96.

125 John Hart Ely, *Democracy and Distrust,* Harvard, 90-102, (1980).

126 See Robert H. Bork, *The Tempting of America,* Free Press, (1990).

127 Louis Fisher, *Constitutional Dialogues: lnterpretation as a Political Process,* Princeton U. P., 231, (1988).

128 Idem, at 239.

129 Idem, at 245.

130 See Koplow, supra note 12, at 1475, footnote 53.

131 Idem, at 1432.

132 Idem, at 1433.

The tendency of the Judiciary to see a political question in many foreign relations issue is affirmed by most of the commentators. Henkin notes that "foreign affairs makes a difference; the Courts are less willing than elsewhere to curb the political branches."[133] In Baker v. Carr, Justice Brennan attenuates the principle: "there are sweeping statements to the effect that all questions touching foreign relations are political questions(...) Yet it is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[134] In any event, treaty-interpretation and its constitutional reading is one of the areas in foreign relations and separation of powers where the courts rarely decide a case. Trimble summarizes this view very accurately:

> "The most active decision makers [about treaty-interpretation] are Congress and the Executive Branch. Their interaction and joint decision reflect a kind of constitutional common law. Indeed, in this respect, the two political branches may properly be viewed as an elected judiciary, making decisions on the legally correct boundaries of separated powers in foreign policy, and being held regularly accountable to the voters for those decisions".[135]

133 L. Henkin:"Foreign Affairs and the Constitution", 206, (1976).

134 369 u.s. 186, 212, (1962).

135 See Trimble, supra note 69, at 1475.

8. Conclusion

"A conclusion is the place where you got tired of thinking".
Martin H. Fischer.

The fast changes in the world will produce many new treaties. In many of them, the United States will be a most important party. The new world's political, economical and security structures will have to rely on this formal instruments. A future mutual understanding among the nations depends on the making of these treaties as much as on its interpretations. We have briefly seen in these pages some of the limits of treaty-interpretation in the U.S. domestic sphere, where interpretation is the practical outcome of a political process. In the international sphere, the limit is no other than the other party's consent to one's interpretation, also a situation of interdependence and bargaining.

Interpretation and especially reinterpretation are possible not just because of the "inherent degree of ambiguity and indeterminacy of international agreements."[136] The structure of separation of powers and the two-step process for treaty-making facilitate thoses changes of meaning. From the negotiation to the ratification many things can happen. In fact, "the U.S. has experienced grave difficulties in bringing the national security treaties that it negotiates into force."[137] Article II Treaties once ratified by the President carry the threat of Senate disagreements with the Executive interpretation or reinterpretation, since the Senate played a certain role in its making.

As we have seen through the description of the political process and its different constitutional imaginations, it is possible to have analytically two competing interpretations of a treaty, with two different "spins" or focuses and with theoretically all the international implications of this unpleasant situation. But the political bargaining process finds enough incentives, like the ones described in our "blank checks dilemma", to reach a *de facto* agreement, if not in the legal interpretation of the treaty, in what to do practically about it. Of course, different interpretations of a treaty, *a priori,* imply different ways of acting, e.g. allowing the Strategic Defense Initiative or not Luckily, consensus over the meaning of a treaty or about how treaties should be interpreted, is not politically necessary in order to find consensus on the practical decisions concerning that particular treaty. A middle ground for the two branches to find that basic agreement was in the ABM controversy the negotiating record, whose difficult exploration gave some room to both sides far weighing each others strenghts and rationales, and finally come up with two different interpretations of the treaty, but one policy. This was apparently closer to the "restrictive reading" of the Senate, although the Executive had good reasons for not furthering the broad reading, such as the disagreement of the other treaty party, the Soviet Union, and the technical financial obstacles of the SDI. Practitioners, thus, will look at the factual outcome of the process. What is the substantial law of the treaty, no matter the continuing disagreement on the constitutional principles of treaty-interpretation.[138] They will omit the analytical exploration of confrontative and conflicting interpretations (on interpretation and on the particular treaty) between the two branches, driven by different political imaginations. The fears raised by each branch to justify the faith in their own constitutional roles are, at the most, presupposed.

Yet not every treaty presents the same problems of interpretation or in such a degree. Ambiguity is always present in statements made between nations, especially if we consider that their political culture changes independently and at a different pace. But the interpretation difficulties found in the ABM case are quite exceptional, even if they have a lot to do with the difficulty of interpreting the U.S. Constitution non-written provisions for treaty-interpretation. Nevertheless, it is probable that if there is enough political momentum when a polemic treaty is at stage again, the debate will continue. The Biden Condition does not settle it, because it is just a formalization of one side's arguments. On the other hand, it does not offer and

136 See Koplow, supra note 12, at 1433.

137 Idem, at 1384.

138 See Trimble, supra note. 69, at 1468.

uncontroversial self-interpretation. It seems like there are no fixed rules in the Constitution about who and how interprets treaty-interpretation rules...

We devoted a few pages to deal with the Judiciary absent role in the constitutional controversy, although there is much more that could be said about what the Court considers a "political question". Some authors argue today that one of the most important approaches of the modern constitutional law era is that the Supreme Court will give constitutional protection only to those persons, institutions or values that cannot protect themselves.[139] In the 1954 celebrated opinion of Brown v. Board of Education[140] this new focus became clear. Following this approach, we could ask, first, if the Senate or the Executive could deserve protection when engaged in treaty-interpretation. Reasons of preserving some checks and balances, of the needed efficiency of the U.S. in its foreign relations and of representations and participation of the people in those foreign affairs would be enough to answer that both branches would deserve judicial protection when interpreting treaties. But, the second question would be, do they need that protection from the Court? Even regarding the tyranny arguments made from both branches in the ABM controversy, if we look at the political bargaining process, we can see both branches have enough means of self-protection.

Treaty-interpretation, when involving an art. II treaty,will still be typically decided by political choices in a process of confrontation between the Executive and the Senate. The practical consensus about what to do under the treaty will not deter simultaneous opposed imaginations and analysis of the meaning of the treaty and the Constitution by either branch of government. Divergence is inevitable when one chooses, and may be that is why "it hurts to choose".[141]

139 Professor Richard Parker held this view during his 1990 Constitutional Law course at Harvard Law School.

140 347 483, (1954).

141 "Entscheiden Tut Weh" in German; Johannes Gross, Frankfurter Allgemeine Magazin, 10, feb. 1990.

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Resumen: la «condición Biden» fue introducida por el senador Joe Biden en la cámara alta con motivo de la ratificación del tratado INF en enero de 1988. Esta resolución limitaba la libertad que la Administración Reagan reclamaba a la hora de interpretar las limitaciones del tratado ABM sobre pruebas de nuevas armas. Iba más allá del caso concreto, al reforzar un principio básico de la práctica constitucional norteamericana. Por contraste, la Casa Blanca buscaba consolidar la iniciativa presidencial conocida popularmente como «Guerra de las Galaxias» y contradecía doscientos años de trabajo conjunto del ejecutivo y el legislativo en la ratificación e interpretación de tratados internacionales. Este estudio plantea los problemas jurídicos y políticos de la condición Biden desde el derecho constitucional de Estados Unidos, su regulación de los tratados internacionales y la práctica institucional en la ratificación e interpretación de dichos acuerdos. Se pregunta a partir de distintas teorías de interpretación del Derecho por el valor de la condición Biden y su efecto en la separación de poderes y la política internacional de EEUU.

Abstract: the "Biden condition" was introduced by Senator Joe Biden in the upper house on January 1988, during the ratification of the INF treaty. This resolution limited the unrestricted freedom that the Reagan Administration demanded when interpreting the limitations placed by the ABM treaty on testing new weapons. The Biden condition went beyond the concrete case, by reinforcing a basic principle of constitutional practice. By contrast, the White House sought to consolidate the presidential initiative popularly known as "Star Wars" and contradicted two hundred years of joint work by the executive and the legislature in the ratification and interpretation of international treaties. This study raises the legal and political problems of the Biden condition in the US constitutional context, its regulation of international treaties and the institutional practice of ratification and interpretation of said agreements. The relevance of the Biden condition is assessed from different theories of interpretation, as well as its impact on separation of powers and US foreign policy.

Palabras clave: Joe Biden, tratados internacionales, derecho internacional, INF, política exterior, Estados Unidos.

Keywords: Joe Biden, international treaties, international law, ABM, foreign policy, United States.

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