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PROCEEDINGS OF THE SEMINAR
UNITED STATES DEPARTMENT OF LABOR
NATIONAL ADMINISTRATIVE OFFICE
SEMINAR ON INTERNATIONAL TREATIES
AND CONSTITUTIONAL SYSTEMS
OF THE UNITED STATES, MEXICO AND CANADA

University of Maryland School of Law
Westminster Hall
519 West Fayette Street
Baltimore, Maryland

Thursday,
December 4, 1997

9:00 a.m.
National Administrative
Office Secretaries

U.S.: Irasema Garza
Mexico: Rafael Aranda Vollmer
Canada: May Morpaw

U.S. Panelists

- David P. Stewart
Assistant Legal Adviser for Human Rights and
Refugees, U.S. Department of State
- Hurst Hannum
Professor, Fletcher School of Law and
Diplomacy, Tufts University, Medford, Massachusetts
- Benjamin Aaron
Professor Emeritus, School of Law,
University of California at Los Angeles (UCLA)

Mexican Panelists

- Javier Moctezuma Barragan
Sub Secretary "A", Secretariat of Labor and
Social Welfare of Mexico
- Dr. Manuel Gonzalez Oropeza
National Autonomous, University of Mexico
- Lic. Loretta Ortiz Ahlf
Legal Director, National Council for Culture
and the Arts

Canadian Panelists

- Ton Zuijdwijk
Senior Counsel, Trade Law Division,
Department of Foreign Affairs and International Trade
- Robert Howse
Associate Professor, Faculty of Law,
University of Toronto
- Sophie Dufour
Professor, Faculte de Droit, Universite de
Sherbrooke

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- David P. Stewart
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- Benjamin Aaron

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- Javier Moctezuma Barragan
- Dr. Manuel Gonzalez Oropeza
- Lic. Loretta Ortiz Ahlf

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- Ton Zuijdwijk
- Robert Howse
- Sophie Dufour

INTRODUCTION

The purpose of this seminar is to examine the relationship between international treaties and constitutional provisions in the United States, Canada, and Mexico. This event is part of a work program resulting from an agreement on ministerial consultations between the governments of Mexico and the United States on U.S. Submission 9601. Canada agreed to participate in the implementation of this work program.

U.S. Submission 9601 was filed on June 13th, 1996. On January 27th, the U.S. National Administrative Office issued a public report recommending ministerial consultations with Mexico. The Submission concerns freedom of association for federal sector workers. A larger union was certified as a representative majority union. The administrative decision was subsequently overturned by the Mexican federal courts, and a secret ballot election was held. The petitioning union lost the election, and final registration and recognition was awarded to the majority union.

The U.S. National Administrative Office ("NAO") found that Mexico had acted to enforce the specific requirements of relevant Mexican labor laws in this case. However, the NAO further found that important issues were raised as to whether those laws conformed with the Mexican Constitution or international treaties ratified by Mexico. These include requirements that

- (1) Unions obtain prior registration from government authorities;
- (2) Only one union can exist in each government workplace; and
- (3) Federal sector unions may affiliate to only one national federation.

The issues raised in the report involved internationally recognized freedom of association principles. The NAO cited extensive reports by the International Labor Organization in support of its findings as well as decisions of the Supreme Court of Mexico, which found that a single union restriction is unconstitutional at the state level.

Consistent with the provisions of the North American Agreement on Labor Cooperation ("NAALC"), the National Administrative Office recommended that consultations be pursued to clarify the effects of constitutional provisions in international treaties that guarantee freedom of association and protection of the right to organize.

The NAALC is the authority under which we review these types of cases. The Agreement has given all three countries; the United States, Mexico, and Canada; the unique opportunity to raise and examine labor issues of concern. The participation of all three NAALC countries in the symposium is further evidence that we can cooperatively address difficult and sensitive labor issues as intended by the framers of the agreement. By sharing information, hopefully, we can enhance our respective knowledge and understanding of each other's legal and constitutional histories and interpretations. Creating a base of knowledge regarding our labor

laws, policies, and legal institutions is crucial to the success of implementing the North American Agreement on Labor Cooperation.

INTRODUCTION OF PANELISTS AND STAFF

United States

Dave Stewart is a legal adviser for Human Rights and Refugees in the Office of the Legal Adviser at the U.S. Department of State. His principle responsibility is advising the Bureau of Democracy, Human Rights, and Labor and Bureau of Population, Refugees, and Migration.

Hurst Hannum is a professor from the Fletcher School of Law and Diplomacy at Tufts University in Medford, Massachusetts. Professor Hannum teaches courses in international organizations and international human rights law.

Professor Ben Aaron has served on the ILO Committee of Experts regarding the Implication of Conventions and Recommendations.

Mr. Stewart will give us the Government's perspective on international conventions. Professor Hannum will focus on general human rights conventions, and Professor Aaron will focus on ILO conventions and the ratification and what the ratification of these conventions means.

Mexico

Mexico considers it important to gain a better understanding of the constitutional systems of our counterparts, of our partners, and thus improve mutual relationships.

Javier Moctezuma Barragan works in the Office of the Secretary of Labor and Social Welfare of Mexico. He has had a long career in public service. He has worked at the Mexican Embassy to the United States as the general director of our Government Office, and also been a legal adviser to the Government. He has authored many publications, including one on remodelar iglesias (ph), electoral reform, legislation, and many others. He'll be talking about international treaties and our constitutional system.

Dr. Manuel Oropeza is a graduate of the National Autonomous University of Mexico. He is a representative to the National Electoral Institute and a member and consultant to our National Congress, Academic Secretary of Humanities at the Autonomous University, and a founder of the Legal Research Institute at Guadalajara University. He is currently a researcher at the Autonomous University of Mexico Legal Institute. He will be discussing constitutional principles and international treaties, specifically with regard to Mexico.

Professor Loretta Ortiz Ahlf is also a graduate of the law school in Mexico and is legal director for the National Council for Culture and the

Arts and works at the Panamerican University in the Martinez Romero Diplomatic School in Mexico. Professor Ortiz will be talking about the implementation of international treaties in the Mexican system.

Canada

Ton Zuijdwijk was part of the negotiating team for Canada during the labor side agreement negotiation. He is senior counsel in the Trade Law Division of the Department of Foreign Affairs and International Trade. As a result, he will speak about the Government perspective on international treaties and constitutional systems. Mr. Zuijdwijk is also an adjunct law professor at the University of Ottawa. He teaches a course on European Community Law. He holds an LLB from the University of Toronto, a LLM degree is from Layden University in the Netherlands and Columbia University, a Master's in International Affairs from Columbia, and a Doctorate in International Law from the University of Toronto. His thesis was on human rights petitions to the United Nations.

Robert Howse is the associate director of the Center for the Study of State and Market at the University of Toronto. He is also an associate of the University's Institute for Policy Analysis and an adjunct scholar of the C.D. Howe Institute in Canada. He's a former public servant who worked at the Department of External Affairs before it changed its name. He's also a prolific author. Professor Howse was educated at the University of Toronto and Harvard Law School with an LLM.

Sophie Dufour is assistant professor in the faculty of law at Université de Sherbrooke in Sherbrooke, Quebec. She holds a Doctor of Juridical Science degree from the Faculty of Law at Laval University. She completed her thesis on the social dimension and international trade system. She holds Master's and Law Degrees from Cambridge in England and the Osgoode School of Law at York University in Ontario. Sophie Dufour has previously worked as a researcher at the WTO and the International Labor Office and as a consultant in legal affairs at the ILO and is also the author of a number of publications in this area.

Professor Howse will speak more generally on international treaties and the Canadian constitution while Professor Dufour will focus more specifically on the ILO, although they will both cover more areas than that as well.

INTERNATIONAL TREATIES AND CONSTITUTIONAL SYSTEMS PRESENTATION BY THE UNITED STATES DELEGATION

DAVID STEWART: Several questions of terminology need to be dealt with at the outset. First, in terms of U.S. law, the difference between treaties and executive agreements; secondly, a brief description of

the procedure by which treaties and executive agreements are adopted in our system; third, a brief description of the status of treaties in U.S. law; fourth, a few aspects of the limitations on the treaty power; fifth, a topic I think we need to mention for further discussion, which is some aspects of the implication of the federal treaty power for our constituent states in our federal system; and then sixth, the topic which bears more discussion than I can give it, and that's the distinction between self-executing and non-self-executing treaties.

The first question is the distinction between treaty and executive agreement. In its most general form, it can be explained very simply. Treaties require the concurrence of the United States Senate and executive agreements do not. In our view, both treaties and executive agreements are international agreements from the point of view of international law. Our parlance does not distinguish between bilateral and multilateral treaties; both are handled the same way, although in their application they may possibly have some different dimensions.

There is sometimes a very interesting and difficult debate over whether a particular instrument is, or should be treated as, a treaty or an executive agreement. Some of you may be familiar with the dispute a number of years ago over the agreement with the People's Republic of Hungary to return the Crown of Saint Stephen, the Hungarian coronation regalia which was taken during World War II. This dispute resulted in litigation which asked a district court to decide the issue. The court decided in favor of the Government's view that the instrument was not a treaty. That case was brought by an individual named Dole who, of course, was subsequently a Presidential candidate. I mention that fact only to highlight the fact that this issue sometimes has serious political implications.

Executive agreements come in different varieties. There are those resting on the President's authority under the Constitution alone, sometimes called sole executive agreements, and there are those resting on the joint authority of the President and the Congress. Those in the latter category are entered into by the President on the basis of enabling or authorizing, or even implementing, legislation, either adopted prior to the negotiation of the agreement or in some cases subsequently. You may be familiar, for example, with the Iranian hostage agreement and remember the important case of *Dames & Moore*.¹ Here, the Supreme Court found implicit prior congressional approval, concurrence, or acquiescence, depending on your view, in the arrangements that the President had made, and upheld their constitutionality.

1. 453 U.S. 654, 101 S.Ct. 2972 (1981).

There can also be an executive agreement pursuant to a treaty. For example, in the case of a treaty that has a dispute settlement mechanism, the subsequent method of submitting a dispute to the agreed mechanism might be an executive agreement authorized by the treaty, or in the case of mutual legal assistance treaties there may be a specific undertaking to reach subsequent understandings on the form of evidence to be submitted. In these ways, you can have subsidiary executive agreements.

In our practice, formal treaties are in fact the least numerous kinds of agreements. Pure executive agreements are only slightly more numerous, and by far the largest number in our national history have been the Congressionally-approved or joint Congressional-Presidential agreements.

The second question is that of procedure. Our process of formalizing adherence to treaties is relatively simple. I do not say "ratification" because ratification is not in fact specifically mentioned in the Constitution, and some treaties provide for ratification of signature only for a limited time.

Article II, Section 2 of the United States Constitution says that the President has the power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur. Once negotiations have been concluded, or in the case of a multilateral treaty, the text has been adopted or approved, and once the relevant instrument has been signed by a duly authorized official, it is submitted in ordinary practice by the Secretary of State to the President. The President then transmits the treaty to the Senate for its consideration. The treaty goes first to the Senate Foreign Relations Committee, then to the full Senate, which endorses the treaty by a resolution of advice and consent either of ratification or in some cases of accession. The President then completes the process of ratification by depositing the appropriate instrument and proclaiming the treaty. By comparison, executive agreements do not require the advice and consent of the Senate, and they are not ever mentioned in the Constitution at all.

Sometimes the distinction between a treaty and an executive agreement is a matter of discussion between the Congress or the Senate and the Executive. For example, in the case of the "Budapest Treaty on Microorganisms,"² the Executive was prepared to submit it to the Senate as a treaty for advice and consent, but following consultations and the advice of the Senate, it was in fact handled as an executive agreement for domestic purposes, and we then submitted an instrument of approval.

2. Budapest Treaty on Microorganisms, *Done at Budapest*, Apr. 28, 1977, *entered into force* Aug. 19, 1980. T.I.A.S. 9678, 19 I.L.M. 1542.

Now, for the obvious reasons on certain occasions, there can be congressional hostility to executive agreements that aren't founded in any measure in congressional authorization. There is a long history of this hostility dating back to the infamous Bricker Amendment in the late 1940's and early 1950's.³ Those of you who practice or teach in this area will know that since the 1972 adoption of the so-called Case Act,⁴ Congress has required us to submit all executive agreements within a matter of months to the Congress for its consideration and examination.

The third subject is the status of treaties in domestic law. It's important to emphasize that we treat the question of whether a treaty or an agreement is internationally binding as one question, and its effectiveness and status in domestic law as a separate question. In this sense, we are a "dualist" country on this issue. It is quite possible that the United States could be bound by international law, but the treaty in question would not be legally effective domestically. If it risks non-compliance, that's, of course, an event that, as a Government lawyer, I'm paid to try to avoid. We want to be able to carry out our obligations under international agreements and we simultaneously adhere to the rule that domestic law cannot be properly invoked as an excuse for non-performance of international obligations.

Under the Constitution duly-ratified treaties are "the Supreme Law of the Land," equal in stature to enacted federal statutes. Article VI of our Constitution says, "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state notwithstanding."⁵ As I hope we will hear, this provision bears a resemblance to the parallel provision in the Mexican constitution.⁶

3. The Bricker Amendment takes its name from Ohio Senator John Bricker, who led an effort in the early 1950's to enact a proposed amendment to the Constitution. The version recommended by the Senate Judiciary Committee in 1953 stated, "A provision of a treaty which conflicts with this Constitution shall not be of any force or effect". Gerald Gunther and Kathleen Sullivan, *CONSTITUTIONAL LAW* 254-55 (13th ed., 1997).

4. Case-Zablocki Act of 1972, Pub. L. 92-403, Section 1, 86 Stat. 619.

5. U.S. CONST., Art. VI, Cl. 2.

6. MEX. CONST., Title VII, art. 133. The relevant language states "This Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The judges of every State shall be bound by said Constitution, the laws, the treaties, notwithstanding any contradictory provisions that may appear in the Constitution or laws of the states." *Id.*

In our system, therefore, duly-ratified treaties prevail over inconsistent state and local law. To the extent of any inconsistency, they also prevail over previously adopted federal law. They may be displaced in turn by subsequently enacted federal law. There are a number of interesting cases on this subject, exploring the question as to whether the Congress has in fact the authority to put the United States into violation of previously adopted treaties. There is also a body of interpretive doctrine adopted by the courts to the effect that treaties and statutes should, wherever possible, be read compatibly, that congressional intent to modify obligations under a treaty should be explicit. Thus only where the conflict between the law and a treaty is irreconcilable and Congressional intent is clear can the latter in time be given precedence.

A recent case in which this conundrum was addressed by a district court, and one which will be familiar to many, is the Palestine Liberation Organization case in the late 1980's in New York.⁷ In a statute, Congress effectively directed the executive branch to shut down the PLO Observer Mission, which of course claimed on its part that it had a right to be represented and to exist before the United Nations under our bilateral headquarters agreement. The court found that in that case there was no specific congressional intent to require a violation of the treaty, thereby putting the executive in something of a box. In any event, that was an example of how a court will go to some length to avoid finding a direct conflict or requirement to give voice to a treaty over an existing statutory requirement.

Importantly, in our system it is now clear that treaty obligations are subordinate to the Constitution. There has been some discussion and concern over the years on this point, including the very important case of *Reed v. Covert*⁸ in 1957. It is clear that an agreement with a foreign nation cannot confer power on the Congress or on any other branch of the Government, which is free from restraints of the Constitution. It is possible for a treaty, of course, to provide greater rights to individuals or to elaborate on the rights of individuals which can be asserted against a branch of the government. In that sense, the power of the Constitution would be working at its minimum rather than at its maximum. Executive agreements, likewise, are also subject to the Constitution.

A fourth question to answer is what are the limitations on the treaty power. If a treaty or an executive agreement cannot deprive a citizen of a right given under the First Amendment, for example, are there other limi-

7. *U.S. v. the Palestine Liberation Organization*, 695 F.Supp. 1456 (S.D.N.Y. 1988).

8. 354 U.S. 1 (1957).

tations on the treaty power? Let me just address briefly two questions, which I think will come up later in discussion.

In the first case, the question is the separation of powers. Can the treaty power be used to alter the allocation of authority between the branches of the federal government? In an important case from the 1920, *Missouri v. Holland*,⁹ the Supreme Court made clear that Congress may act under the treaty power when it might not otherwise have the authority to act. In that case, Congress enacted a statute which was held to be unconstitutional. The U.S. then negotiated a relevant treaty with the Canadian government. A statute was enacted pursuant to that treaty and upheld by the Court. Ultimately in that situation, the Court said that under the treaty authority Congress may have the authority to enact a statute which it might not otherwise have under the Constitution.¹⁰ I do believe, and I'd like to hear more discussion of this point, that under the Canadian system that might not be the case. They may have a different rule.

The other aspect of this question of limitation concerns the exercise of the treaty power in terms of its subject matter. Are there subjects under our Constitution which are not appropriate for the treaty power? There is nothing specific on this issue in the Constitution, and the Supreme Court in *Missouri v. Holland*¹¹ left that issue open. It said clearly there are some matters of great importance which the executive needs to deal with, and if Congress cannot deal with them under a statutory grant of authority then it can do so under its treaty authority.

Another very important case, the *Curtiss-Wright*¹² case, suggested that the treaty authority is somehow separate from the constraints of our Constitution, that it exists as a spin-off or a derivative aspect of the law of nations and is inherent in sovereignty. In this way, it was not at all limited. We have yet to find a topic, a subject matter, which has been in fact not appropriate for the treaty authority, but I'll give just one example for people to think about.

In the case of the human rights treaties, we sometimes run up against the argument that agreements adopted in the U.N. touch on subjects which may not be appropriate subjects of regulation under our constitutional system, but are nonetheless appropriate for the treaty power. This issue is raised by some articles of the Convention on the Rights of the Child, which also poses the question whether a treaty can authorize the government to impose some kind of limitation on private regulatory

9. 252 U.S. 416 (1920).

10. *Id.* at 433-34. The pertinent text reads "It is open to question whether the authority of the U.S. means more than the formal acts prescribed to make the convention."

11. 252 U.S. 416 (1920).

12. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

action. For example, we have expressed our understanding in the human rights treaties that we will not implement the treaty past the point at which our government may properly intrude into private affairs. Thus, we see the relevance of the limitation of private action under our Constitution. This, however, is an open question, and I hope we'll hear more about it in the future.

Fifth, and very briefly, we must ask about the relationship of treaties to the states. Treaties are federal law under our Constitution. States are not allowed to enter into treaties under the Constitution. Now, this is not a complete prohibition because states are allowed to enter into a compact or an agreement with a foreign power if they have Congressional consent. States historically have had a measure of authority to implement international law and do in fact enter into forms of agreements with foreign countries.

The question that is of particular interest to me in the area of human rights is whether adoption of a treaty on a subject which is otherwise within the purview of state and local governments somehow "federalizes" that issue, reigning the federal government into an area which it might not otherwise be competent to act. As I have already mentioned, we have concerns about this in the area of human rights. Another reason for concern has to do with the 1968 Supreme Court decision in *Zcherning v. Miller*,¹³ in which even in instances where the federal government hadn't acted, the Supreme Court held that an Oregon statute having to do with inheritance matters was an impermissible intrusion into the area of foreign affairs. It was not a question of preemption because the Government hadn't in fact acted in that field. It was a question really of superiority, and one has to wonder how that can apply in other areas.

Lastly and very briefly, we come to the difficult issue of self-executing treaties and non-self-executing treaties. We have had this distinction in our law since the early 19th century. It is not in the Constitution itself, but the Supreme Court has adopted it, and it has become a part of our Constitutional doctrine. In its simplest sense, the doctrine says that self-executing treaties, once ratified, become fully effective as domestic law. Non-self-executing treaties by comparison require implementing legislation. And in the latter case, it is the legislation and not the treaty which has the effect of domestic law.

This is not a distinction unique to the United States. One can say generally that common law countries acknowledge the distinction and generally favor non-self-executing approaches. Under British law a treaty does not become effective unless and until it has been specifically imple-

13. 389 U.S. 429 (1968).

mented by the legislature. In Australia there has been some recent discussion about this subject as well. The doctrine adopted by the English High Court said simply that a treaty is not part of English law until it has been incorporated.

By comparison, most civil law countries recognize the distinction but favor self-executing treaties. That is the case, for example, under Article 25 of the Federal Republic of Germany constitution.¹⁴ The United States, on the other hand, has this rather odd bifurcated system where a treaty can be one or the other.

What does the doctrine mean? Well, here we get into very deep water, and I'll just introduce the subject. In the area of judicial consideration, a treaty is self-executing when the court can and must use it as a rule of decision. Non-self-executing treaties then are not applied that way, and the court will defer any decision to the legislature. This appears to be true at least with respect to the effect of treaties on state law and whether they can be invoked by private parties.

Beyond that it is less clear exactly what the doctrine means. Can, for example, the principles and doctrines of a non-self-executing treaty be used to interpret pre-existing statutes? Can they be referred to as normative guidelines by the courts? Can they inform decisions based on customary international law? Here, the Australian system has recently had an interesting development where the High Court said that a treaty is a positive statement by the executive government. The Court further said it would act in accordance with that treaty, and give rise to the legitimate expectation that administrative decision-makers will act in conformity with that treaty. This provoked a legislative response from the government saying that in fact this was not true. And perhaps we can hear more about that debate.

Finally, when is a treaty self-executing? This is a controversial question. There are those, and I'm one of them, who say it's a matter for the executive branch, or at least for the executive and the legislature. When we enter into a treaty, and the President transmits it to the Senate and declares that it will be a non-self-executing treaty, that ought to be determinative. Certainly when the Senate conditions its advice and consent on that same understanding, that combination ought to bind the courts.

Then there are those who would say that is just the view of the political branches, that the doctrine is in fact a judicial doctrine rooted in the Constitution, so a court can have a different view. There are even some who think that the Constitution favors self-executing treaties, that in fact all treaties are self-executing unless you can prove that they

14. GRUNDESETZ [Constitution] [GG] art. 25 (F.R.G.).

aren't. There are those who believe that treaties that obligate the Government to refrain from an action, not to torture for example, are *de facto*, self-executing treaties. There are those who would also say that even in the case of a non-self-executing treaty, the Government has the obligation to implement the treaty.

The question of self-executing versus non-self-executing also arises but with less force in the case of executive agreements. There are clearly executive agreements that can be self-executing, and here *Dames & Moore*¹⁵ is the relevant case to cite.

MS. GARZA: Thank you, Mr. Stewart. That was a very good overview of the Government's perspective on this issue. Next, we have Professor Hurst Hannum.

MR. HANNUM: I would like to put the labor agreements and human rights that are at issue here into a larger context.

I've had the pleasure of serving on other panels with David Stewart, and this time I can say that I agree with almost everything that he said. He has given you a very good overview of the status of international law in general and treaties, in particular, within U.S. domestic law.

What I would like to do is to focus on the last issue that he raised, that of the self-executing treaty, which is peculiar to U.S. law. Comparing the situations in Canada and Mexico, we will undoubtedly end up with very different views of the roles that treaties should play in domestic law and the role that, in fact, they do play.

As Mr. Stewart mentioned, the distinction in U.S. law between self-executing and non-self-executing treaties is one that was created by the judicial branch. It does not appear in the Constitution, which says simply that treaties, along with federal laws, are the supreme law of the land. It wasn't until 1829, 40 years after our Constitution was adopted, that Chief Justice Marshall invented the distinction,¹⁶ and it has remained an extremely controversial and difficult issue ever since. I would suggest that, in effect, the Constitution has been amended through political developments that have removed treaties from their position as equal to federal law and essentially placed them in an inferior position. The assumption that Mr. Stewart mentioned - that treaties are not self-executing - has become the political reality in the United States, even though I believe that such a position is legally unjustified.

The real question is when a treaty is self-executing and when it is not. Perhaps the best I can do to sow as much confusion as possible, but also to give you a realistic view of the situation, is to read from three of

15. 453 U.S. 654 (1981).

16. See *Foster v. Neilson*, 27 U.S. 253 (1829).

the most important U.S. cases that have attempted to tell us which is which.

The first is the original formulation by Chief Justice Marshall in 1829 in *Foster v. Nielsen*, in which he said, "our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature wherever it operates by itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."¹⁷

This formulation is absolutely incomprehensible, as demonstrated by the fact that Chief Justice Marshall initially found that the treaty was non-self-executing. Four years later, in examining exactly the same treaty, he decided that he had been mistaken; in fact, the treaty was self-executing and, therefore, did operate directly. That kind of confusion has continued.

Probably the two best-reasoned cases are somewhat more recent, and let me mention briefly the tests that they suggested for determining whether or not a treaty is self-executing. The first is a Circuit Court case from 1974, *People of Saipan v. the Department of the Interior*,¹⁸ which identified four factors that one should look at to determine self-executing treaties: first, the purpose of the treaty and the objectives of its creators; second, the existence of domestic procedures and institutions appropriate for direct implementation; third, the availability and feasibility of alternative enforcement methods; and fourth, the immediate and long-range consequences of determining that the treaty is self-executing or non-self-executing.

In 1985, the Seventh Circuit, in the case of *Frolova v. Union of Soviet Socialist Republics*,¹⁹ came up with six factors, at least some of which are similar to those in *People of Saipan*:²⁰ first, the language and purpose of the agreement as a whole; second, the circumstances surrounding its execution; third, the nature of the obligations imposed by the agreement; fourth, the availability of alternative enforcement mechanisms; fifth, the implications, presumably for the court, if one permitted a private right of action to grow out of the treaty; and finally, the capacity of the judiciary to resolve the dispute.

17. *Id.* at 314.

18. 502 F.2d 90 (9th Cir. 1974), *aff'd* 420 U.S. 1003 (1975).

19. 761 F.2d 370 (7th Cir. 1985).

20. 502 F.2d 90 (9th Cir. 1974), *aff'd* 420 U.S. 1003 (1975).

These factors may help us a little bit. However, at least one probably isn't of much help, and that is the reference to the expectations of those who drafted the treaty. In drafting any multilateral treaty, there is simply no expectation on the part of the drafters as to what the domestic effect of that treaty will be. As Mr. Stewart observed, in civil law countries, treaties are generally considered self-executing, whereas in common law countries the reverse is true. The only expectation is that each party will apply the rule found in its own legal system.

It seems to me that, given the peculiar U.S. Constitutional directive, which is quite different from the law of the United Kingdom and Australia, one should begin with the presumption that treaties are self-executing. This has been suggested by some recent U.S. cases, although it's probably fair to say that this is true only with respect to some treaties. I thought it might be interesting to give you a sense of the kinds of treaties that have been found to be self-executing in the U.S. and those not found to be self-executing.

Bilateral treaties concerned with Friendship, Commerce, and Navigation ("the FCN Treaties"), have been generally found by U.S. courts to be self-executing. That is, where the provision is essentially one of non-discrimination between foreigners and U.S. citizens, the courts have assumed self-execution without serious consideration of the issue.

Extradition treaties have also been considered, without much discussion, to be self-executing, although one should at least parenthetically mention the case of *U.S. v. Alvarez-Machain*.²¹ Here, the Supreme Court demonstrated its political (if not its legal) view towards international law by allowing a suspect to remain in custody in the United States, even though he was kidnapped by U.S. Government officials from Mexico in clear violation of international law.

Among other treaties normally thought to be self-executing are those which deal with what might be called "procedural" details of international relations. These would include, for example, the treaty on Mutual Assistance in Criminal Matters between the United States and the Netherlands,²² the U.N. Conference on Contracts for the International Sale of Goods,²³ and the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters.²⁴

21. 504 U.S. 655 (1992).

22. 22 I.L.M. 1414 (1983) (*signed at The Hague, June 12, 1981*).

23. U.S. Neth., 19 I.L.M. 668, (1980) (*adopted by the Conference April 10, 1980, opened for signature April 11, 1980*).

24. *Done at The Hague, Nov. 15, 1965, entered into force Feb. 10, 1969, T.I.A.S. 6638, 24 I.L.M. 1746 (1985)*.

All of these have been considered to be self-executing, again often without much discussion.

Treaties can be partially self-executing and partially non-self-executing. One example of this is the Chicago Convention on Civil Aviation,²⁵ which includes a provision relating to non-discrimination in landing fees that foreign carriers are obliged to pay and also contains provisions on the reasonableness of those landing fees. Several U.S. courts have addressed those provisions, with one court finding that the discrimination provisions were self-executing and could therefore be invoked by a private party where discrimination was alleged. More recently, another court determined that the reasonableness provisions were not self-executing, because they weren't sufficiently precise to give the court an issue with which it could deal.

Notably missing from this list are human rights treaties or broad multilateral treaties with a larger political purpose. However, one district court, in a case involving General Noriega after he had been arrested by the United States, held rather specifically that the third Geneva Convention of 1949²⁶ (which applies to prisoners of war) was self-executing and did apply to Noriega.²⁷ This case was appealed but was decided on other grounds,²⁸ and this particular issue, to the best of my knowledge, was not re-litigated.

Other courts that have addressed the issue of the Geneva Conventions have found them not to be self-executing, which has been the fate of most general multilateral treaties. The United Nations Charter,²⁹ the Charter of the Organization of American States,³⁰ the Geneva Convention on the High Seas,³¹ the 1907 Hague Convention regarding land warfare,³² the Refugee Convention and Protocol,³³ and finally, the Covenant on Civil and Political Rights,³⁴ only ratified relatively recently by the United

25. *Done at Chicago*, Dec. 7, 1944, *entered into force* April 4, 1947, T.I.A.S. 1591, 18 I.L.M. 542 (1979).

26. Third Geneva Convention of 1949, *done at Geneva*, Aug. 12, 1949, *entered into force* Oct. 21, 1950, T.I.A.S. 3364, 15 I.L.M. 1236 (1976).

27. *U.S. v. Noriega*, 808 F.Supp. 791 (S.D. Fla. 1992).

28. *U.S. v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

29. *Signed at San Francisco*, Jun. 26, 1945, T.S. 993, 59 Stat. 1031.

30. *Signed at Bogota*, Apr. 10, 1948, T.I.A.S. 2361.

31. 1958, T.I.A.S. 5200, 13 U.S.T. 2312.

32. Convention Respecting the Laws and Customs of War on Land, *signed at The Hague*, Oct. 18, 1907; 36 Stat. 2277; T.S. 539.

33. Convention Relating to the Status of Refugees, *signed at Geneva*, July 28, 1951; T.I.A.S. 6577. *See also*, Protocol Relating to the Status of Refugees, *done at New York*, Jan. 31, 1967; T.I.A.S. 6577; 19 U.S.T. 6223.

34. International Covenant on Civil and Political Rights, *done at New York*, Dec.

States,³⁵ have all been found by the courts to be non-self-executing.

In many cases, this has been done without much discussion or thought. In some cases, at least, it has been based on the view expressed by Mr. Stewart that the intention of the executive branch or the legislative branch should be controlling. Indeed, in the recent case involving the Covenant on Civil and Political Rights, the court said not only that the treaty provision in question was so brief and at a level of such generality as to be meaningless, which might or might not be true, but it went on to say that the declaration that the treaty was non-self-executing added by the U.S. Senate was dispositive of the issue and that therefore the court could not look any farther.³⁶

It has become the practice of the United States, as also indicated by Mr. Stewart, to include a declaration of non-self-executing effect to every human rights treaty ratified in recent years. This appears to be due to a shift from the principle that federally adopted laws and treaties are equal, as stated in our Constitution, to a position that federal laws should be given more weight than treaties and that somehow it is inappropriate and politically too difficult to adopt binding federal legislation through the treaty process - even though that process is specified with great clarity in the Constitution.

As a result, it has become extremely difficult for courts to find that treaties are self-executing, even when their terms would appear to be quite clear. In a recent case, the a U.S. Court of Appeals looked to the Department of Defense interpretation that a particular recruitment and employment contract between the U.S. and the Philippines was non-self-executing, and concluded simply, if this is the Government's view, then it must be right.³⁷ This may be a reasonable position, but it unfortunately distorts not only the original intent and the clear wording of the Constitution.

Finally, there should be a distinction made (and some courts have made it) between the fact that a treaty may be directly effective in the United States and therefore self-executing in that respect but still not create a private right of action. This was the position that the Supreme Court adopted fairly recently, in a case in which the plaintiff was the Government of Paraguay, not a private citizen.³⁸ The court first found the

16, 1966, *entered into force* Mar. 23, 1976; 36 I.L.M. 228; (1997).

35. International Covenant on Civil and Political Rights, *entered into force for the United States* Sept. 8, 1992; 36 I.L.M. 228 (1992).

36. *Jama v. United States Immigration and Naturalization Service*, No. 97-3093 DRD, 1998 WL 684473, at *10 (D.N.J. Oct. 1, 1998).

37. *More v. Intelcom Support Services, Inc.*, 960 F.2d 466, 472 (5th Cir. 1992).

38. *Breard v. Greene*, 118 S.Ct. 1352 (1998).

provision in question in this particular treaty was clear. Therefore, since Paraguay was a party, it had a right to bring a case alleging violation of the treaty in United States courts, even though no private party would have an equivalent right. Perhaps the treaty was therefore only half self-executing.

Since I am not an expert in international labor law, I thought that it might be of some interest to look at ILO Convention 87, which is after all the reason that we're all here, and to give you my opinion as to whether it would be considered to be self-executing in the United States. My answer is partly yes and partly no.

The partly yes answer is derived from the first article in the convention, which says that "each member which ratifies the convention undertakes to give effect to the following provisions." It then lists provisions that are relatively specific, that do not require any additional implementing legislation, and that therefore could and should be applied directly by the U.S. courts.

There are two articles, however, which are clearly non-self-executing, and I think they demonstrate very well the difference between the two kinds of provisions. The first is Article 9, which says that the extent to which the convention will apply to the armed forces and the police "shall be determined by national law or regulation." Clearly, this is the sort of provision that requires subsequent legislative action before it can have any effect, and therefore it would be non-self-executing.

The other is Article 11, which deals with the right to organize. Here, the obligation that States undertake is quite different from the obligation they assume in Article 1. In Article 11, States agree to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize. There obviously is an assumption that what is appropriate and necessary will be determined later by the appropriate domestic authorities, and therefore a U.S. court would not be able to enforce this provision directly.

I believe that treaties should have a much higher legal status in the United States than they do, but our discussions can't and shouldn't separate law from politics. I think that it's fair to look back at the United States Government over the last twenty years in all its aspects - judicial, legislative, executive - and to see whether or not the United States appears to be a country in which international law is generally respected, given deference to, felt to be important. With very rare exceptions, one of them the case involving the Palestine Liberation Organization mentioned by Mr. Stewart,³⁹ the answer to that question is no. In general, in-

39. U.S. v. Palestine Liberation Organization, 695 F.Supp. 1456 (S.D.N.Y. 1988).

ternational law is viewed by both the political branches and the judicial branches as something that may be useful only if it is consistent with what the United States is already doing.

It may not be surprising that the courts are reluctant to look to international law for a rule of decision that overturns domestic law. Nonetheless, I think that, until there is a change in the political as well as the legal climate in this country, courts are unlikely to look very often to international law in any form to identify or even to interpret norms that are essential for protecting the human rights and the labor rights of U.S. citizens.

MS. GARZA: Thank you, Professor Hannum, for that presentation on self-executing versus non-self-executing treaties and your candid opinion on the U.S. position versus international law. Next we have Professor Ben Aaron.

MR. AARON: My presentation regards the ILO and the conventions that we have or have not ratified and why. But my experience is that a great many people do not know very much about the ILO, so I'd like to start with just a word about the structure and function of the ILO.

It was created, as I'm sure most of you know, as part of the Treaty of Versailles, and the preamble to its constitution states in part that universal and lasting peace can be established only if it is based upon social justice and also that the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries.

That last statement is relevant today when we are discussing with other countries whether to add certain human rights protections to our international trade agreements. The ILO is composed of a yearly general assembly, which is called the International Labor Conference, an executive council, which is called the Governing Body, and a permanent staff, which is called the International Labor Office. The organization also works through a wide variety of subsidiary bodies, such as regional conferences, industrial committees, and meetings of experts.

Two of the principal functions of the ILO are setting international standards and supervising their observance. Standards emerge from the International Labor Conference in the form of conventions or recommendations. The conventions are similar to international treaties and are subject to ratification. When a member ratifies a convention, it is obligated to bring national legislation and practice into conformity with its terms and provisions. Recommendations do not require ratification. They are intended to serve as guidelines for national policy in given fields.

Together the conventions and the recommendations comprise the International Labor Code that serves as a model and stimulus for national legislation and practice in member countries. It is particularly important

for Third World countries that have no other point of reference for their labor standards and who depend very heavily upon advice and technical support from the ILO.

Two ILO bodies share primary responsibility for supervising the way governments carry out their obligations under ratified conventions. First, an independent Committee of Experts on the Application of Conventions and Recommendations, composed of twenty members, makes observations or requests for specific information on a totally independent basis. The Committee's terms of reference do not require it to give formal interpretations of conventions because competence to do that is vested in the International Court of Justice. Nevertheless, in order to carry out its function of evaluating the implication of implementation of the conventions, the committee has to consider and express its views on the meanings of certain provisions of the conventions. Second, after the initial evaluation by the experts, a more general review is made at the International Labor Conference by a tripartite committee on the application of conventions and recommendations.

In addition, the ILO constitution permits two special procedures for investigating non-compliance with a ratified convention in a given country. First, employer or worker organizations can submit representation to the ILO governing body alleging a failure to comply. This representation is then examined by a three-member team and may be communicated to the government concerned for comment, and if the member government fails to respond effectively, then the governing body can publish the representation and the government's comments.

Second, a conference delegate or a state that has ratified a particular convention can file a complaint with the governing body. The complaint may be referred to an independent three-member commission of inquiry, which may take evidence from witnesses and conduct on-site inquiries. Results of the investigation and the commission's recommendations are published in a report.

You notice that there's no machinery actually to enforce any of this, but the reports of these committees carry with them a great deal of moral suasion. Countries do not like to be subject to these procedures, and they take very seriously the efforts of the committees to try to resolve them and to avoid the necessity of publishing reports which indicate some reluctance on the part of the allegedly offending country to comply with the law.

The ILO established special machinery in the field of freedom of association for trade union purposes in 1950. It is based on the submission of complaints by governments or by employers' or workers' organizations. Complaints under this procedure may be made even against states that have not ratified Convention 87, Freedom of Association and Protec-

tion of the Right to Organize, or Convention 98, Right to Organize and to Bargain Collectively, and other basic conventions.

Because the ILO constitution lays down the principle of freedom of association, it has been held that this principle should be observed by members by virtue of their membership in the organization alone, whether or not they have ratified it. Although member states cannot be compelled to observe the more detailed standards of ILO conventions that they haven't ratified, the ILO considers it is entitled to promote the implementation of this constitutional principle by means such as investigation and conciliation. So, for example, the United States, if accused of violating Convention 87, even though it hasn't ratified it, may have to submit to formal inquiries and make responses simply to clarify the situation even though it cannot be compelled to formally articulate and ratify the specific provisions of the convention.

One of the principle instrumentalities established in this field is the Tripartite Committee on Freedom of Association, which consists of nine members. The reports of the Committee are made to the governing body of the ILO. They contain the findings of the Committee on the cases submitted to it and, where appropriate, recommendations to the governments concerned.

The Committee, in over 1,500 cases since its inception, has established a body of case law. Faced with a wide variety of situations, the Committee, while relying at the outset on the general standards laid down in the ILO conventions concerning freedom of association, was gradually led to frame principles defining more closely and in some respects supplementing and even extending those expressly embodied in conventions. These principles refer in particular to the right to strike, collective bargaining, and related civil liberties.

To promote the flexibility in the ratification of conventions, numerous possibilities have been afforded ratifying states. They can ratify only certain parts of an instrument, choosing from a number of provisions laying down different obligations, excluding certain groups of workers from the scope of an instrument, making temporary exceptions, and so forth. And the Labor Conference has also sought to make certain provisions less rigid by introducing such modifiers as "where necessary" and "appropriate circumstances" and so forth.

In some areas, however, there is no room for flexibility. The ILO view is that international standards must be intransigent when they are a matter of fundamental rights, such as freedom of association, the abolition of forced labor, or elimination of discrimination. Also, the practice of ratifying a convention with reservations has never been permitted by the ILO. On the other hand, conventions may be ratified subject to certain understandings as to the meaning of a specific term.

Now, as far as the U.S. participation in the ILO is concerned, the United States joined the ILO in 1934 and withdrew in 1977 because of certain policy disputes. The U.S. rejoined in 1980, and throughout the entire period since 1934, the U.S. has ratified only 11 conventions, seven of which deal with maritime matters.

Constitutional Considerations

Under Article VI of the U.S. Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." The United States has adopted the "monist" theory of international law:

Monists view international and domestic law as together constituting a single legal system. Each country's legislature is bound to respect international law in enacting its legislation. The national executive is obliged to take care that international law be faithfully executed. Domestic courts must give effect to international law, anything in the domestic constitution or laws to the contrary notwithstanding.⁴⁰

As early as 1829, however, the Supreme Court distinguished between self-executing and non-self-executing treaties.⁴¹ The Court declared that if a treaty contains a promise by the United States to do something that only the political branches can do (e.g., pass an implementing law), then by hypothesis the courts cannot give effect to that treaty. On the other hand, the courts can and will give effect to such treaty after the political branches have acted or if the United States effectively fulfilled the promised act before the treaty was concluded.⁴²

Many provisions of ILO Conventions are self-executing and require supplementary laws or regulations for their application. This is true, in particular, of the so-called promotional Conventions, which lay down "programmatic" standards that cannot give rise directly to individual rights, but consist of a general description of objectives and represent programs for action by governments which may be carried out by different methods and over a period of time.

Two of the so-called cornerstone ILO Conventions, 87 and 98, neither of which has been ratified by the United States, have been cited

40. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its "Progeny,"* 100 HARV. L. REV. 853, 864 (1987).

41. See *Foster & Elam v. Nielsen*, 27 U.S. (2 Pet.) 253, 314 (1829).

42. See Henkin, *supra* note 40, at 866 n.65. See also E. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF ILO EXPERIENCE* 103 (1966).

as examples of what would be non-self-executing and self-executing treaties, respectively, if they were to be ratified. Thus, 87 provides that a ratifying State “undertakes to give effect” to its provisions, whereas 98 contains no equivalent implementation language and affirmatively establishes standards relative to the right to organize and to bargain collectively.⁴³

So far as the discharge of international obligations by States ratifying ILO Conventions is concerned, however, the Committee of Experts has pointed out that mere incorporation into national law of ratified Conventions whose provisions are not self-executing does not discharge the international obligations of the ratifying States.⁴⁴

Another aspect of U.S. law that must be noted is the doctrine that subsequent laws supersede a prior treaty if its terms are incompatible with the more recent legislation.

Problems with Federal States, such as the United States

A federal State, in this context, is not only a country composed of units (e.g., states) enjoying a degree of self-government, but one in which the power to give effect to ILO Conventions lies to some extent at least with these constituent units rather than with the central (federal) government. Thus, for example, the primacy, with some exceptions, of federal labor relations law in the private sector in the United States must be contrasted with the lack of federal jurisdiction in most areas of labor relations in the states’ public sector. Obviously, it is impracticable to submit a convention to each of the 50 states for ratification; yet if the federal government is not exclusively or even primarily responsible for giving effect to a particular Convention, action by several states constitutes the only acceptable alternative.

Policy debate over Convention Ratifications by the United States

The next subject is the policy debate over convention ratification by the U.S. And in doing this I’m going to refer to some specific hearings held before the Senate Committee on Labor and Human Resources in 1985.⁴⁵ I’m doing this so I can lay out more clearly exactly what the re-

43. See generally E. POTTER, FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING – THE IMPACT ON U.S. LAW AND PRACTICE OF RATIFICATION OF ILO CONVENTIONS NO. 87 & NO. 98 (1984).

44. See COMMITTEE OF EXPERTS REPORT 8-12 (1963); COMMITTEE OF EXPERTS REPORT 8 (1970).

45. See *Examination of the Relationship Between the United States and the International Labor Organization: Hearing Before the Senate Comm. on Labor and Human Resources*, 99th Cong. 1 (1985).

spective positions of the interested parties are.

The chairman of the committee introduced the subject by raising two questions. First, what is the feasibility of U.S. ratification of ILO labor conventions without creating a detrimental effect on U.S. labor law? And second, is there any linkage between the U.S. ratification history and our country's influence within the ILO?

The principal witnesses were the then Secretary of State George P. Schultz; the Secretary of Labor William E. Brock; Lane Kirkland, then President of AFL-CIO; and Abraham Katz, President of the U.S. Council for International Business.

Secretary Schultz declared that the failure of the U.S. to ratify any but the maritime ILO conventions conflicts with the obligations we assumed when we joined the ILO.⁴⁶ Noting that the ILO's purpose was to raise labor standards around the globe through the process of adoption and ratification of conventions,⁴⁷ he pointed out that "every member state has a moral obligation to make a good faith effort to determine whether it can ratify conventions."⁴⁸ But, he observed, "our behavior sends a message that ILO procedures do not apply to us."⁴⁹

Schultz also pointed out the inconsistency between our failure to consider ratification of ILO conventions and the growing tendency in the congress to refer to internationally recognized workers' rights standards regarding freedom of association and forced labor in the U.S. trade and aid legislation.⁵⁰ He concluded that the U.S. should correct its approach and be more flexible and consider individual conventions on their own merits rather than continue to make a priori judgements that only maritime conventions are suitable for the United States to ratify.⁵¹

Secretary Brock argued that the low number of U.S. ratifications of ILO conventions is attributable mainly to our federal system of government.⁵² "Most conventions," he explained, "would require legislative action by the constituent states as well as or instead of the federal government, and the United States cannot assume treaty obligations under a convention which might fall wholly or in part within state jurisdiction."⁵³

46. *See id.* at 9.

47. *See id.*

48. *Id.*

49. *Id.*

50. *See id.*

51. *Examination of the Relationship Between the United States and the International Labor Organization: Hearing Before the Senate Comm. on Labor and Human Resources, 99th Cong. at 9, (1985).*

52. *See id.* at 21.

53. *Id.*

Well, I associate myself with the views of Secretary Schultz. I think then Secretary Brock wasn't entirely right in his labor law understanding, and I think that most of the treaties that we could be considering would not have to be ratified by the states.

Lane Kirkland, whose organization had not shown any tremendous interest in ILO conventions up to that time, termed the U.S. ratification record "deplorable," noting that of the countries with comparable years of ILO membership only one, El Salvador, had fewer ratifications than does the United States.⁵⁴ Of more critical importance, he continued, "is the fact that a nation that prides and proclaims itself as a champion of human rights has ratified none of the basic human rights conventions."⁵⁵ Kirkland insisted that federal structure is not the real reason for our non-ratification record.⁵⁶ Rather, he said, "it stems from the resistance in the past by employer organizations because ratification would involve a supervisory scrutiny of our democratic laws and practices and involve some of our domestic labor standards."⁵⁷

Abraham Katz stressed two points. First, that modification of U.S. labor law through ratification of ILO conventions that differ from U.S. law would amount to a complete divestiture by Congress to the ILO of its delegated power to establish labor policy.⁵⁸ Second, that on broader policy grounds the business community remains opposed to ratification of ILO conventions because it is concerned that any ratification will be perceived by the ILO community as ending the longstanding U.S. policy of not ratifying non-maritime ILO conventions.⁵⁹ The argument seems to be something of a non sequitur, but in any event, that is the position.

To ratify non-maritime conventions, he continued, would be sending the wrong signal to the ILO community, because he did not believe that there were many of those conventions that the U.S. would be able to ratify.⁶⁰ Moreover, ratification of conventions with which our law is at variance would, he said, "present an opportunity that does not now exist for our critics to criticize the United States."⁶¹

54. *See id.* at 42.

55. *Id.*

56. *See id.* at 43.

57. *Examination of the Relationship Between the United States and the International Labor Organization: Hearing Before the Senate Comm. on Labor and Human Resources, 99th Cong. at 43 (1985).*

58. *See id.* at 77.

59. *See id.*

60. *See id.*

61. *Id.*

Well, what is this fight all about? The fight really boils down to a question of sovereignty. The views of the business group, which have been very forcefully and ably presented by its general counsel, Mr. Potter, really boil down to this: we continue to have a solipsistic view of the universe insofar as our laws, and particularly our labor laws, are concerned. We think that our laws set the standard and that everything else is irrelevant; we do not like the idea that we could be wrong, that there may be other ideas out there, other practices, other procedures which are really better and fairer than ours; we don't want to risk the possibility that these views will be brought to the attention of the American public, and therefore, the simplest thing is to say, well, we're not going to ratify any of these conventions. I submit that is not the position that the United States, or any country, ought to be taking. I think we would do much better to tone down the rhetoric and simply, quietly agree to take a new look at all of these conventions and to ask ourselves whether we might be wrong and somebody else might be right; and, finally, that we can adopt some of these new conventions or old conventions without destroying the foundation stones of the republic.

Unfortunately, the position as it remains today is simply that we will consider ratification of any convention with which we already in effect comply and will not consider the possibility of ratifying conventions which are non-self-executing and require us to adopt some legislative response, either by modifying existing legislation or introducing some new legislation. I hope that in time we will retreat from that position. I wish I could say that I see it in the near future. Unfortunately, I do not.

MS. GARZA: Thank you, Professor, for your comments, in particular for talking to us about the structure of the ILO, and you mentioned that there's no enforcement mechanism and that basically there's a reliance on moral suasion. And as you know, this is the same provision of the North American Agreement on Labor Cooperation when it comes to freedom of association issues.

I also appreciate your views on the U.S. position and why we as a country have ratified very few conventions. This is an issue that's often raised by my counterparts here, and I don't always have the answers, so I'm glad that Professor Aaron is here to answer those types of questions. The following presentation will be made by the Mexico delegation. The first panelist is Dr. Javier Moctezuma Barragan.

PRESENTATION BY THE MEXICAN DELEGATION

DR. MOCTEZUMA: In regard to the legal treatment of treaties, international treaties, and the relationship between treaties and federal law, we can say that our treatment is somewhat similar to that in the United States. From a simple reading of our constitutional text one can see in

Article 133 of the Mexican Constitution and Article 6 of the U.S. Constitution, they show some similarities.

Our legal systems have evolved, however, in different directions. Here today we're in a splendid building, a historical building, and both of our countries, both of our legal systems is also built on a historical foundation. All three of our countries are federal systems with states and provinces. There's a division of powers, democracy is in place, and we all believe in international peace and cooperation. We have all built our structures, our constitutions with the same building material, so to say.

However, there are major differences that need to be discussed. As I said, in appearance it would seem that these structures are similar; however, the blueprints might be a bit different. They were designed and drawn by different architects, if you will. In the United States at that time, things went in a different direction. We know that in 1788, Luther Martin, a renowned Marylander, even wrote about such matters.

But anyway, things have gone in different directions. The buildings have gone up differently. Their foundation, the ground they were built on was different, so to say. Mexico is a civil law country while the United States is a common law country. And that makes us examine the differences that may exist and how international treaties and constitutional systems are different in Mexican. Article 133 of the Constitution of Mexico states the following, and I will read from our Constitution:

This Constitution, the laws of the Congress that emanate from it, and all treaties that are in agreement with it which are signed or shall be signed by the President with the approval of a Congress will be the supreme law of the land. The judges will rule in accordance with these laws in spite of any provisions contrary to them that may exist in the individual provinces or states.⁶²

So, as we see from this precept, the supreme law of the land in Mexico is the constitution, laws passed by the congress of the land, and all treaties that are signed and that are in agreement with them.

But there is a certain hierarchy among these various provisions in our country. The beginning of Article 133 seems to say that supreme law of the land will not only be the Constitution but any law that emanates from the congress and from the international treaties that are signed by the President with the approval of the Senate. However, in spite of that declaration, law passed by the congress and the aforementioned international treaties are subjected to the provision that they not run contrary to the Constitution. The hegemony of the Constitution over and above con-

62. MEX. CONST. art. 133.

gressional laws and treaties is in agreement with Article 15 of our Constitution. Article 15 says that no other law or treaty can go against the Constitution of the land.⁶³ Therefore, there is no doubt about the supremacy of our Constitution. That has also been established by the Supreme Court of Mexico.

As you know, there are different views of doctrine regarding the relationship between domestic and international law. This is a practical problem, especially when one ratifies a convention or a treaty and one has international obligations to enact such a treaty or convention. Thus, Bartosky and Bartolome de la Cruz coined out that there are two basic doctrines in this regard: a monistic and a dualistic one.

In the former, the monistic view, there is no illegal separation between international law and domestic law, and thus, treaties such as ILO Conventions, are automatically incorporated into the legislation of a country. But the dualistic doctrine says that international law and domestic law are two different orders of things, and once a treaty is ratified, it must be formally incorporated into the law by the lawmakers, such as is the case in Mexico.

In Mexico, we accept the dualistic doctrine, which says that for a treaty to be incorporated into domestic law it must go through two phases. First, the President of the Republic must sign the treaty or convention. Second, the convention must be approved by the congress of the country. And in both cases, Articles 15 and 133 of the Constitution must be respected. These stipulate that the conventional treaty must be in accordance with the Constitution.⁶⁴

Article 15 is rooted in the principles consecrated in the 19th century that prohibited slavery in Mexico, and so presence of a slave on our territory would make him or her into a free person. Moreover, our Constitution says that no treaty may be held for the extradition of political prisoners or for any common prisoners or common criminals if they are to be extradited to a country where they would be considered to be slaves.⁶⁵

Furthermore, a treaty must be published in the official State Bulletin or Diary in accordance with Article IV of legislation on the international treaties.⁶⁶ Thus, we can see that treaties are subordinated to the Constitu-

63. MEX. CONST. art. 15. "No treaty shall be authorized for the expatriation of political offenders or for offenders of common opinion who have been slaves in the country where the offense was committed. Nor shall any agreement or treaty be entered into which restricts or modifies the guarantees and rights which this constitution grants to the individual and to the citizen."

64. *See id.*

65. *See* MEX. CONST. art. 15.

66. *See* MEX. CONST. art. 4.

tion of Mexico. However, as is also the case in other countries with similar systems, we find some legal uncertainty after a treaty is signed if a law is passed that has provisions that go contrary to the treaty. And let me go into this to throw some light on what needs to be known or done specifically in regard to Mexico here.

Once we see the subordination of a treaty to the Constitution, we need to clarify about whether any legislation should be subordinated to an enacted treaty. This would mean that administrative or jurisdictional authorities, according to the case, would find themselves in a position to choose one or the other. In other words, a decision would have to be made between subordination or incorporation. The initial solution would be to base this on principles of legal hermeneutics. That is very clear. That is to say that any older provision is eliminated by a newer and higher level provision.

However, if it's a question of a treaty or a convention and federal law, that is no longer possible because they are enacted or created in a very different way. In effect, a law or an amendment to a law must go through the processes laid out in Articles 61 and 62 of the Constitution.⁶⁷ In other words, publication of a bill, debate, and approval by the legislation and signed by the Executive.

However, a convention or treaty goes through a different process in order to become part of our national legislation or law. First of all, it must be signed by the President and then approved by one of the two chambers of our congress, namely by the Senate. Article 133 of the Constitution states this.⁶⁸ So, from that Article we can see that treaties as well as any regulations approved under the Constitution are put at the same hierarchical level just under the Constitutional level. The Constitution says nothing about subordination of treaty law to congressionally-passed law. Thus, the two are held at an equal level. Cases have gone to our Supreme Court in Mexico on this as I will now show you.

This is a national law, and treaties have the same level or hierarchy. And in the decision that I am looking at, this is PC 91, page 27 of Book

67. See MEX. CONST. art. 61. "Deputies and Senators are invidable for opinions expressed by them in the discharge of their offices and shall never be called to account for them. The president of each chamber shall see that the constitutional privilege of the member thereof is respected and that the premises where their meetings take place are not violated." See also MEX. CONST. art. 62.

68. See MEX. CONST. art. 133. "This constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic with the approval of the Senate, shall be the Supreme law throughout the Union. The judge of every state shall be bound to said constitution, the laws and treaties, notwithstanding any contradictory provisions that may appear in the constitution of laws of the states."

20. The Supreme Court says, "Given that a treaty has the same hierarchy, that is not a criteria for the Constitutionality of law or vice versa." So thus, it's relevant to point out that the decisions emanating from these cases before a Supreme Court are based on the principle of the relativity of the Amparo provisions under Article 68 of the Amparo Law.⁶⁹ In Mexico, this principle is only applied to the specific cases examined by the Supreme Court.

According to Article 124 of the Constitution, there must be express definition in the Constitution when passing legislation.⁷⁰ In other words, there are certain Constitutional provisions in Article 63 of the Constitution that rule on this question, and anything that isn't reserved for the federal authorities is considered to be the authority of the states in Mexico.⁷¹ But since there is no norm that says treaties are to be put above the law passed by the congress, nor is there any legal provision that establishes that treaties must be in harmony with such law, it is possible for them to be or not to be in harmony with such a law. And in that case, the principle of a newer law replacing an older law does not necessarily come into effect.

Thus, it can be concluded that in elaborating a law within the congress, treaties and conventions signed by Mexico must be taken into consideration in order to ensure consistency. If not, two possibilities exist. One would be that we would have to amend the law to bring it into line with a convention. Alternatively, if amendments are not made to the law, a treaty would have to be renounced and eliminated. That possibility is rarely used by any state. If treaty is self-executing, then the state has a responsibility to other states as well as a responsibility to people within the country to balance the treaty and local law.

In closing, we can reach the following four conclusions. First of all, in Mexico we live in a strict legal system in which the Constitution is the full manifestation of national sovereignty and therefore, any legal norms emanating from the Constitution are fully subordinated to the Constitution or higher law, including national law and treaties.

Secondly, the legal nature of federal law and treaties and conventions is different in our country since for the reform or amendment of a law, a full process that is established by the Constitution must be carried out. However, to incorporate a treaty or convention into our national legislation, it must be signed by the executive branch and then be approved by the Senate of the country. Moreover, to leave a convention, there is a

69. MEX. CONST. art. 68.

70. MEX. CONST. art. 124. "The powers not expressly granted by the constitution to federal officials are understood to be reserved to the states."

71. *See generally*, MEX. CONST. art. 63.

special process laid out in international law that is different than what we have for actually passing law in the country.

Third, according to the decision handed down by the Supreme Court, Article 133 of our Constitution says that national law and treaties have the same hierarchy just under the rank of Constitutional law. Moreover, national law cannot be used to determine Constitutionality of a law or vice versa. Additionally, there is no greater obligation under a treaty than under national law.

Fourth, decisions of the Supreme Court have effect only for the parties directly involved in the trial with no *ergo homines* effects. Therefore, the decision is not generally applicable but only for the specific case on trial.

MS. GARZA: Thank you very much for your comments. It's interesting to note that at the opening I mentioned that there were two Supreme Court decisions in Mexico that found a state statute unconstitutional because it limited the number of unions per workplace to one, and I think Dr. Moctezuma has just said that it requires that those particular decisions have impact only insofar as the parties before it and not have effect on other parties that were not before the Supreme Court. Next we have Dr. Manuel Gonzalez.

DR. GONZALEZ: My main ideas relate to the different structural and Constitutional differences between Mexico and the United States, despite the similarity of the words, especially focusing on Article 133 of our Constitution related to Article 6 of the United States Constitution. However, that Article should be related to two other articles, the content of which Dr. Moctezuma has just mentioned. The first one would be Article 72, Section F, and the other would be Article 124.

Mexico is a country that has a codified legal system quite different from U.S. common law which also includes common law in Canada. The legislation has been the source by *autonomasia*, with respect to the application of this legislation, it is stipulated that all administrative authorities as well as judicial authorities must respect and implement in a mechanical fashion the texts or wording of the law. In Mexico, tradition has been that from the time that the constitutions that were drafted at the provincial or state level it was prohibited for the judges and law enforcement to suspend or interpret laws. Now, there is a law that forbids a judicial interpretation of laws.

During the 19th century in Mexico, there was a process launched before the courts having to do with "duda de ley" or "in the case of doubt". In the case of doubt with regard to the interpretation of a particular law, the courts were compelled to present this text to the legislature so that these parties could resolve any doubts that there may be in the interpretation of said law. This precedent is now reflected in paragraph F

of Article 72 in the Mexican Constitution in which any reform or repeal of a law or federal resolutions or decrees must be undertaken in accordance with the proceedings of the creation.⁷² This standard establishes the following law.

As far as the interpretation or the repeal of any laws or decrees, the same criteria must be respected that was utilized in the formulation or passing of those laws. So, it's determined that no law can be repealed or subject to reform unless another law has been introduced that fulfills the same procedures. The international treaties in Mexico have been considered laws whose application is restricted with regard to domestic law. The said Constitution of Mexico gives the impression that it has been created with the objective of implementing international law at the domestic level.

As we can see, we see the Calvo Clause that was established in Article 27 of the Constitution, describes the absolute territorial coverage of Mexican laws.⁷³ Mexico has always rejected the extraterritorial implementation of laws.

We find another example in the resolution — to the Constitution that established freedom for slaves that enter Mexican borders from foreign countries. This was an immediate reaction to the *Dred Scott* decision of 1857.⁷⁴

All of this information provides historical background for this law. Mexico adopted the federal system, taking as an original model, the system that was created in the United States. However, for the past 150 years, the distribution of power at the federal level in Mexico is quite different from the separation of powers in the United States. The history of Mexico dictates this difference. In 1847, the conflicts between the federal government and the state governments in Mexico created a conviction that the distribution of powers would be better served if the federation powers were explicitly included in the Constitution. The states would have all other reserved powers. In other words, anything not expressly included in the Constitution falls to the state governments.

72. MEX. CONST. art. 72, para. F. "In the interpretation, amendment or repeal of laws or decrees, the same procedure shall be followed as that established for their enactment. Every bill or proposed decrees, the resolution of which does not pertain to one of the chambers, shall be discussed successively in both the regulations on debate being observed as to form, intervals of time and mode of procedure in discussions and voting."

73. MEX. CONST. art. 27, para. XIC. "Landowner affected by granting or restoring commercial lands and waters to villages or who may be affected by future decisions, shall have no right to ordinary legal recourse and cannot institute amparo proceedings."

74. See *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

The distribution of power in our country is really following more a confederation model as opposed to a federation model of the United States. Article 124 of the federal Constitution determines that the federal powers or authorities should be expressly provided by the Constitution to said authorities.⁷⁵ This has resulted in our Constitution undergoing hundreds of reforms. On each occasion in which there is a doubt regarding federal jurisdiction, the Constitution undergoes another reform.

In 1832, in a controversial Supreme Court case between the Mexican federal government and the state of Oaxaca, the Court decided the use of implicit authorities, as we call it, of the congress as a way of interpreting the expansion of federal jurisdictions. This is a major case, and I feel honored to be here at Maryland because Maryland really launched in the United States this implicit authority or jurisdiction for the Government of the United States in the case of *M'Culloch v. Maryland*.⁷⁶

Even though our Constitution in Paragraph 30 of Article 163, similar terminology to proper and necessary clause of the U.S. Constitution, this has become almost null and void in our country.⁷⁷ It has lost jurisdiction vis a vis Article 124 that I've already mentioned. Therefore, the judicial activity regarding the hierarchy of laws has been quite different in its structure, in its system as opposed to the Anglo Saxon law. There is no subordination in our country of local law as opposed to federal law. The federation has its express authorities and jurisdiction and the states have their reserved authorities. As far as I understand, maybe I'm in error, but it's very similar to the Canadian system. That is my interpretation.

The Mexican Constitution, as I said, has undergone reform in order to allow for these changes in jurisdiction between the states and the federal government. Following the model of the *M'Culloch v. Maryland* decision, the international treaties that are included in Article 133 of the Mexican Constitution has a different relevance regarding the U.S. perception as the 19th century in the case of *Ex parte Coy* regarding the U.S. perception that was applied to an international treaty.⁷⁸ We don't have any equivalent to *Ex parte Coy*, and we will never be able to apply it because our Constitution forbids two things. First, it prohibits a judicial in-

75. See MEX. CONST. art. 124.

76. 17 U.S. 316, 380 (1819).

77. See MEX. CONST. art. 73, para. 30.

78. *Ex parte Coy*, 32 F. 911, 916 (1887). In discussing which law, local or federal, shall govern the court stated that "this government has entered into solemn treaty stipulations with Mexico with reference to refugees from justice. These stipulations are, by a declaration of the Constitution of the United States, the supreme law of the land, state constitutions and laws to the contrary notwithstanding."

terpretation on that scale. Secondly, it prohibits the local laws, state laws, and federal laws from undergoing reforms via international treaties.

The Supreme Court in Mexico and legislative branch have not accepted the possibility that international treaties could reform neither federal nor local legislation. It has also not established a final hierarchy between these laws. As I said, this perception is quite different from that maintained in the United States. In particular, when we look at the superiority of international treaties, vis a vis local laws, there is no *Missouri v. Holland*⁷⁹ in Mexico.

At the same time, the relationship between domestic and international law, the principle of federal constitution prevails in that no law can undergo a reform unless it's substituted by another law that has observed the same procedures that created the first law. The case of *Holmes v. Jennison*⁸⁰ provides an example of this.

International treaties create a procedure that is different from laws, both federal and local laws. As a result, no hierarchical relationship exists among the laws. There are to guide conflict resolutions that state whether a law is in contradiction to a treaty. In Mexico, the simple issue is whether the law is constitutional or not. It's not a question of determining which has a greater weight, the local law or the international treaty. Therefore, the Mexican Constitution provides the solution that requires the adoption of non-executing treaties and the implementation of legislation for every international treaty in which Mexico is a party. However, this recourse is still not in existence. The supremacy of the law which Article 133 suggests for international treaties is applied as long as these are in agreement with the Constitution.

The international agreement must be in accord with the Mexican Constitution. By this I mean the creation, content, and the wording should reflect that which the Constitution demands. I'm not only referring to the way it was created and formulated, approved by the president, ratified by the Senate, etc. I also mean the content of the wording must reflect Mexico's Constitution. This is another major difference between Mexico and the United States because in the United States, the tradition is that which is found in the case of *Soderland* or the case of *Wright Corporation*, which Mr. Stewart alluded to in which the content of the treaty in the United States can be any content, practically. However, in our country we cannot reach that conclusion or we have not reached that conclusion. There has not been any precedent established by the Supreme Court that would interpret this or have this scope.

79. 252 U.S. 416 (1920).

80. 39 U.S. 540, 544 (1840).

So, in summary, looking at the cases that have already been mentioned by Ms. Garza as far as Oaxaca and Guadalajara regarding the implementation of international agreement, the interpretation or reading of those cases give us the conclusion that the laws involved with Jalisco and Oaxaca were considered in those precedents as unconstitutional. As a result, constitutional guarantees were provided to both parties because those laws, according to the court's interpretation, violated Paragraph B of Article 133 of the Constitution. It would be against the legal tradition that I've already mentioned to interpret those precedents in order to be able to say that those state laws have been considered null and void because they are inconsistent with an international treaty.

I believe that would be an erroneous conclusion because the Supreme Court's decision mentions that those laws are unconstitutional. As additional proof to its unconstitutionality is the fact that there's international agreement that also provides those guarantees and those rights. So, in our country any conflict between treaties and local laws has to do with interpreting whether it's unconstitutional or not, not whether it is legal.

MS. GARZA: Thank you for your interesting presentation and for giving us that historical perspective and pointing out where our Constitutions may have similarities, even though our laws are applied differently. Next we have Lic. Loretta Ortiz.

MS. ORTIZ: Well, the first part of my presentation is going to cover the constitutional framework in the signing of international treaties. The second part of my presentation is going to be a summary of the signing of international laws which come directly from the Constitution.

During the first part of my presentation when I cover the Constitutional framework, vis a vis the signing of international agreements, the basic Constitutional articles are Article 89, Paragraph 10, which talks about the power of the president in order to enter into international agreements; Article 76, Paragraph 1, which talks about the power of the legislature in order to approve or ratify said treaties; Article 15 of the Constitution, which has already been cited, which establishes that no international agreement can alter or abridge international freedoms; Article 117 of the Constitution, which prohibits federal as well as state authorities to enter into international agreements on their own; Article 133 of the Constitution, which has already been mentioned by Dr. Moctezuma Barragan.

The Mexican legal system, in particular the Constitutional legal system, is different because it has three different levels. It has the national, federal, and local levels. At the national level, we have the Constitution and other legal frameworks, such as the international treaty framework. When the president of the country enters into an international treaty, he does it as the head of state, and it's not really a question of distribution

of federal or local jurisdictions. That is because the federal system is the one that distributes authorities.

For example, we could place a decree of suspension of guarantees within the national level or strata. The difference or the division between the federal and local is specified in Article 124 of the Constitution, which has already been mentioned. There are other issues that are also covered in the text of the Constitution regarding the exercise of power covering, for example, environment and health issues. These are exceptions where power is given to the federal government.

The international agreements provide a national legal framework. Article 133 of the Constitution has to be in agreement with the Constitution. In the case of a conflict between one law passed by the congress, a federal law, and an international treaty, the Constitution always is supreme.

The text of Article 133 is from 1833. This Article is very similar to Article 6 of the U.S. Constitution. It states that the laws of the congress and the treaties will become the supreme law of the union when it is in agreement with the Constitution. This text was reformed so as to clear up any doubts regarding the international agreements. Now, international agreements must be considered constitutional.

As Dr. Moctezuma Barragan clearly stated, the government of Mexico adopted a dualistic doctrine regarding incorporating domestic law to international agreement. The international agreements are subordinated to Constitutional articles. They also must be in agreement with the local laws.

Now, regarding the resolution of hierarchical conflicts between local and federal levels, vis a vis an international agreement (This is proposed in Article 133 of the Constitution), there is no doubt that the Constitutional text establishes a hierarchical status between international agreements and the congressional laws. In the case of a conflict between or doubts as far as the implementation of one of these, the judicial or administrative authorities would apply priority to that which is in accordance with the Constitution. If one of those is not in accordance with the Constitution then automatically it is considered null and void and the treaty or agreement in accordance with the Constitution would be in effect.

In the case of where both laws are in accordance with the Constitution, then we would see a dilemma as to which law would be implemented. Would it be that approved by the congress or the international agreement? We don't have any jurisprudence or precedent in which we find this problem resolved as to how to resolve a conflict between a federal law and an international agreement or treaty resolved.

As has already been stated, in order to resolve this problem we have to repeal one law and substitute it with another. Article 127, as already discussed, provides that the procedures formulating or creating a law or international treaty are different procedures. One procedure is determined in a congress at the domestic level. The other one is in an international arena.

Our judicial system, as opposed to other systems like the Anglo Saxon system, changes the nature of the treaties of law in order to incorporate it into its judicial system. We incorporate the treaty word by word, verbatim, which implies that the principles of interpretation and implementation of that instrument are principles dictated by international norms. In our case, we are signatories to the other convention and we subscribe to one formula. It would be difficult to apply other principles of interpretation. For example, the criminal code, trade code, or commercial code would not provide helpful guidelines when we are interpreting an international agreement. We apply or implement international principles of interpretation of said articles. Despite the fact that they are judicial mechanisms, one cannot supplant or repeal the other.

Though it has not been resolved in any previous case before judicial or administrative authorities, perhaps a better criteria for resolution would be to resort to both standards. If there is a law that applies in the international treaty, perhaps the solution would be to apply the law as a priority in the case of a conflict between the international treaty and domestic law. In any case, this is an issue that has not been resolved. The constitutional wording specifies that the laws of the congress and international treaties are the supreme law if they are in agreement with the Constitution.

In the case of local laws the problem has been resolved in a very express fashion. In Article 133 of the Mexican Constitution, it is stipulated that the judges must, in the case of a conflict between local Constitutions and local legislation, abide by what has been established by the congress.⁸¹ We have an interesting, recent precedent, that was brought up in a case of a Constitutional guarantee before the court, a conflict of the Washington convention with the local legislation and the civil code. In

81. Article 133 of the Mexican Constitution states: "This Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The Judges of every state shall be bound to the said Constitution, the laws, and the treaties, notwithstanding and contradictory provisions that may appear in the Constitution or laws of the States." MEX. CONST. art. 133.

that case, the court decided to give the international agreement priority over the local law.

The constitutional considerations could then be brought down to the constitutional regime. Until recently the treaty issue had not been decided on in Mexico. The law on treaty celebration was only recently incorporated into the Constitution.⁸² The new law distinguishes between international treaties and inter-institutional agreements. International treaties are those signed by the president of the Republic which require ratification by congress and are published in the Federal Register.⁸³ Inter-institutional agreements can be compared to North American executive agreements. These are agreements carried out by any body of public government, whether state or federal, with foreign governments or international organizations under international law.

The procedure to implement these agreements is much simpler because inter-institutional agreements do not require either the president's signature or publication in the Federal Register. This agreement merely needs to be notified as part of the treaty to the Foreign Ministry, its judicial secretariat. Once a verdict is issued, it is registered under a record of inter-institutional agreements kept by the Foreign Secretary.

And to finish, I will refer briefly to the problem of self-executory standards or non-self-executory regulations, which derived from the signing of a treaty by Mexico. In Mexico, the courts have never solved an issue related to international treaties that would not be applied because they were not self-executory. In Mexico, for an international treaty, regulations can be self-executory or not self-executory, and the whole treaty may not necessarily be either self-executory or non-self-executory, but rather the treaty could have a mix of these regulations or norms.

Though this issue has not been resolved by the courts because it has never come up, several concerns do arise which we could characterize as doctrinaire. First, who should implement on the local level an international treaty which has been signed by the president of the Republic? This includes those issues that are under the competency of the 124 clause which covers the jurisdiction of federal bodies,⁸⁴ including all reg-

82. For further information on the new Mexican law regarding the making of treaties, Antonio Garza Canovas from the Office of the Legal Advisor, Department of Foreign Affairs, Mexico wrote an informative introductory note to accompany the text of the law. See Antonio Garza Canovas, MEXICO: LAW REGARDING THE MAKING OF TREATIES, 31 I.L.M. 390 (1992).

83. See MEX. CONST. art. 89, §X.

84. Article 124 of the Mexican Constitution states, "The powers not expressly granted by this Constitution to federal officials are understood to be reserved to the States." MEX. CONST. art. 124.

ulatory civil affairs such as adoptions, marriage or anything related to common law.

Who is to implement these international treaties once the president is empowered to sign them as the chief executive of the Mexican State? This is an attribute given the president by the 89 Article, Paragraph 10 with no other limitation than those laid out by the Constitution.⁸⁵ Under the Mexican Constitution, the local or state legislatures would be in charge of implementation. That is, the federal congress cannot implement an international treaty which invades the jurisdiction of these state legislatures. Under Article 124 this would violate the separation of powers established by the Constitution.⁸⁶

In the case of implementation of international treaties, under federal jurisdiction, the federal congress would be empowered to legislate or implement international treaties because it is directly empowered by Article 73 of the Constitution.⁸⁷

MS. GARZA: Thank you very much for your comments, Mr. Ortiz. Next our first panelist from Canada is Ton Zijldwijk.

PRESENTATION OF THE CANADIAN DELEGATION

MR. ZUIJDWIJK: I want to thank the dean of the law school for hosting this event. My topic is the Canadian treaty-making practice. I will deal with the theoretical underpinnings and practical implications, first of treaty-making, and then I will go into treaty implementation at a general level. Finally, I will make some specific comments about the labor side agreement and International Labor Organization (hereinafter "ILO") conventions.

Let me start off with treaty-making. In Canada we have a strictly dualist system. Treaties for us are completely separate from domestic law. By entering into treaties, Canada does not change domestic law. In other words, we have no self-executing treaties whatsoever.

In Canada, treaty-making is an exercise by the federal government of Canada of what is historically the crown's prerogative. It is the old common law right of the sovereign to enter into agreements, on behalf of the state, with other states.⁸⁸ And in Canada this prerogative power is exercised by the Governor General. In a formal sense this power is delegated by Queen Elizabeth II to the Governor General.⁸⁹ The treaty-

85. See MEX. CONST. art. 89, §X.

86. See MEX. CONST. art. 124.

87. See MEX. CONST. art. 73, §VI (amended 1987).

88. See A.E. GOTLIEB, CANADIAN TREATY MAKING 4-5 (1968).

89. The current instrument of delegation is entitled "Letters Patent Constituting the Office of the Governor General of Canada," of 1947. See 1 HOGG, CONSTITUTIONAL LAW

making power is exercised completely in Canada upon advice of Canadian (federal) ministers.

Now, since treaty-making is an exercise of the crown prerogative, the consequence is that there is no requirement for any formal involvement by parliament for treaty-making. There is no requirement in the Canadian Constitution that treaties be submitted to the federal parliament for approval. Treaty-making is purely an executive act. There is only a need to involve Canada's legislative bodies if a treaty requires changes in domestic law. That is where the federal provincial angle comes into play because some treaties require legislative changes in areas that are provincial in nature and then the provincial legislatures need to get involved.

The British model on which Canada's system is based usually operates in a straightforward manner in a unitary state because the government of the day controls parliament, goes out to negotiate treaties, and then can pass whatever implementing legislation is needed because the government usually controls parliament. In Canada the federal government is usually able to ensure the adoption of implementing legislation for matters that fall within federal jurisdiction. It is more complex when we deal with matters that are within provincial jurisdiction.

Many treaties, of course, will not require implementing legislation. For instance, in the defense field where Canada may agree to send troops to a foreign country, that can be done strictly by administrative action and no legislation is required. However, if the domestic law needs to be changed, then we need to go to the Constitution and determine which legislature has the legislative capacity to change the law.

Canada's federal parliament does not have a power similar to the power that is vested in the U.S. Congress by virtue of the *Missouri v. Holland*⁹⁰ judgment of the U.S. Supreme Court. In fact, that question was decided in 1937 by the Privy Council in London, which was then our highest court.⁹¹ That early Privy Council decision held that the federal parliament could not pass legislation pursuant to an international agreement that would break the ordinary division of powers established by the Constitution.⁹²

OF CANADA §11-2 (3d ed. 1992).

90. 252 U.S. 416 (1920) (holding that the Tenth Amendment, reserving powers not delegated to the United States federal government, cannot invalidate a treaty if that treaty has been held valid under Art. 1, Sec. 8, as a necessary and proper means to execute the powers of the government.)

91. See *Attorney General of Canada v. Attorney General of Ontario (Labour Conventions)* [1937] A.C. 326. The appeal to the Privy Council was abolished in 1949.

92. See HOGG, *supra* note 89 at §§11-10 – 11-12.

In the absence of special treaty implementation powers for the Parliament in the Canadian Constitution, the scope of ordinary powers of the federal parliament becomes of particular importance for the federal government. I believe Professor Howse will spend some time elaborating on relevant federal powers in the Constitution.

It has been suggested that the Supreme Court of Canada may be willing to give a more expansive interpretation to certain federal powers if those powers are used by the federal government to implement an international agreement.⁹³ But this is very much leading edge, and in my mind, it is largely speculative.

Now, if a matter that is dealt with in the treaty falls within provincial jurisdiction, then concurrence of all the provinces will be sought by the federal government before it will accept new international obligations. So, for a treaty that concerns labor, which is largely a provincial matter, the federal government will first get the concurrence of the provinces, unless there is a federal state clause⁹⁴ in the agreement.

Let me explain what a federal state clause is. A federal state clause allows the federal government of Canada to enter into treaty obligations in areas that are within provincial jurisdiction and accept such obligations only in respect of those provinces that have been notified by the federal government to its treaty partners. You find those clauses in certain of the Hague Conventions on Private International Law.⁹⁵ Another example is the Vienna Convention on the Sale of Goods.⁹⁶

The clause that you find in Article 93(1) of the United Nations Convention on Contracts for the International Sale of Goods reads
If a contracting state has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to

93. See *id.* at §§11-15 – 11-16.

94. Professor Peter W. Hogg defines a “federal state clause” in his book “Constitutional Law of Canada” as “a clause a federal state undertakes to perform only those obligations which are within central executive or legislative competence, and undertakes merely to bring to the notice of the provinces (or states or cantons), “with a favorable recommendation” for action, those obligations which are within regional competence.” HOGG, CONSTITUTIONAL LAW OF CANADA 252 (1985). Professor Hogg notes that Canada, along with the United States and Australia, “have exercised caution in the making and implementing of treaties upon subjects which would, apart from a treaty, be outside of federal legislative competence . . . the caution stems from a general federal policy of not wishing to intrude too vigorously into matters normally controlled by the states.” *Id.* at 252 n.52.

95. See *e.g.* Convention on Civil Aspects of International Child Abduction Between the United States of America and Other Governments at the Hague, Oct. 25, 1980, T.I.A.S. No. 11670, 1998 WL 411501, art. 40.

96. See United Nations Convention on Contracts for the International Sale of Goods, (1980) 19 I.L.M. 671.

the matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval, or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them and may amend this declaration by submitting another declaration at any time.⁹⁷

It is a very flexible device, but it may be difficult to obtain that kind of clause in international negotiations. I should mention that in the case of the Vienna Sales Convention,⁹⁸ the federal government managed to extend the Convention to all the provinces within 15 months from Canada's date of accession. Now the Convention applies to all 10 provinces as well as the two territories. A similar provision can be found in Article 29 of the Convention of the Law Applicable to Trusts and on their Recognition of the Hague Conference on Private International Law.⁹⁹ That Convention currently applies to seven out of 10 provinces.

Let me say a few words about labor law. Under the Canadian Constitution, labor law is an area of split jurisdiction. Canadian labor law is normally governed by provincial law, but there is an area of federal jurisdiction when dealing with businesses that is regulated by federal law. For example, the banks, the airlines, and of course, the federal public service are examples of operations that are governed by federal law. By virtue of that, the Canadian Supreme Court has held that those employees are subject to federal labor jurisdiction.¹⁰⁰ Percentage-wise, over 90 percent of the employees in Canada are governed by provincial law, and less than 10 percent by federal law.

It was in the light of the provincial jurisdiction over labor that it was necessary for Canada to secure the special provisions of Annex 46 of the North American Agreement on Labor Cooperation¹⁰¹ (hereinafter "NAALC") which is based on the classical federal state clause. However, the NAALC clause is more complicated because complex formulae had to be worked out concerning when Canada could initiate a complaint, on behalf of which provinces and when Canada could be expected to defend the record of certain provinces in proceedings under the NAALC.¹⁰²

97. *Id.* at art. 93, para. 1.

98. *Id.*

99. *See* [1984] 23 I.L.M. 1389.

100. *See* HOGG, *supra* note 89 at §§21-10 - 21-15.

101. *See* North American Free Trade Agreement Supplemental Agreements and Additional Documents: North American Agreement on Labor Cooperation, 1st. Sess., Annex 46, Arnold & Porter - H.R. Doc. 103-160, *48 (1993).

102. *See id.*

Domestically, with respect to the NAFTA Labor Side Agreement,¹⁰³ the federal government worked out a federal-provincial agreement with the provinces which regulated the participation of the provinces in activities under the Labor Side Agreement.¹⁰⁴ The provinces that wish to participate have to sign on to the domestic agreement. Then the federal government will notify the U.S. and Mexico that these provinces are covered by NAALC.¹⁰⁵ That has happened for Alberta, Manitoba, and Quebec.

By contrast, the ILO conventions do not contain federal state clauses. Thus, given that labor falls largely within provincial jurisdiction, practical reality dictates that the federal government will seek provincial concurrence before Canada adheres to an ILO convention.

Now, I come to my conclusions. The first one is that binding Canada at the international level is an executive act in which parliament is not involved. Two, there are no self-executing treaties in Canada. Three, there is no primacy of treaty law over domestic law. Fourth, both the Parliament of Canada and the legislatures of the provinces have the capacity to legislate a contravention of international treaty obligations. Five, if implementing legislation is required, then the ordinary division of powers between the federal level of government and the provinces will be followed. Six, in the labor field, federal competence is limited to businesses that are federally regulated and to the public service. Therefore, provincial involvement in the implementation of labor treaties is a given. In the absence of a federal state clause, which I discussed, consent of all the provinces will be sought by the federal government before it takes on new international obligations in the labor field.

MS. GARZA: Thank you very much, Mr. Zijdwijk for your presentation on the status of treaties in Canada. I was glad that you pointed to the NAALC because as many of you know Canada had not participated with us in some of the submissions because of this Annex 46¹⁰⁶ and the need to seek the approval of provincial governments and bring them onto

103. For discussion of the NAFTA Labor Side Agreement, *See* Can the Labor Side Agreement Save NAFTA? 1993: Hearings on the NAFTA Labor Side Agreement Before the Employment, Housing, and Aviation Subcommittee of the Committee on Government Operations, 103rd Cong., 1st Sess. (1993), Arnold & Porter NAFTA HEARINGS (30). *See also* North American Free Trade Agreement Supplemental Agreements and Additional Documents: North American Agreement on Labor Cooperation, 1st Sess., Annex 46, Arnold & Porter – H.R. Doc. 103-160, *48 (1993).

104. *See Canadian Intergovernmental Agreement Regarding the North American Agreement on Labour Cooperation* (visited December 8, 1998) <<http://labour.hrdc-drhc.gc.ca/doc/nafta/eng/e/final-e.html>>.

105. *See id.*

106. *See supra* note 101.

the agreement. So, thank you very much for that presentation. Next we have Professor Robert Howse.

MR. HOWSE: Thank you. It is a pleasure to participate in this process. The relevant Canadian constitutional law with respect to the implementation of treaties has already been pointed out. Its origins are in a 1937 decision not of a Canadian court but of the judicial committee of the Privy Council,¹⁰⁷ which at that time was the court of last resort for Canada since we had not yet broken with our imperial heritage.¹⁰⁸ This case essentially said that, with respect to the implementation of treaties through legislation, and only through legislation, the normal division of powers in the Canadian Constitution applies. I think that a number of factors about this case ought to be mentioned in order to place it in context and to perhaps give you a sense of its relevance or perhaps irrelevance if there were a constitutional challenge today related to the federal government's activities in international relations.

First of all, as has been pointed out, it was not a decision of a Canadian court. Secondly, it is part of a series of decisions by the judicial committee of the Privy Council which had the effect, or in the view of some critics the intention, in the context of this ideological situation in Canada in the 1930s, of constraining the development of the social welfare state and defending private rights against the social welfare state. So, this whole line of decisions of the Privy Council is kind of our Canadian *Lochner* era¹⁰⁹, and it has been widely criticized and to some extent rightly discredited in decades of academic writing.

Now, this does not mean that the Supreme Court has ever overruled this decision. It does mean that if these issues were to be placed before the Supreme Court of Canada today there is far from any guarantee that it would not adopt a very different conceptual approach to the problem. So, think about this: we are dealing with a decision of a foreign court or a foreign judicial body. We are a dealing with a decision that is 60 years old and a decision that has been widely discredited in much of the academic writing surrounding this matter over a period of decades.

107. *See id.*

108. *See supra* note 91.

109. During the *Lochner* era, the U.S. courts used the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution to invalidate a variety of federal and state social and economic laws and arbitrary and unreasonable interferences with the freedom to contract protected by the Due Process guarantees of liberty and property. *See Lochner v. New York*, 198 U.S. 45 (1905) (holding that a state law setting maximum hours of employment unreasonably interfered with the relationship between master and employee and therefore was an excessive burden on personal liberty and violated the Federal Constitution).

So, take the Labor Convention's doctrine at the outset with a grain of salt. It would be like interpreting the U.S. Constitution on some Lochner era decision that for some reason or other happened never to have been explicitly overruled by the United States Supreme Court.

Now, I think the extent to which the doctrine, even strictly interpreted, constrains the international relations powers of the federal government in Canada, can be greatly exaggerated. It is very convenient in international negotiations to be able to turn to the other party and say, as Velma says in "Dangerous Liaisons," "It's beyond my control." This is a matter of our domestic constitution and so we can not do this or that.

But the fact of the matter is that in some areas where Canada's international obligations are profoundly related to provincial policies it has not been "necessary" to have a federal state clause. One example, and a very important example, is the U.N. Covenant on Civil and Political Rights¹¹⁰. Recently some individuals from the province of Quebec took Canada to the Human Rights Committee at the U.N. in Geneva on the basis that the sign law in Quebec, which at the time prohibited most commercial signs from being in languages other than French, violated the guarantees of freedom of association and equality rights in the Civil and Political Covenant.¹¹¹ These people were able to do this in part because there was nothing like a federal state clause in the Civil and Political Covenant.¹¹² The result was an agreement to which Canada was fully bound without any federal state clause. So, the U.N. Human Rights Committee found that at least with respect to the freedom of association, this Quebec law violated the guarantees of the Covenant.¹¹³

It would have been very unlikely that the federal government would have passed legislation to force the province of Quebec to change or abolish this law which was clearly within provincial legislative competence. The province, nevertheless, did actually change the law, partly under the moral pressure from a decision of the Human Rights Committee.

Now, what is the lesson of all this? The lesson is that overriding federal legislation which may be in violation of the Labor Convention's

110. See International Covenant on Civil and Political Rights, Human Rights Committee, U.N. Doc. CCPR/C/21/Rev./Add. 6, 34 I.L.M. 839 (1995). See also International Covenant on Civil and Political Rights, United States: Senate Committee on Foreign Relations Report, 31 I.L.M. 645 (1992).

111. Several Canadian cases have ruled on the discriminatory effects of Quebec language legislation which prohibits the use of any language other than French on commercial signs. See *Devine v. Quebec*, 55 D.L.R. 641; *Ford v. Quebec*, 54 D.L.R. 577 (1988).

112. See *supra* note 110.

113. See *id.*

interpretation of the Canadian Constitution is a crude and often unnecessary mechanism for ensuring provincial compliance with Canada's international obligations.

Secondly, even if moral persuasion is not enough, in other areas, for example the labor area, there may be other means, other than federal overriding legislation, which will get provinces to comply. For example, the federal government of Canada recently entered into a number of agreements concerning labor market training with a variety of Canadian provinces. Now, why did the federal government not make compliance with various kinds of international obligations in the labor field a condition of the federal transfers to provinces for spending in the area of labor market training or indeed use that leverage to bring on board other provinces with respect to the NAFTA Labor Side Agreement? It has nothing to do with the Constitution. It was merely the decision not to use the federal government's spending power leverage in this area.

So, we have to understand the politics as well as the law that is involved. An enormous number of tools available to the federal government facilitate provincial compliance. Moral persuasion also has value. All this leads one to the conclusion that it would be entirely reasonable for Canada, in many contexts, even where provincial jurisdiction is implemented, to sign on to international agreements with the good faith belief that one way or another it would be a very, very unlikely scenario that the federal government actually would have to pass legislation in an area of exclusive provincial jurisdiction in order to ensure that both obligations ultimately were complied with.

Now, this leads me to the second main dimension of my presentation, and this dimension really relates to the division of powers within the Canadian federation. Labor conventions are a product of a very different era of thinking about the way that power is distributed in the Canadian Constitution. This era of thinking that has been characterized on the basis of a dictum in one of the Privy Council's decision as the *Water-tight Compartments* era. Today, again and again, the Supreme Court jurisprudence reflects the fact that there are many overlapping and concurrent areas of jurisdiction. It is very difficult to align in a complex, interdependent policy environment specific categories of public policies in the contemporary era when these ideas about exclusive powers come from a constitutional text that is more than a century old and that was invented before the modern regulatory and welfare state. Therefore, be extremely, extremely skeptical when anyone tells you that something is an exclusive provincial power.

I would like to elaborate on this. Canada is not a confederal state. Therefore, the residual power is conferred on the federal government in Canada, thereby giving the federal government certain general powers:

the power of peace, order, and good government; and the power of trade and commerce, both international and interprovincial. When exercising these kinds of general powers in accordance with criteria established by the Canadian Supreme Court, the federal government's legislative action will be held by the Court to be paramount to provincial legislation. This doctrine of paramouncy in the case of an actual operational conflict between provincial and overriding federal legislation is a cornerstone of the Canadian constitutional order and one of the reasons why it is inaccurate to characterize that order as confederal as opposed to being genuinely federal.

Now, it was suggested that these powers or their influence on the labor conventions doctrine is largely speculative. Well, maybe one can have more than one definition of speculative. However, there have been recent Supreme Court decisions that have suggested that the federal government does have the scope to legislate in matters that would otherwise be matters of exclusive provincial jurisdiction where there is a genuine national dimension. A national dimension can include the fact that there is an international dimension, that a matter that would otherwise normally be a provincial jurisdiction has become in effect through globalization or through the expansion of the domain of international relations a matter that is national in scope.

This does not give the federal government unlimited capacity to trench on provincial jurisdiction. It can only do so to the extent necessary to vindicate this national dimension. But I would refer you to the extremely important decision of the Canadian Supreme Court in the *Crown Zellerbach*¹¹⁴ case where the Court found that federal legislation that dealt with environmental matters, which all the jurisprudence up to that point had suggested were exclusively provincial because they related to pollution in intraprovincial, that is inside the province waters, that the federal legislation was nevertheless valid because it was connected to an international regime for the regulation of pollution in maritime waters.

There are a number of other cases as well where similar kind of reasoning has existed, particularly in private international law, where it actually turns out that the Supreme Court, for example in the decision of *Hunt v. T & N*¹¹⁵ suggested that the federal government may actually be able to legislate with respect to civil procedure, a matter that is usually considered exclusive provincial jurisdiction, again where economic mobility is involved across provincial lines, mobility across international lines, and therefore that there's a genuine national dimension even though

114. *R. v. Crown Zellerbach Canada*, [1988] 1 S.C.R. 401.

115. [1993] 4 S.C.R. 289.

the matter is strictly speaking or a matter of exclusive provincial jurisdiction. There is a lot of scope for the federal government if it really needs to pass legislation implementing agreements even if there is going to be some kind of trenching on provincial jurisdiction.

When taken altogether, this is one reason why those provinces had decided or seemed to decide have decided to constitutionally challenge the NAFTA withdrew that constitutional challenge. I encountered one of the premiers in one of those provinces, I asked him why that province had withdrawn its challenge or never actually put forward its promised challenge to the constitutionality of NAFTA or the challenge that NAFTA interfered with provincial jurisdiction and therefore labor conventions meant it was *au travers* the federal government. He said because they thought that would lose their challenge.

This summarizes the current status. One can question whether labor conventions ultimately really matter anymore. If no one asserted themselves and stalled the interpretation of the Canadian constitution and the functioning of the Canadian political order in the colonial era of the 1930's, then one really has to ask the question whether labor conventions matter anymore.

MS. GARZA: Thank you very much, Professor Howse, for your presentation, and last but not least we have Professor Sophie Dufour.

MS. DUFOUR: I will discuss first the approach which has been used by Canada regarding the implementation of international treaties. Also, I will discuss the way the Province of Quebec implements the treaties in Quebec law.

Canada's Implementation of ILO Conventions

So, I will first start by looking at the way Canada implements ILO conventions and specifically, Convention 87 on Freedom of Association.¹¹⁶ The International Labor Organization sprang from the Treaty of Versailles of 1919¹¹⁷ following the cessation of hostilities of the First World War. As a signatory to that treaty, Canada played an important role in the founding of the ILO.¹¹⁸

By the standard of those times, Canada had a well developed system of labor law, and it regarded the establishment of the ILO as designed

116. Convention 87 on the Freedom of Association and the Protection of the Right to Organize, Mar. 23, 1948, ILO, International Labor Conventions and Recommendations (1982).

117. Treaty of Versailles, Jun. 28, 1919, pt. XIII, ch. 1, arts. 387, 388, 2 Bevans 242.

118. The treaty was signed "for the Dominion of Canada" by the Canadian ministers of Finance and Justice.

primarily to enable newly emerging democratic states to adopt fair and reasonable labor standards and therefore, as having a far less significant role to play in affecting its labor relation regime. Although Canada belonged to the ILO since its inception, it has ratified only 29 of the 176 ILO conventions,¹¹⁹ including Convention 87 on Freedom of Association,¹²⁰ Convention 111 on Discrimination in Employment,¹²¹ and Convention 100 on Equality of Remuneration.¹²²

This may be better than the United States' record in this regard. As Professor Aaron pointed out earlier, the United States has only ratified 12 conventions.¹²³ However, it is far from being significant. The question therefore to be asked is why Canadian interests in the ratification of ILO conventions seem to have been so slight? The answer lies mainly on two Privy Council decisions, rendered in 1925 and in 1937.

The 1925 decision in *Toronto Electric Commissioners v. Snider*¹²⁴ altered the distribution of powers over labor law by deciding that labor relations in most industries came within the exclusive provincial jurisdiction over property and civil rights in the Province under Section 92(13) of the Constitutional Act of 1867.¹²⁵ Accordingly, the federal Industrial Disputes Investigation Act was rendered inapplicable to most workers. Ever since this decision, the provincial governments, rather than Ottawa, have been the major players in Canadian labor law.

The second Privy Council decision which affected Canadian labor law was rendered in 1937 in the Labor Conventions case. Although I do not intend to examine it deeply, I will make some brief comments.

In 1935, the federal government ratified three ILO conventions. Those were Convention 1 on Maximum Hours in the Industry,¹²⁶ Convention 14 on Weekly Rest,¹²⁷ as well as Convention 26 on Minimum Wages.¹²⁸ These three conventions deal with the subject matters which fall mainly within provincial legislative powers under Section 92(13) of the Constitutional Act of 1867.

119. Search of ILOLEX (Nov. 17, 1998) (search of ILO's database on International Labor Standards).

120. *See supra* note 116.

121. Convention 111 on Discrimination (Employment and Occupation), Nov. 26, 1964, ILO, International Labor Conventions and Recommendations (1982).

122. Convention 100 on the Equality of Remuneration, Nov. 16, 1972, ILO, International Labor Conventions and Recommendations (1982).

123. Search of ILOLEX (Nov. 15, 1998).

124. [1925] 2 D.L.R. 5.

125. CAN. CONST. Sec. 92(13).

126. Convention 1 on Hours of Work (Industry), Mar. 21, 1935.

127. Convention 14 on Weekly Rest (Industry), Mar. 21, 1935.

128. Convention 26 on Minimum Wage Fixing Machinery, Apr. 25, 1935.

During the same year (1935), the Canadian parliament passed maximum hours, weekly rest, and minimum wages statutes in order to implement the three ILO conventions. In 1937, the Privy Council held this Canadian federal legislation unconstitutional because it infringed upon provincial legislative powers. According to the Privy Council, although the power to sign international treaties stems from the federal prerogative and, therefore, rests in the federal government, the power to implement such international treaties in Canadian domestic law is subject to the division of legislative powers established under Sections 91 and 92 of the Constitutional Act of 1867.¹²⁹

When international agreements undertaken by the Canadian government cover subjects dealing with provincial matters under the Constitution, the provincial parliaments have the exclusive power to implement these engagements in Canadian domestic law. The Labor Conventions case affected the Canadian government's approach to the ratification of the ILO conventions promulgated after World War II. As compliance with most of the conventions fell exclusively within provincial legislative power, the federal government took initially the cautious view that it should not ratify conventions whose subject matter falls within provincial competence.

By the 1950's, however, the Canadian government took the bolder approach of consulting with provinces on convention ratification. For example, the Canadian government ratified Convention 87 on Freedom of Association in 1972, after all the provincial governments agreed to ratification and to bring their laws into line with the Convention.

By 1980, Canada had ratified fewer ILO conventions than it might have been expected. First, there was the problem of the division of federal and provincial legislative powers. Second, due to Canada's relatively good labor relations and human rights record, there was little public pressure to ratify more conventions.

Of the six ILO conventions governing freedom of association and collective bargaining, Canada has ratified only Convention 87, leaving unadopted Convention 98 on the Right to Organize and to Bargain Collectively,¹³⁰ Convention 135 on Workers' Representatives,¹³¹ Convention 141 on the Rural Workers,¹³² Convention 151 on Labor Relations in the

129. CAN. CONST. §§ 91-92.

130. Convention 98 on the Right to Organize and Bargain Collectively, Jul. 7, 1949, ILO, *International Labor Conventions and Recommendations* (1982).

131. Convention 135 Concerning Workers' Representatives, Jun. 23, 1971, ILO, *International Labor Conventions and Recommendations* (1982).

132. Convention 141 on Rural Workers' Organization, Jun. 23, 1975, ILO, *International Labor Conventions and Recommendations* (1982).

Public Service,¹³³ and Convention 154 on the Promotion of Collective Bargaining.¹³⁴

Canada is nonetheless bound by the provisions included in these conventions since all member states are required to honor the freedom of association and collective bargaining principles embodied in the ILO Constitution.¹³⁵ Complaints can in fact be submitted by national or international associations of workers or employees against a member state alleging non-conformity with ILO principles on freedom of association and collective bargaining, regardless of whether it has ratified the relevant ILO conventions. These complaints are examined by the ILO Committee on Freedom of Association, a tripartite committee of the ILO Governing Body created in 1950, which meets three times a year, in March, June, and November in Geneva.

The Committee examines the complaints and reports its recommendations and the type of action to be taken on each case to the ILO Governing Body. It does not, however, have the power to decide on matters presented to it.

This ILO complaint system did not seem to have much influence in encouraging the Canadian federal and provincial governments to comply with these ILO conventions dealing with freedom of association and collective bargaining. In fact, between 1980 and 1994, Canada was subject to 43 complaints alleging non-compliance to one of these principles. In 65% of these complaints, the Committee concluded that the federal or the provincial legislation or practice was not in conformity with ILO principles and called upon the government concerned to make changes.

The vast majority (72%) of the complaints involved the public sector. Yet, despite the fact that the ILO Committee on Freedom of Association has alerted the Canadian federal and provincial governments repeatedly, there has been little impact on Canadian domestic legislation, which has essentially remained unchanged.

Might there be another reason, besides the problem of the division of federal and provincial legislative powers, which explains this Canadian federal and provincial governments' attitude towards the ILO Committee on Freedom of Association's recommendations? An answer perhaps lies in the coming into force in 1982 of the Canadian Charter of Rights and

133. Convention 151 on Labor Relations (Public Service), Jun. 27, 1978, ILO, International Labor Conventions and Recommendations (1982).

134. Convention 154 on the Promotion of Collective Bargaining, Jun. 19, 1981, ILO, International Labor Conventions and Recommendations (1982).

135. Constitution of the International Labor Organization, Jun. 28, 1919, annex, ch. III.

Freedoms.¹³⁶

In 1982, the Canadian Parliament adopted the Charter of Rights and Freedoms, which ushered in a new era in Canadian constitutionalism. Section 2(d) of the Charter guarantees the freedom of association, subject to certain limitations. At the time of the adoption of the Charter, the Canadian Trade Union movement did not perceive that the Charter would affect Canadian industrial relations. As a result, it appeared to take little interest in the hearings, discussions, and debates which led to its adoption.

Yet, once the Charter became operational,¹³⁷ it did have a significant impact on labor management relations. In particular, in three decisions rendered in 1987, the Canadian Supreme Court interpreted the freedom of association guaranteed in Section 2(d) as excluding a constitutional right to strike. In so doing, the Supreme Court disregarded the ILO Supervisory Body's recognition of the right to strike as one of the essential means available to workers for the promotion and the protection of their interests as provided for in Convention 87.

In fact, although none of the 176 ILO Conventions explicitly provides for the right to strike, the ILO Committee of Experts on the Application of Conventions¹³⁸ held as early as 1959 that strike activity is implicitly protected by Convention 87. The same principle was later recognized by the ILO Freedom of Association Committee. Consequently, in the current ILO view, prohibitions of or restrictions to the right to strike should be limited to: (i) public servants engaged in the administration of the State; and (ii) and essential services.

Since 1983, the ILO supervisory bodies have defined "essential services" as those "whose interruption would endanger the life, personal safety, or health of the whole or part of the population."¹³⁹ In most Canadian complaints submitted by provincial or national unions involving back-to-work legislation, the ILO Freedom of Association Committee concluded that the provincial or federal legislation was not in conformity with Convention 87 since the services in question, whether it be postal services, railways, grain handling, and teaching, were not "essential" as

136. CAN. CONST. (Constitution Act, 1982) (Apr. 17, 1982).

137. *Id.*

138. The Committee of Experts is composed of independent legal experts appointed by the ILO director General in consultation with the Governing Body. Its functions are: to examine the reports which each Member State is required to periodically submit on the implementation of Conventions which it has ratified; and to submit each year a report on its findings to the annual ILO Conference.

139. International Labor Office, Freedom of Association and Collective Bargaining, International Labour Conference, 81st Session, Geneva, 1994, para. 159.

defined above.¹⁴⁰

Yet, the Canadian Supreme Court refused to infer a constitutional right to strike from the freedom of association guaranteed in Section 2(d) of the Charter. In one of the 1987 cases, Justice McIntyre, after having concluded that the Charter could not, on its face, support an implication of a right to strike, mentioned another reason based on social policy. He said

Labour law . . . is based upon a political and economic compromise between organized labor - a very powerful socioeconomic force - on the one end, and the employers of labor - an equally powerful socioeconomic force - on the other. The balance between the two forces is delicate and the public at large depends for its security and welfare upon the maintenance of that balance. The whole process is inherently dynamic and unstable. Care must be taken then in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the other subjects to the social pressures of the day . . . To intervene in that dynamic process at this early stage of Charter development by implying constitutional protection for a right to strike would, in my view, give to one of the contending forces an economic weapon . . . which could go far towards freezing the development of labor relations and curtailing that process of evolution necessary to meet the changing circumstances of a modern society in a modern world.¹⁴¹

The Charter has become the repository of Canada's rights and freedom, including the freedom of association. Over the last 15 years, the Canadian Supreme Court has grappled with the scope and breadth of these freedoms, and the Canadian Trade Union movement has been caught up in this litigation. This focus of the Court on the Charter means that there has been less need to look to international instruments, including ILO conventions, for guidance on human rights.

140. See Bureau International du Travail, *La liberté syndicale*, 4th éd., Genève, 1996, para. 572; Canada, Office of the International Affairs, *Freedom of Association Complaints Submitted to the ILO Against Canada 1980-1994*, Ottawa, 1995, 7.

141. *In re Public Service Employee Relations Act*, [1987] 1 S.C.R. 414-15.

I will now discuss the approach which has been adopted by the Province of Quebec on the question of the implementation of international treaties in Quebec law.

The Approach Adopted by the Province of Quebec on the Question of the Implementation of International Treaties

Faced with the phenomenon of the growing economic and social interdependence between States, the Quebec government has felt over the years, and more specifically over the recent years, that it had to take measures to open its frontiers. It was in response to this concern that An Act Respecting the Ministère des Affaires Internationales du Québec was adopted in December 1988¹⁴² the object of which was to ensure that the Quebec government sets forth a coherent and efficient international presence.

By virtue of Section 11 of the Act, the minister of International Affairs has the responsibility of planning, organizing, and directing the foreign activities of the Quebec government.¹⁴³ In this regard, Section 17 of the Act illustrates the fact that the development of the codification of international law springs mainly from international treaties.¹⁴⁴ It states that "The Minister shall make recommendations to the Government as to the ratification of international treaties or accords in fields with the constitutional jurisdiction of Quebec."¹⁴⁵

The practice which has been developed by the Quebec government regarding treaties and accords covered by Section 17 is for it to communicate its agreement to the signature by Canada of such a treaty or accord. This communication is made by means of a letter sent from the provincial International Affairs minister to the federal Secretariat of State on External Affairs. Then, the federal government formally asks each provincial government whether or not it consents to the submission of Canada's ratification instrument, which, on occasion, may contain reservations as well as declarations specifically required by the provinces.

In order to verify the conformity of Quebec domestic law with the international instrument, the Quebec government will generally initiate inter-ministerial consultations. If Quebec domestic law appears to be consistent with the terms and the spirit of the international treaty and where the Quebec government concludes that it has an interest in being subject

142. Act of November 10, 1988, ch. 41, 1988 S.Q. 663 (Act concerning the Ministère des Affaires Internationales).

143. *Id.* at 669.

144. *Id.* at 670.

145. *Id.*

to this treaty, then it will adopt an Order in Council by virtue of Section 17 of the Act.

However, in case of inconsistency between Quebec domestic law and the international instrument, the Quebec government will take the appropriate legislative measures to implement the treaty in question. It will then communicate in writing its consent to the treaty's ratification by the federal government. Ottawa and the provinces then agree to fix a date for the coming into force of the convention throughout the country.

As previously pointed out, while discussing the ILO Conventions, it must be kept in mind that, as a result of the Labor Conventions case, although the power to sign international treaties vests in the federal government, the power to implement such international treaties in Canadian domestic law is subject to the division of legislative jurisdictions as established under Sections 91 and 92 of the Constitutional Act of 1867.¹⁴⁶

In practice, when an international treaty deals with subject matters falling within provincial jurisdiction, as it is often the case in human rights and labor law issues, the federal government will usually consult the provinces and, in the absence of a federal state clause, will await their consent before signing, ratifying, or adhering to such a treaty.

The Quebec government has ratified or declared itself bound by several international instruments. For instance, federal provincial cooperation has been quite efficient in matters relating to human rights. This success results mainly from the fact that since 1975, there has been a permanent federal-provincial Committee responsible for the implementation of the International Covenants on Economic, Social and Cultural Rights,¹⁴⁷ the International Covenants on Civil and Political Rights,¹⁴⁸ and the Optional Protocol of the latter.¹⁴⁹

The federal-provincial cooperation achieved through this permanent committee has resulted in the adherence of Canada to both the covenants and the Protocol, thanks to assurances given by the provinces that they would implement them within their territories. In this regard, Quebec ratified the two covenants as well as the Protocol through the adoption of an Order in Council in April, 1976. In doing so, the Quebec government

146. CAN. CONST. §§91-92.

147. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, *entered into force* Jan. 3, 1976, 6.A.Res. 2200A(XXI), UN Doc. A/6316 (1966), 993 UNTS 3.

148. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entered into force* Mar. 23, 1976, 6.A.Res. 2200A(XXI), UN Doc. A/6316 (1966), 999 UNTS 171.

149. Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entered into force* Mar. 23, 1976, 999 UNTS 171.

has agreed to respect, to guarantee, and to ensure the full exercise in Quebec of the rights incorporated in the covenants.

Besides the covenants and the Optional Protocol, the Quebec government has undertaken, by virtue of an Order in Council, to ensure the respect of the rights recognized in the following conventions: (i) The Convention on the Elimination of All Forms of Discrimination Against Women,¹⁵⁰ the Convention on the Elimination of All Forms of Racial Discrimination,¹⁵¹ the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,¹⁵² and the Convention on the Rights of Child.¹⁵³

The labor law sector is also one where federal-provincial cooperation has been essential in order that the treaties ratified by the Government of Canada can be implemented throughout the country. As mentioned before, Canada is one of the founders of the ILO. The norms developed at the ILO take either the form of a convention or of a recommendation. Section 19(7) of the ILO Constitution provides that, in regards to federative member states, the federal government shall, if it seems appropriate given its constitutional system, conclude effective arrangements with the provinces so that the conventions and the recommendations adopted by the ILO Conference will be submitted to the provincial authorities for legislative or other action.

The federal government must also, subject to the provincial governments' consent, take measures to establish periodic consultations in order to develop a coordinated action within Canada for the implementation of these instruments.

It is worth noting that the Quebec government has declared itself bound by only one ILO convention, that is Convention 162 relating to security in the use of asbestos.¹⁵⁴ The implementation of this convention in Quebec domestic law required modifications to the Security Code for the Construction Industry.¹⁵⁵

Finally, in international trade law matters, the Quebec government has declared itself in favor of several international trade agreements. In

150. The Status of Women, 1980 U.N.Y.B. 885, Sales No. E.83.I.1 [Order in Council 2894-81, Oct. 20, 1981].

151. Prevention of Discrimination and Protection of Minorities, 1969 U.N.Y.B. 484, Sales No. E.71.I.1 [Order in Council 1471-778, May 10, 1978].

152. Protection from Torture and Other Cruel or Inhuman Treatment, 1975 U.N.Y.B. 620, Sales No. E.77.I.1 [Order in Council 912-78, June 19 1987].

153. The Rights of the Child, 1989 U.N.Y.B. 560, Sales No. E.97.I.1 [Order in Council 1676-911, December 9, 1991].

154. Order in Council 2025-87, December 22, 1987, [1988] 120 O.6.II 403.

155. Amendments to the Safety Code for the Construction Industry, *adopted by O.C.*, Jan. 17, 1987, [1988] 120O.6.II 403.

An Act Respecting the Implementation of International Trade Agreements, assented on the 13th of June, 1996,¹⁵⁶ the Quebec government has given its support to the North American Free Trade Agreement, the North American Agreements on Environmental Cooperation and on Labor Cooperation, and the Agreement Establishing the World Trade Organization.¹⁵⁷

This legislation expresses Quebec's intention to bring its laws into harmony with international obligations to which it subscribes and thus ensures the implementation of these international agreements within the provincial territory. In the preamble of the Act, the Quebec government affirms that Quebec alone is competent to implement those agreements in each field coming under its jurisdiction.¹⁵⁸

As we can see, Section 17 of the Act Respecting the Ministère des Affaires Internationales du Québec illustrates the fact that the Province of Quebec subscribes to the method generally used for arriving at a consensus at the international level, that is to say, the adherence to an international treaty.

One thing which has to be kept in mind regarding the implementation of international treaties by Quebec is that these agreements will bind Quebec only if the government has declared itself to be so bound through an Order in Council. In the case where it has done so, it must then take the necessary measures to implement the convention and to ensure the respect of its provisions within its territory.

156. Act of June 13, 1996, ch. 6, 1996 S.Q. 335 (respecting the implementation of international trade agreements in Quebec).

157. *Id.*

158. *Id.*

