

June 1991

The Participation of Parliament in the Treaty Process in the Federal Republic of Germany - Europe

Jochen Abr. Frowein

Michael J. Hahn

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

Jochen A. Frowein & Michael J. Hahn, *The Participation of Parliament in the Treaty Process in the Federal Republic of Germany - Europe*, 67 Chi.-Kent L. Rev. 361 (1991).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss2/5>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

THE PARTICIPATION OF PARLIAMENT IN THE TREATY PROCESS IN THE FEDERAL REPUBLIC OF GERMANY

JOCHEN ABR. FROWEIN*
MICHAEL J. HAHN**

I. THE TREATY-MAKING PROCEDURES UNDER THE BASIC LAW

A. *Outline of the German Constitutional Framework for the Foreign Relations Power*

1. Federation

a. *The Role of the Executive*

The Constitution of the Federal Republic of Germany (Basic Law or Grundgesetz)¹ sets up a system of parliamentary democracy. It provides for close links between the Federal Parliament (Bundestag) and the Federal Government which consists, according to article 62 of the Basic Law, of the Federal Chancellor and the Federal Ministers.² The Bundestag elects the head of the Federal Government, i.e., the Federal Chancellor, who until now has always been a member of the Bundestag and has kept this function even after election into his new office. Equally, most cabinet ministers have been members of the Bundestag. The close relationship between the Cabinet and the (majority groups of the) Bundestag has significant impact on the decision-making process of the parties involved, at least when questions of some importance are at stake. This reciprocal exercise of influence generally ensures that bills introduced in Parliament at large have been agreed upon between the Federal Government and its parliamentary majority.³

* Dr. iur., Dr. iur. honoris causa, Sevilla; M.C.L., Michigan. Director, Max-Planck-Institute for Comparative Public Law and International Law; Professor, University of Heidelberg.

** Assessor iur., LL.M., Michigan. Research Fellow, Max-Planck-Institute for Comparative Public Law and International Law.

1. Germany is a parliamentary democracy in which all state authority emanates from the people and is exercised by specific legislative, executive and judicial organs. GRUNDGESETZ [GG] art. 20, para. 2.

2. The Federal Government and the Federal President (Bundespräsident, whose office is of a more representative nature) form the executive branch of government.

3. According to art. 76 of the Basic Law:

Bills shall be introduced in the Bundestag by the Federal Government or by members of the Bundestag or by the Bundesrat. Bills of the Federal Government shall be submitted first to the Bundesrat. The Bundesrat shall be entitled to state its position on such bills within six weeks. A bill exceptionally submitted to the Bundesrat as being particularly urgent by the Federal Government may be submitted by the latter to the Bundestag three

Notwithstanding this institutionalized regime of co-operation and consultation between executive and legislative branches of government, the Basic Law, as interpreted by the Federal Constitutional Court (Bundesverfassungsgericht),⁴ grants the Federation's executive the dominant position in foreign affairs. According to article 32, paragraph 1 of the Basic Law, relations with foreign states fall within the jurisdiction of the Federation. This includes, *inter alia*, the power to enter into treaty negotiations with foreign states and to sign such treaties without prior approval by the Bundestag.⁵

According to article 59, paragraph 1 of the Basic Law, the Federal President represents the Federation in its international relations and concludes international treaties on its behalf. This competence, however, is of a somewhat formal nature only. It certainly does not alter the constitutional distribution of responsibility, namely the determination of the general policy guidelines by the Federal Chancellor and the conduct of foreign affairs by the Minister for Foreign Affairs.⁶ pertinent orders and decrees of the President are only valid if they are countersigned by either the Chancellor or the responsible Minister.⁷

On a good number of subject matters, the Federal Government may conclude executive agreements.⁸ Also, while questioned by some scholars as to its legality,⁹ state practice attributes to the executive the competence to take legally relevant "unilateral acts" such as the recognition of foreign governments and states, the delimitation of maritime boundaries and so forth.¹⁰ The Federal Constitutional Court denies any inherent competence of the Bundestag to participate in the decision-making process on foreign affairs besides the one granted in article 59, paragraph 2 of the Basic Law.¹¹ Specifically, the Court has rejected the argument

weeks later, even though the Federal Government may not yet have received the statement of the Bundesrat's position; such statement shall be transmitted to the Bundestag by the Federal Government without delay upon its receipt. Bills of the Bundesrat shall be submitted to the Bundestag by the Federal Government within three months. In doing so, the Federal Government must state its own view.

4. In particular, Judgment of July 29, 1952, Bundesverfassungsgericht [BVerfG], 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE], 2 BvE 3/51, at 351, 359-60; Judgment of July 29, 1952, BVerfG, 1 BVerfGE, 2 BvE 2/51, at 372, 394-95; Judgment of June 30, 1953, BVerfG, 2 BVerfGE, 2 BvE 1/52, at 347, 379-80; Judgment of July 17, 1984, BVerfG, 68 BVerfGE, 2 BvE 13/83, at 1, 86.

5. ULRICH FASTENRATH, *KOMPETENZVERTEILUNG IM BEREICH DER AUSWÄRTIGEN GEWALT* 215 (1986).

6. GG art. 65.

7. GG art. 58.

8. See *infra* text accompanying notes 26-27.

9. See Karl Doehring, 36 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER [VVDSiRL] 147-48 (1978).

10. Cf. Judgment of Aug. 8, 1978, BVerfG, 49 BVerfGE, 2 BvL 8/77, at 89, 125.

11. See *infra* text accompanying notes 33-41.

that participation by the legislature is required whenever the foreign policy is "important" for the community as a whole.¹²

b. *The Role of Parliament*

Notwithstanding this strong position of the executive branch, the foreign relations law of the Federal Republic attributes an important role to legislative organs, and in particular to the Bundestag. In fact, the foreign relations power conferred by the Basic Law has been characterized as a power held jointly (*zur gesamten Hand*) by the legislature and the executive.¹³ Though this term was coined before some of the Constitutional Court decisions which strengthened the executive's hand in foreign affairs, it still stands for the Basic Law's commitment to parliamentary influence in external relations.¹⁴ Thus article 59 (2) of the Grundgesetz attributes considerable power to the law-making organs of the Federation with regard to treaties which deal with the political relations of the Federation or relate to matters of federal legislation. Thus, the consent of the Bundestag and, in specific circumstances,¹⁵ of the Bundesrat (Council of the constituent states (*Länder*))¹⁶ in the form of a federal statute is required before the Federal President¹⁷ may ratify¹⁸ the treaty.

However, state practice and the prevailing opinion¹⁹ among constitutional lawyers consider the treaty termination power to be within the exclusive domain of the executive. Some scholars, though, see parliamen-

12. Judgment of July 17, 1984, BVerfG, (Pershing) 68 BVerfGE, 2 BvE 13/83, at 1; *see also* Judgment of Oct. 19, 1983, BVerfG, 65 BVerfGE, 1 BvR 209, 269, 362, 420, 440, 484/83, at 1. Elsewhere, the Court has subscribed to the so-called "Wesentlichkeitstheorie." *See* Judgment of Aug. 8, 1978, BVerfG, 49 BVerfGE, 2 BvL 8/77, at 89, 125.

13. *See* Ernst Friesenhahn, *Parlament und Regierung im modernen Staat*, 16 VVDStRL 9, 47-48 (1958).

14. *See generally* Rudolf Bernhardt, *Bundesverfassungsgericht und völkerrechtliche Verträge*, in 2 BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ 156 (Christian Starck ed., 1976); Albrecht Randelzhofer, *Innerstaatlich erforderliches Verfahren für das Wirksamwerden der von der Exekutive abgeschlossenen völkerrechtlichen Vereinbarungen*, ARCHIV DES ÖFFENTLICHEN RECHTS [AÖR] 18, 21 (1 Supp. 1974).

15. AK-Zuleeg, art. 59, margin note 22; Jochen A. Frowein, *Zustimmung des Bundesrates zu politischen Verträgen?*, in JURISTISCHE SCHULUNG [JuS] 241-44 (1972).

16. The Bundesrat consists of representatives of the state governments. GG art. 50. It is, however, a federal institution. *Inter alia*, it has the competence to initiate federal legislation, GG art. 76, and to veto federal legislation which requires its consent, as provided for in the Basic Law. *E.g.*, GG art. 84. Also, the Bundesrat can amend or reject other legislation, but in this case its objections have no effect if the Bundestag rejects the Bundesrat's position. GG art. 77, para. 3, art. 78.

17. As a matter of state practice the Federal President will delegate his powers to a member of the Federal Government. *See* Jochen A. Frowein, *Federal Republic of Germany*, in THE EFFECT OF TREATIES IN DOMESTIC LAW 63 (Francis J. Jacobs & Shelley Roberts eds., 1987).

18. GG art. 59, para 1.

19. HERMANN W. BAYER, DIE AUFHEBUNG VÖLKERRECHTLICHER VERTRÄGE IM DEUTSCHEN PARLAMENTARISCHEN REGIERUNGSSYSTEM 206-07 (1969), with further references.

tary consent as indispensable.²⁰

Under article 24 of the Constitution, the Federation may transfer powers to inter-governmental institutions by legislation only. Examples of such supranational organizations are the European Communities²¹ and NATO.²²

2. The Role of the Constituent States (Länder)

According to article 32, paragraph 3 of the Basic Law, the Länder may, with the consent of the Federation, enter into treaty relations with foreign states concerning subjects within their legislative competence. The number of treaties concluded between the Länder and foreign states is not significant.²³

However, another aspect of the relationship between the Federation and the Länder seems worth mentioning, since it influences which treaties have to pass the federal legislature's scrutiny. For practical purposes, until the conclusion of the so-called Lindau Agreement on November 14, 1957,²⁴ the Länder and the Federation could not agree whether or not the latter's competence to conclude treaties also existed in the area where the Länder have the right to legislate. Some Länder had taken the position that article 32, paragraph 3 of the Basic Law gave them an exclusive competence to conclude treaties with regard to matters within their exclusive legislative competence. The Federal Government, however, had adopted the view that article 32, paragraph 1 of the Basic Law gave the Federal Government a general foreign relations power while the Länder only had concurrent treaty-making power, even if they

20. See, e.g., FASTENRATH, *supra* note 5, at 233; Judgment of Dec. 18, 1984, BVerfG, 68 BVerfGE, 2 BvE 13/83, at 122 (dissenting opinion of Judge Mahrenholz); Christian Tomuschat, *Der Verfassungsstaat im Geflecht der internationalen Beziehungen*, 36 VVDStRL 7, 60 (1978); Juliane Kokott, *Art. 59 Abs. 2 GG und einseitige völkerrechtliche Akte*, in Festschrift für Karl Doehring 503, 505 (1989); HANS W. BAADE, *DAS VERHÄLTNISS VON PARLAMENT UND REGIERUNG IM BEREICH DER AUSWÄRTIGEN GEWALT DER BUNDESREPUBLIK DEUTSCHLAND* 121 (1962).

21. Judgment of Oct. 18, 1967, BVerfG, 22 BVerfGE, 1 BvR 248/63, 216/67, at 293, 295.

22. The majority opinion of the Constitutional Court in the Pershing Decision, Judgment of July 17, 1984, BVerfG, 68 BVerfGE, 2 BvE 13/83, at 1, held that NATO was such an organization. See the dissent of Judge Mahrenholz, Judgment of Dec. 18, 1984, BVerfG, 68 BVerfGE, 2 BvE 13/83, at 128, which rightly points out the novel perception of the majority.

23. Ondolf Rojahn, in 2 GRUNDGESETZKOMMENTAR 349-50 (Ingo von Münch ed., 2d ed. 1983), lists some 28 treaties since 1949. For some interesting examples, see Frowein, *supra* note 17, at 64; cf. Torsten Stein, *Conclusion and Implementation of Treaties in the Federal Republic of Germany*, in REPORTS ON GERMAN PUBLIC LAW, XIIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, MONTRÉAL 1990, at 49, 55 (Rudolf Bernhardt & Ulrich Beyerlin eds., 1990); Gunther Doeker, *Foreign Relations and Federal States*, in Festschrift für Karl Loewenstein 110 (1971).

24. Reprinted in 2 MAUNZ-DÜRIG, GRUNDGESETZ KOMMENTAR, art. 32, margin note 45, at 18. The dispute still exists as a matter of principle.

had an exclusive right to legislate.²⁵ In order to solve this dispute the parties concerned worked out a special compromise in the Lindau Agreement, which provides for a *modus vivendi*²⁶ that has been applied ever since. It establishes a procedure concerning all agreements to be concluded on matters within the exclusive legislative domain of the Länder.²⁷ As a practical matter this refers almost exclusively to cultural agreements. The Länder agree that the Federal Government will negotiate such agreements with foreign states but on condition that it will seek the agreement of the Länder before a treaty becomes binding. That means in fact that the Federal Government has to seek the formal consent of the Länder for a cultural agreement before the procedure under article 59, paragraph 2 of the Basic Law is implemented and federal legislation allowing the executive to ratify the treaty is adopted.

Two most unfortunate incidents in recent years attract attention to the Länder's claim²⁸ that the Lindau Agreement provides a basis for their participation in the conclusion of all international agreements whose domestic application require adaptation of the Länder's administrative procedures. In these two instances, the German ratifications of important human rights conventions were considerably postponed and made subject to far-reaching and—from an international law perspective—questionable interpretative declarations due to pressure exercised by the Länder.²⁹ Without going into this question in too great detail, it should be said that the Länder's position is highly debatable as a matter of German constitutional law. The purpose of the Lindau Agreement—whose legality has never been put to a test before the Constitutional Court—is to grant the Länder a say in all substantive matters falling into their exclusive legislative competence and dealt with by the Federation on an international level; in particular, cultural affairs were meant to be the Lindau Agreement's field of application. It was certainly not the purpose of the agreement to give the Länder the power to block any treaty whose application influences the relationship between German state au-

25. See for the following Frowein, *supra* note 17, at 64-65; BERNHARD HARTUNG, DIE PRAXIS DES LINDAUER ABKOMMENS 2 (1984).

26. Eberhard Menzel, *Die Geltung internationaler Verträge im innerstaatlichen Recht*, in DEUTSCHE LANDESREFERATE ZUM VI. INTERNATIONALEN KONGREß FÜR RECHTSVERGLEICHUNG IN HAMBURG 1962, at 410 (Hans Döle ed., 1962).

27. 2 MAUNZ-DÜRIG, *supra* note 24, art. 32, n. 45.

28. The Bundesrat advocates this claim. See Bundesrat-Drucksachen 769/90, 385/89.

29. See also *infra* text accompanying notes 85, 150. The conventions in question are the UN Convention for the Rights of the Child and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See Joachim Wolf, *Ratifizierung unter Vorbehalten: Einstieg oder Ausstieg der Bundesrepublik Deutschland aus der UN-Konvention über die Rechte des Kindes*, ZEITSCHRIFT FÜR RECHTSPOLITIK 374, 375 (1991).

thorities and individuals and hence is governed one way or the other by the Länders' Administrative Procedure Codes. Such a *de facto* veto power of the Länder would violate the distribution of competencies mandated by article 32 of the Basic Law.³⁰

B. *The Participation of the Legislative Bodies in the Treaty-Making Process*

Under article 59, paragraph 2 of the Basic Law treaties that regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation.³¹

1. Bundestag and Bundesrat

Under the Basic Law, the Bundestag is the supreme legislative authority but not the sole legislative body. Rather, bills adopted by the Bundestag need the consent of the Bundesrat in order to become law whenever this is expressly required by the Constitution.³² Even where its consent is not necessary, the Bundesrat has a veto which, however, can be overridden by the Bundestag. This summary description of the law-making process applies to all bills of consent concerning treaties dealing with matters of federal legislation. However, "purely political" treaties not relating to federal legislation only have to obtain the Bundestag's approval.³³

2. Treaties Requiring Legislative Assent

Treaties which regulate the "*political relations of the Federation*" require the approval of Parliament before ratification through so-called "acts of consent" (*Zustimmungsgesetze*).³⁴ Treaties for the purpose of

30. Nevertheless, the Federal Government, while opposing the Länders' view in those particular cases, has not voiced concern as to the Länders' claim to be involved in these matters.

31. The second sentence reads as follows: "As regards administrative agreements, the provisions concerning the federal administration shall apply *mutatis mutandis*."

32. Cf. GG art. 77; see 2 KLAUS STERN, *DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND* 131-32 (1980). For examples of state practice, see Klaus Platz & Gind Lörcher, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1962*, 24 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* [ZaöRV] 637, 644 (1964).

33. Frowein, *supra* note 15; see also Eberhard Menzel, *Bedürfen 'politische Verträge' der Zustimmung des Bundesrates?*, in 1971 *JURISTENZEITUNG* [JZ]; W. Kewenig, *Bundesrat und auswärtige Gewalt*, in *ZEITSCHRIFT FÜR RECHTSPOLITIK* [ZRP] 238; Dieter Blumenwitz, *Die Beteiligung des Bundesrates beim Abschluß politischer Verträge*, in *BAYERISCHE VERWALTUNGSBLÄTTER* [BayVBl] 29.

34. Emphasis added. Similar provisions can already be found in the Weimarer Reichsverfas-

article 59 are only treaties with other subjects of international law,³⁵ governed by international law.³⁶ In one of its first decisions, the Bundesverfassungsgericht made clear that a treaty does not fall within this category merely because it generally deals with public affairs, the good of the community or affairs of state. An international agreement is considered "political" within the meaning of article 59, paragraph 2³⁷ only if the survival of the Federal Republic, her territory and independence, her position and relative weight within the international community are concerned and the content and object of the treaty is directed towards governing political relations. Treaties meeting the standard set forth, are, *inter alia*, military alliances, treaties of guarantee, treaties concerning political co-operation, peace treaties, non-aggression pacts, treaties dealing with questions such as disarmament, neutrality and peaceful settlement of disputes.³⁸ It is fair to say that the vast majority of important international agreements will fall within this category.³⁹

The other category of treaties mentioned by the Grundgesetz as requiring parliamentary endorsement are those relating to matters of legis-

sung, art. 45, paras. 2-3. See WILHELM GREWE, *SPIEL DER KRÄFTE IN DER WELTPOLITIK* 931-32 (1970); LUZIUS WILDHABER, *TREATY-MAKING POWER AND CONSTITUTION* 48 (1971).

35. See Judgment of July 29, 1952, BVerfG (Petersberg Agreement), 1 BVerfGE, 2 BvE 3/51, at 351. In the so-called Port of Kehl case, a parliamentary group (Fraktion) of the Bundestag had brought suit against the Federal Government for approving a treaty concluded between one of Germany's constituent states (Baden) and the Port Authority of Strasbourg without the approval of the Bundestag. The Court's reasoning made clear that only treaties with subjects of international law and governed by it were treaties for the purpose of art. 59, para. 2. If Baden had concluded a compact with a foreign state in a matter over which it had the power to legislate, the Basic Law would have required the consent of the Federal Government only, without the Bundestag having a right to be involved. See Judgment of June 30, 1953, BVerfG, 2 BVerfGE, 2 BvE 1/52, at 347, 374-75. As to concordats with the Holy See, see Judgment of Mar. 26, 1957, BVerfG, 6 BVerfGE, 2 BvG 1/55, at 309, 341.

36. Therefore the Petersberg Agreement between Federal Chancellor Adenauer and the Allied High Commissioners, in their capacity as collective organ of the occupying powers in Germany, and not as representatives of their states, was not considered a treaty under art. 59, para. 2. See Judgment of July 29, 1952, BVerfG, 1 BVerfGE, 2 BvE 3/51, at 351, 369. The Bundesverfassungsgericht further found (Leitsatz 6) that art. 59, para. 2 could not analogously be applied to this particular situation. *Contra* BAADE, *supra* note 20, at 115, 222-25; Eberhard Menzel, *Die auswärtige Gewalt der Bundesrepublik*, 12 VVDStRL 179, 195-96 (1954).

37. Judgment of July 29, 1952, BVerfG, 1 BVerfGE, 2 BvE 2/51, at 372, 381; see also Eberhard Menzel, *Die auswärtige Gewalt der Bundesrepublik in der Deutung des Bundesverfassungsgerichts*, 1953-54 AöR 79, 326, 34.

38. Judgment of July 29, 1952, BVerfG, 1 BVerfGE, 2 BvE 2/51, at 372, 381-82.

39. AK-Zuleeg, art. 59, margin notes 28-31. *But see* WILDHABER, *supra* note 34, at 51, who points out that the Federal Government adhered to the Constitutions of the ILO, WHO, UNESCO, FAO WMO and OEEC on its own. *Cf.* WALTER RUDOLF, *VÖLKERRECHT UND DEUTSCHES RECHT* 192 (1967). Also, the Federal Government took the position that the German-Israeli agreement concerning the shipment of weapons to Israel was not a treaty under art. 59, para. 2 of the Basic Law; see Axel Werbke, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1965*, 27 ZaöRV 139, 144 (1967).

lation.⁴⁰ This provision prevents the executive from bypassing the law-making organs by lifting a subject-matter from the national to the international sphere. Thus, whenever a treaty obligation can only be fulfilled by an Act of Parliament, the German constitution requires the consent of Parliament before the executive may accept this international obligation.⁴¹

Obviously, the two categories of treaties mentioned are not mutually exclusive, but overlapping. Many "political" treaties will relate, in one way or the other, to matters of federal legislation.⁴²

It follows that under German constitutional law the Federal Government may, on its own, conclude only those international treaties in the form of sole *executive agreements* which it can fulfill by acting within its normal sphere of competence and which are not "political" within the meaning of article 59, paragraph 2. However, the executive has a considerable discretion when to submit an international agreement to the Bundestag.⁴³ Thus, the 1985 Schengen Agreement between the Benelux-states, Germany and France on the gradual abolition of controls at the common frontiers (Schengen I) was obviously not considered "political" for the purposes of article 59, as it was concluded in the form of an executive agreement. The "Convention applying the Schengen Agreement of 14 June 1985" (Schengen II), however, will be presented to the Bundestag.⁴⁴ It is recognized that executive agreements are possible where federal law has enabled the executive to issue regulations (Ver-

40. In the words of the Bundesverfassungsgericht, Judgment of July 29, 1952, BVerfG, 1 BVerfGE, 2 BvE 2/51 at 372, 389-90, as translated by Professor Wildhaber, *supra* note 34, at 51: "Only those treaties, the content of which, if it were a question not of international agreement, but of municipal regulation, would be matters of legislation and not administration." Cf. Hermann Meyer-Lindenberg, *Zum Begriff der Verträge, die sich auf Gegenstände der Bundesgesetzgebung beziehen*, in Festschrift für Jahrreiss 269 (1964).

41. Judgment of July 29, 1952, BVerfG, 1 BVerfGE, 2 BvE 2/51, at 372, 385; 2 MAUNZ-DÜRIG, *supra* note 24, art. 59, rdnr. 17; Rojahn, *supra* note 23, art. 59, margin note 26. So-called "Parallel-Abkommen," which need no new municipal legislation to be fulfilled vis-à-vis the other contracting parties, are therefore not exempt from the consent under art. 59, para. 2 of the Basic Law. For pertinent state practice, see FRITJOF REGEHR, *DIE VÖLKERRECHTLICHE VERTRAGSPRAXIS DER BUNDESREPUBLIK DEUTSCHLAND* 62 (1974); Hans D. Treviranus, *Inkraftsetzen völkerrechtlicher Vereinbarungen durch Rechtsverordnung*, NEUE JURISTISCHE WOCHENSCHRIFT 1948, 1951 (1983). See, e.g., RUDOLF, *supra* note 39, at 218; Helmut Steinberger, *Auswärtige Gewalt unter dem Grundgesetz*, in RECHTSENTWICKLUNGEN UNTER DEM BONNER GRUNDGESETZ 117 (1990); AK-Zuleeg, art. 59, margin note 63; FASTENRATH, *supra* note 5, at 222; BAYER, *supra* note 19; RUDOLF GEIGER, *GRUNDGESETZ UND VÖLKERRECHT* 158 (1985). *Contra* Meyer-Lindenberg, *supra* note 40, at 269, 270; 2 MAUNZ-DÜRIG, *supra* note 24, art. 59, margin note 44.

42. Rojahn, *supra* note 23, art. 59, margin note 28, with further references.

43. See WILDHABER, *supra* note 34, at 131, with further references to state practice.

44. Both Conventions are now reprinted in English in 30 I.L.M. 73 (1991). Until late 1990 no official German publication had reprinted the text of Schengen I.

ordnungen) having lower rank than a statute.⁴⁵

3. Article 82 GeschOBT (Rules of the Bundestag)

If Parliament rejects a treaty, this may create serious problems for the international treaty-making process, to the development of international law in general⁴⁶ and, last but not least, may entail substantial friction in the foreign relations of a nation. International agreements, negotiated between sovereign states, are different from other "proposed legislation." They are the result, not the starting point, of the international political process. One way or the other, therefore, many democracies have figured out procedural devices to allow a sort of "take-it-or-leave-it" approach for legislative approval.⁴⁷ The German procedure is laid down in article 82, paragraph 2 of the Rules of the House of the Bundestag. According to this provision, motions to amend or alter agreements under article 59 of the Basic Law are excluded. Members of the Bundestag have to vote on them *en bloc*. Of course, this limitation does not apply to the proposed bill of consent as such.⁴⁸

The question whether article 82, paragraph 2 is compatible with the parliamentary system established by the Grundgesetz⁴⁹ has never been squarely put to the Constitutional Court. Chances are, however, that the Court would uphold the (self-) restraint on democratic participation for the sake of Germany's ability to participate appropriately in the international norm-making process. A recent decision points in that direction.⁵⁰ There, individual members of the Bundestag had claimed that the application of article 82 Rules of the Bundestag to those provisions of the "Einigungsvertrag" (Treaty concerning the Unification of Germany between the Federal Republic of Germany and the German Democratic Republic),⁵¹ which effected amendments to the Grundgesetz, had vio-

45. See ALBERT BLECKMANN, *GRUNDGESETZ UND VÖLKERRECHT* 221 (1975); FASTENRATH, *supra* note 5, at 220.

46. Compare the failure of the International Trade Organization (ITO) and the stillbirth of the League of Nations.

47. As to the actual discussion in the United States to extend "fast-track" for the Uruguay-Round and to grant it for the negotiations over an FTA with Mexico and NAFTA see, e.g., the report of President Bush to Congress on March 1, 1991, requesting the extension of fast track procedures to facilitate passage of foreign trade legislation, *reprinted in* 2 U.S. Department of State Dispatch 150, 151 (1991).

48. Walter Wiese, *Verfassungsrechtliche Aspekte der Vorbehalte zu völkerrechtlichen Verträgen*, 1975 DEUTSCHES VERWALTUNGSBLATT [DVBl.] 73; Herman Mosler, *Die auswärtige Gewalt im Verfassungssystem der Bundesrepublik Deutschland*, in *FESTSCHRIFT FÜR BILFINGER* 243, 293 (1954).

49. I.e., with the right of members of the Bundestag enshrined in art. 38 of the Basic Law.

50. Decision of the Constitutional Court, 2d Senate, Sept. 18, 1990, 2 BvE 90.

51. *Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen*

lated their rights as members of the Bundestag to participate actively in the making of the law.⁵² While the thrust of petitioners' argument lay on the contention that another procedure should have been chosen to allow full parliamentary participation, the Constitutional Court dismissed the petitioners' claim without much argument.

Stating at the outset⁵³ that it was manifest that the rights of petitioners had not been infringed because the executive had the right to include provisions requiring changes of the Grundgesetz in an international treaty, and that accordingly article 59, paragraph 2 of the Basic Law was applicable, the Court did not even address the issue of whether article 82 GeschOBT was compatible with article 38 of the Basic Law, in particular when applied to treaties requiring constitutional amendments. A lot could have been said for justifying the Court's result in this particular case.⁵⁴

4. The Right to Initiate Legislative Proceedings with Regard to Treaties

Under article 76, paragraph 1 of the Basic Law, bills can be introduced in the Bundestag by the Federal Government, by members of the Bundestag or by the Bundesrat. Notwithstanding the unambiguous wording of this provision, both the Federal Government⁵⁵ and scholarly writers⁵⁶ have advocated that only the executive has the power to intro-

Demokratischen Republik über die Herstellung der Einheit Deutschlands, 1990 Bundesgesetzblatt [Federal Gazette] [BGBl] II 889-1238.

52. It is remarkable that in its counter-memorial, the Federal Government and the President of the Bundestag took the position that article 82 GeschOBT merely fulfilled a constitutional command. See Decision of the Court, *supra* note 50, *sub* A II.

53. *Id. sub* B II.

54. See in particular the provision of art. 23 of the Basic Law, and the "Wiedervereinigungsgebot" (constitutional command to use every peaceful means to allow a re-unification of Germany, if the people concerned so wish), enshrined in the preamble and recognized by the Constitutional Court. See, e.g., Judgment of June 19, 1973, BVerfG, 36 BVerfGE, 2 BvF 1/73, at 1. In the authors' view, art. 82 GeschOBT is compatible with the rights of members of Parliament to participate in the law-making process insofar as a treaty (under art. 59, para. 2) does not require constitutional changes. Otherwise, considerable doubts remain. The changing of the Constitution is a particularly important legislative act. Therefore the Basic Law requires, for instance, that any such change obtains a 2/3 majority; some changes are completely outlawed by the Basic Law. It seems highly questionable, then, to restrain the usual rights of members of the Bundestag in the law-making process with regard to constitutional changes.

55. See for two recent examples Michael J. Hahn, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1987*, 49 ZaöRV 520, 528 (1989); Stefan Oeter, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1984*, 46 ZaöRV 295, 299-300 (1986).

56. AK-Zuleeg art. 59, margin notes 22; Hans D. Treviranus, *Vorbehalte zu normativen völkerrechtlichen Verträgen in der Staatspraxis der Bundesrepublik Deutschland*, 1976 DIE ÖFFENTLICHE VERWALTUNG [DÖV] 326, 327; Brun-Otto Bryde, in 3 GRUNDGESETZKOMMENTAR, *supra* note 23, art. 76, margin note 5; 2 HANS VON MANGOLDT & FRIEDRICH KEIN, DAS BONNER GRUNDGESETZ art. 76 III 2 c (2d ed. 1964).

duce legislation approving treaties. This position is based on the understanding that foreign affairs ought to be the *domaine réservé* of the executive branch of government.⁵⁷ As a matter of law, this argument probably does not withstand scrutiny. Neither is article 76 of the Basic Law subject to any explicit exception, nor does a systematic or teleological interpretation of the foreign relations power under the Basic Law require the assumption of an implicit command to depart from the plain text of the Constitution. The act of consent simply *allows* the executive to bind the Federal Republic by entering into treaty-obligations; it by no means requires the executive to do so.⁵⁸ Politically, an initiative by the Bundestag to consent on its own to an international treaty certainly creates pressure to go ahead with the ratification of an international agreement. Such exercise of political influence by the Bundestag in matters which lie within the executive's sole competence is by no means alien to the parliamentary system of the Basic Law. Hence, in the absence of strong and convincing arguments to the contrary, a departure from the provision of article 76 of the Basic Law as to bills of consent is not justifiable.

Accordingly, no legal objections were raised when, in 1951, the parliamentary groups (Fraktionen) of several political parties initiated the act of consent to the European Convention on Human Rights.⁵⁹ Only later did the government raise doubts as to the legality of those activities.⁶⁰

5. In Particular: Reservations⁶¹

The Basic Law does not explicitly mention the right of the federal legislature to give its assent on condition that the Federal Government ratify the treaty only subject to a certain reservation. However, on several occasions, the Bundestag has qualified its approval of a treaty in this way.⁶² For instance, in the act of consent to the European Convention on Extradition and on Mutual Assistance in Criminal Matters, the Bundestag expresses in article 1 its consent "as qualified" by article 2 (nach Maßgabe des Artikels 2). Article 2 contains the wording of the

57. See in particular Mosler, *supra* note 48, at 243.

58. BLECKMANN, *supra* note 45, at 213-14; Rojahn, *supra* note 23, art. 59, margin note 13, with further references.

59. BT-Drs. 1/2110 (4/4/1951); BT-Drs. 1/3338 (4/30/1952).

60. See Hahn, *supra* note 55, at 520, 528; Stefan Forch, *Die Vorlage von Gesetzentwürfen zu völkerrechtlichen Verträgen aus der Mitte des Bundestages*, 1984 JURISTISCHE RUNDSCHAU [JR] 366. For another example of state practice see BT-Drs. IV/3004, 3005 (1/27/1965).

61. See Wiese, *supra* note 48, at 74; Hans D. Jarass, *Die Erklärung von Vorbehalten zu völkerrechtlichen Verträgen*, 1975 DÖV 117.

62. See Treviranus, *supra* note 56, at 325, 326, for references to state practice.

reservation the Federal Government had informed the legislature it would declare, together with the ratification.⁶³ Such actions constitute a legal and legitimate exercise of the Bundestag's right to legislate as it deems proper. If the executive ratified the treaty without the reservations required by Parliament, it would become fully binding internationally.⁶⁴ So far, reservations attached to the *initial* declaration of ratification have always been agreed upon by the executive and the Bundestag,⁶⁵ although there had been several instances where the Federal Government had to be pushed to include those reservations into its bill.⁶⁶ It seems that the Bundesrat has been more active in that regard than the Bundestag.⁶⁷ Thus, in 1971 its Legal Committee passed guidelines dealing extensively with the questions of legislative assent to a treaty, to which all parties concerned adhere.⁶⁸ The most important provisions can be summarized as follows: If, as a matter of public international law, the Federal Republic is entitled to declare a reservation upon ratification, the legislative organs may give their consent only on condition that a specific reservation is made. Equally, consent may be linked to the Federal Republic's ratification of a treaty without reservation. If the text of a treaty explicitly mentions certain reservations and the legislative organs do not take a position in that regard, the government is free to deposit a reservation as it deems proper. To the contrary, if the government wants to make a reservation not expressly provided for in the treaty, it has to notify the legislative organs which may or may not qualify their consent accordingly and with binding effect for the Federal Government. If upon such governmental notice the legislature does not qualify its consent, the Federal Government may act in accordance with its prior notification. Also, if the executive has informed the legislative

63. See 1964 BGBl II 1369; for the legislative history, see BT-Drs. IV/328, at 26, 50.

64. In order to avoid international liability, such a reservation would have to be legal under international law, i.e., it had to be permitted by a specific treaty provision or by general public international law. See generally FRANK HORN, RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES (1988); ROLF KÜHNER, VORBEHALTE ZU MULTILATERALEN VÖLKERRECHTLICHEN VERTRÄGEN (1986), with further references.

65. Wiese, *supra* note 48, at 73, 74; Treviranus, *supra* note 56, at 326.

66. Treviranus, *supra* note 56, reports four instances between 1960 and 1975 in which the reservations were not included in the act of consent.

67. For pertinent actions of the Bundesrat see Platz & Lörcher, *supra* note 32, at 641, with further references; Meinhard Hilf & Kay Hailbronner, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1966*, 29 ZaöRV 71, 92 (1969); Heinz E. Kitz & Nikolaus Rothenbücher, *Völkerrechtliche Praxis der Bundesrepublik Deutschland in den Jahren 1969 und 1970*, 33 ZaöRV 686, 687 (1973); Rudolf Dolzer & Georgios Papadimitru, *Völkerrechtliche Praxis der Bundesrepublik Deutschland in den Jahren 1971 und 1972*, 34 ZaöRV 503, 508 (1974).

68. Leitsätze des Rechtsausschusses des Bundesrats zu mit völkerrechtlichen Verträgen zusammenhängenden Rechtsfragen (June 7/8, 1971), reprinted in FASTENRATH, *supra* note 5, at 289 [hereinafter Leitsätze].

organs of a specific conduct with regard to the declaration of a reservation, it has the obligation to follow that course. If new circumstances arise that require a change of position, Bundestag and Bundesrat must receive notice of this development. Finally, all reservations have to be published in the Federal Gazette.⁶⁹

If at some later point the Federal Government would deem it appropriate to make a reservation to a treaty, to which the Bundestag has unconditionally consented, the Basic Law does not grant the Bundestag the power to object.⁷⁰ Finally, it is well established that the Federal Government has the power to withhold or decline ratification, despite the consent of the legislative organs.⁷¹

6. Determination of Direct Applicability and Rank

a. Applicability

Since Triepel's fundamental work on the subject,⁷² the majority of German constitutional lawyers had adhered to the theory that provisions of international compacts are capable of having effect in the domestic legal order only through transformation into municipal law. In their understanding, the acts of consent provide the necessary new domestic legal basis needed for international treaties to be applied municipally vis-à-vis the subjects of German law.⁷³ In some of its early cases the Constitutional Court seemed to share this position.⁷⁴ This does not hold true any more:⁷⁵ The Court now clearly sides with the so-called doctrine of adoption (Adoptionslehre, Vollzugslehre).⁷⁶ This theory perceives the act of consent as permitting the internal application of a treaty by opening the domestic legal order for the "influx" of international treaty rules.⁷⁷

69. Before the passage of these guidelines the Bundestag and the Federal Government had sometimes informally agreed upon making a reservation. See Treviranus, *supra* note 56.

70. See Leitsätze, *supra* note 68, para. 2. *Contra* Kokott, *supra* note 20, at 503, 514; Jarass, *supra* note 61, at 115, 120, who is of the opinion that every reservation needs the consent of the Bundestag.

71. BAADE, *supra* note 20, at 90; Wilhelm Grewe, 12 VVDStRL 260 (1954); RUDOLF, *supra* note 41, at 204; Rojahn, *supra* note 23, art. 59, margin note 13.

72. HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* (1899).

73. See, e.g., 2 MAUNZ-DÜRIG, *supra* note 24, art. 59, margin notes 22-25; RUDOLF, *supra* note 41, at 205-11 with further references.

74. Judgment of July 30, 1952, BVerfG, 1 BVerfGE, 1 BvE 1/52, at 396, 411; Judgment of Mar. 21, 1957, BVerfG, 6 BVerfGE, 1 BvR 65/54, at 290, 294; see also the analysis of Helmut Steinberger, *Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen*, 48 ZaöRV 1,4 (1988). Compare the position of the High Court in Civil Matters, Judgment of Jan. 10, 1966, Bundesgerichtshof [BGH], 45 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ], III ZR 70/64, at 46, 49.

75. See Steinberger, *supra* note 74, at 3-6.

76. Judgment of Dec. 13, 1977, BVerfG, 46 BVerfGE, 2 BvM 1/76, at 342, 363.

77. As has been rightly pointed out, this doctrine explains more coherently and consistently the

Hence an act of consent adopted by the Bundestag has a double effect.⁷⁸ On the one hand, it enables the Federal President to ratify the treaty and to make it binding for the Federal Republic internationally. On the other hand, the law opens up the German legal system to the norms of the treaty. These rules may then become applicable in the same way as domestic law.⁷⁹ Of course, this effect does not take place if a treaty falls within the legislative competence of the Länder, which regularly will be the case with cultural agreements. It is then up to the Länder to render provisions of these treaties applicable.⁸⁰

With the exception just mentioned, the introduction of treaty provisions into the German legal order takes place via the act of consent. It follows that the rank of those rules in German law is that of a federal statute.⁸¹ Treaty provisions will be applied and interpreted by the courts and the various administrative bodies of the Federation and the Länder.⁸² However, for practical purposes, the legislature has the possibility to determine *ab initio* the rank and future effect of a treaty.

In particular, an act of consent under article 59, paragraph 2 of the Basic Law may determine whether a treaty is to be directly applicable or not. Only in exceptional cases an international agreement will contain a specific obligation as to what method of implementation a contracting party must use to comply with its treaty obligations. From an international law perspective, it is therefore up to the competent national authorities to determine what effect the treaty provisions ought to have in the domestic legal order. However, if an act of consent under article 59, paragraph 2 of the Basic Law contains the clear command that a specific treaty provision is applicable or not, German courts and executive bodies

effect of entry into force of treaties, their interpretation and other problems. See Herman Mosler, *Das Völkerrecht in der Praxis der deutschen Gerichte*, in JURISTISCHE STUDIENGESellschaft KARLSRUHE 13 (1957); Erich Kaufmann, *Normenkontrollverfahren und völkerrechtlicher Vertrag*, in GS W. JELLINEK 445-56 (1955); Karl J. Partsch, *Die Anwendung des Völkerrechts im innerstaatlichen Recht*, 6 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 161-62 (1964); CHRISTIAN GLORIA, *DAS STEUERLICHE VERSTÄNDIGUNGSVERFAHREN* 43-44 (1988); MANFRED SCHERF, *DIE UMSETZUNG DES INTERNATIONALEN PAKTES ÜBER WIRTSCHAFTLICHE, SOZIALE UND KULTURELLE RECHTE VOM 19. DEZEMBER 1966 IN DIE RECHTSORDNUNG DER BUNDESREPUBLIK DEUTSCHLAND* 33 (1990), with further references.

78. See generally Frederic A. Mann, *Zur Wirkung des Zustimmungsgesetzes nach Artikel 59 Absatz 2 des Grundgesetzes*, 18 JAHRBUCH FÜR INTERNATIONALES RECHT [JIR] (GYIL) 374 (1975).

79. Frowein, *supra* note 17, at 63, 65-66. The act of consent will usually become law before the international treaty has become internationally binding; nevertheless, the treaty only has impact on the domestic legal order after its entering into force on the international level. Cf. Judgment of July 30, 1952, BVerfG, 1 BVerfGE, 1 BvF 1/52, at 396, 411.

80. RUDOLF, *supra* note 41, at 227.

81. See Partsch, *supra* note 77, at 13.

82. See *infra* III, C., 2. For the status of treaties in the German municipal system see Frowein, *supra* note 17.

are bound in that respect. One of the rare examples in which the Bundestag chose to exercise its pertinent power related to the European Convention on the Law Applicable to Contractual Obligations.⁸³ Article 1, paragraph 2 of the act of consent to this convention states that assent to the treaty is given under the condition (mit der Maßgabe) that the provisions contained in articles 1 through 21 of the Agreement are not directly applicable. Although this is contrary to well-established tradition,⁸⁴ there is no question with regard to the binding effect of this formulation on German courts. The Convention certainly does not have the status of EEC law which is directly applicable and takes precedence over conflicting German law.⁸⁵ Even if one takes into account the Convention's function to promote European legal integration within the EC system, a contracting party's freedom to choose how to implement the treaty domestically is not diminished. The drafting history reveals that the contracting parties did not consider one specific form of implementation to be required by the Convention.⁸⁶

To the contrary, the Bundestag's mere articulation of a specific understanding of treaty provisions will not bind courts, although as a matter of fact, it will exercise considerable influence on the judiciary when called upon to decide a specific case.⁸⁷ For example, the Bundestag's acceptance of the Federal Government's view that article 3, paragraph 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁸⁸ only establishes inter-state obligations, thus not being self-executing and invocable by individuals, could be disregarded by a court, if it was convinced that a correct treaty interpreta-

83. *Übereinkommen vom 19. Juni 1980 über das auf vertragliche Schuldverhältnisse anzuwendende Recht*, 1986 BGBl II 809.

84. See Jost Delbrück, *Multilaterale Staatesverträge erga omnes und deren Inkorporation in nationale IPR-Kodifikationen - Vor- und Nachteile einer solchen Rezeption*, 27 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 147; Jochen A. Frowein, *Statement on the occasion of the annual meeting of the German Society of International Law*, 27 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 172 (1986).

85. See the two leading cases of the ECJ which established those principles: Case 26/62, Van Gend & Loos, 1963 E.C.R. 16 (direct applicability); Case 6/64, Costa/ENEL, 1964 E.C.R. 585 (supremacy); see also Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 45 AM. J. INT'L L. 1 (1981).

86. See the Report by Professors Giuliano and Lagarde, *reprinted in* 1980 O.J. (C 282) 12, BT Drs. 10/503, 33. Unfortunately, it seems also clear, that the German "Sonderweg" in this matter was motivated by the desire to keep their own efforts to codify the German approach to Conflicts of Law free from external influences. See generally the reports by Professors Matscher, Siehr and Delbrück and the following discussion on the question of *Multilateral Conventions erga omnes and Their Incorporation into National Codifications of Private International Law - Advantages and Disadvantages*, 27 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 1 (1986), with further references.

87. See *infra* III, C., 2.

88. 1990 BGBl II 246.

tion⁸⁹ commands a different outcome.⁹⁰ That the Federal Government's view was contained in an interpretative declaration notified to other contracting parties⁹¹ would not alter that result. It is obvious that the pertinent German law goes further in protecting individuals from being returned to a home state practicing torture;⁹² still, article 3 of the convention may in certain circumstances create an enforceable right for individuals not to be returned to a state threatening them with torture.⁹³ We will cover the relationship between the executive branch and the judiciary in greater detail *infra*, under III, C.

b. Rank

Parliament may also determine the rank of treaty provisions in the municipal legal system. In several areas German legislation has provided that precedence should be given to treaty provisions over federal legislation. For instance, Section 2 of the German Tax Code (Abgabenerdnung) states that "treaties. . . concluded under article 59, paragraph 2 of the Basic Law concerning tax matters shall take precedence over tax legislation if they have become immediately applicable municipal law." Similar provisions can be found in other areas of law. The Ausländergesetz (law on aliens) provides that some of its provisions are not applicable to specific categories of aliens or may be superseded by treaty.⁹⁴ The same phenomenon is to be found in the law of extradition. Paragraph 1 section 3 of the Law on International Legal Co-Operation in Criminal Matters⁹⁵ explicitly provides that provisions of treaties supersede its provisions, insofar as they have become directly applicable municipal law. As long as the legislature does not clearly indicate a departure from these rules, treaties supersede "ordinary" legislation in those fields.

89. According to the rules laid down in the Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31-33, 1155 UNTS 331. See, e.g., Judgment of May 4, 1955, BVerfG, 4 BVerfGE, 1 BvF 1/55, at 157, 168; Judgment of June 25, 1969, BGH, 52 BGHZ, 1 ZR 15/67, at 216, 220; Judgment of July 30, 1985, Bundesfinanzhof [BFH], Sammlung der Entscheidungen und Gutachten des Bundesfinanzhofs 144 [BFHE], VII R 142/82, at 297; Judgment of Oct. 9, 1985, BFH, 145 BFHE, No. 1 R 128/80, at 341.

90. See as an example the Decision of July 25, 1967, Bundespatentgericht [High Court for Patent Law] [BPatG], Gewerblicher Rechtsschutz und Urheberrecht-Internationaler Teil [GRUR Int.], 1968, at 132.

91. As has been the case here; see the letter of transmission (Denkschrift) to the legislative organs, BR-Drs. 385/89, at 24.

92. See, e.g., Kay Hailbronner & Georg Ress, *Zur Zeichnung der UN-Folterkonvention durch die Bundesrepublik Deutschland*, 1986 Europäische Grundrechte Zeitschrift [EuGRZ] 641.

93. *Id.* at 648.

94. See para. 55, sec. 3; para. 49, sec. 1, no. 3; para. 2, sec. 2, no. 3.

95. Gesetz über die Internationale Rechtshilfe in Strafsachen (IRG), vom 23. Dezember 1982, BGBl. 1982 I 2071.

7. Interpretative Declarations by the Parliament

Although, as a matter of political reality, the Federal Government will stay in close touch with the parliamentary groups which form the governing majority on all matters of foreign policy,⁹⁶ it is nevertheless a limited role that is left to the Bundestag. Ordinarily, the "take-it-or-leave-it" option will not leave a reasonable choice. It is always the executive which sets the agenda and which fashions the subject matter according to its discretion. Notwithstanding this general rule, there has been a limited number of cases where the Bundestag overcame its passive role and considerably influenced German foreign policy.

The first such occasion arose in 1963 when the Bundestag added a preamble to the bill of consent to the French-German Treaty of Friendship of 1963. This preamble emphasized the relationship with the United States and reaffirmed the German commitment both to NATO and to a European Community open to all European States willing to join, including the United Kingdom. Furthermore, the preamble supported free trade between the EEC, the UK and the United States within the framework of GATT and repeated the well-known German position concerning the unification of Germany and the right of its people to self-determination.⁹⁷ During the parliamentary discussions it was stressed that this preamble could not be viewed as a non-binding policy statement of the Bundestag, but rather that its provisions were binding on the Fed-

96. But see the almost successful attempt by the then opposition to replace Chancellor Brandt by a vote of no-confidence, GG art. 67. One of the reasons for this effort was Brandt's foreign policy vis-à-vis the former GDR, Poland and the USSR.

97. In der Überzeugung, daß der <deutsch-französische Vertrag> . . . die Aussöhnung und Freundschaft zwischen dem deutschen und französischen Volk vertiefen und ausgestalten wird; mit der Feststellung, daß durch diesen Vertrag die Rechte und Pflichten aus den von der Bundesrepublik abgeschlossenen multilateralen Verträgen unberührt bleiben; mit dem Willen, durch die Anwendung dieses Vertrages die großen Ziele zu fördern, die die Bundesrepublik Deutschland in Gemeinschaft mit den anderen ihr verbündeten Staaten seit Jahren anstrebt und die ihre Politik bestimmen, nämlich die Erhaltung und Festigung des Zusammenschlusses der freien Völker, insbesondere einer engen Partnerschaft zwischen Europa und den Vereinigten Staaten von Amerika, die Verwirklichung des Selbstbestimmungsrechts für das deutsche Volk und die Wiederherstellung der deutschen Einheit, die gemeinsame Verteidigung im Rahmen des nordatlantischen Bündnisses und die Integrierung der Streitkräfte der in diesem Bündnis zusammengeschlossenen Staaten, die Einigung Europas auf dem durch die Schaffung der Europäischen Gemeinschaft begangenen Wege unter Einbeziehung Großbritanniens und anderer zum Beitritt gewillter Staaten und die weitere Stärkung dieser Gemeinschaften, den Abbau von Handelsschranken durch Verhandlungen zwischen der Europäischen Wirtschaftsgemeinschaft, Großbritannien und den Vereinigten Staaten von Amerika sowie anderer Staaten im Rahmen des <GATT> . . . ; in dem Bewußtsein, daß eine deutsch-französische Zusammenarbeit, die sich von diesen Zielen leiten läßt, allen Völkern Nutzen bringt, dem Frieden in der Welt dienen und dadurch zugleich dem deutschen und französischen Volke zum Wohl gereichen wird; hat der Bundestag das folgende Gesetz beschlossen . . .

eral Government's foreign policy.⁹⁸ However, both the representatives of the Federal Government and the Members of the Bundestag agreed that the German-French treaty was not in conflict with other multilateral treaty obligations, and even if it were, the latter would take precedence.⁹⁹ Despite the considerable political impact of these domestic discussions, France was never notified of this amendment to the act of consent.¹⁰⁰

The other case where the Bundestag played a more prominent role than usual was in German-Polish relations. As is well known, the new "Ostpolitik" towards Poland was not unequivocally endorsed in all political quarters of the Federal Republic. In particular, the western border of the then People's Republic of Poland was something difficult to accept for a great number of Germans, considering that large areas east of the Oder-Neisse line had for several hundred years been part of German territory. However, in order to improve relations with Poland, it was a *conditio sine qua non* to assure the Polish that their borders were not put into question by the Federal Republic. Thus, in article 1 (1) of the Treaty of Warsaw, the Federal Republic and Poland agree that the Oder-Neisse line constitutes Poland's western border. The careful wording leaves it open as to how Poland acquired title to the territory.¹⁰¹ In paragraph 2 of article 1, the two contracting parties declare the inviolability of their respective state frontiers. Also, in the Treaty between the USSR and the Federal Republic,¹⁰² the contracting parties declared the inviolability of the existing frontiers in Europe. Still, the Federal Republic made it clear that it considered this statement not to be in conflict with the right of the German people to reunify by peaceful means. Also, in both treaties the Federal Republic emphasized that it was acting on its own behalf only, and not for Germany as whole. The western Allied Powers always supported this position.¹⁰³

98. See the remarks of the Member of the Bundestag (MdB) Schmid, Verhandlungen des Deutschen Bundestages, 4. Wahlperiode, 77. Sitzung, Stenographischer Bericht [transcripts of the discussions of the Bundestag during its 4th term] 3745.

99. Cf. Michael Bothe, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1963*, 25 ZaöRV 277-81 (1965).

100. See Wiese, *supra* note 48, at 74; GERHARD H. REICHEL, DIE AUSWÄRTIGE GEWALT NACH DEM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND VOM 23.5.1949, at 80 (1967).

101. See for these intriguing problems Jochen A. Frowein, *Legal Problems of the German Ostpolitik*, 23 INT'L & COMP. L.Q. 105, 110 (1974); BENNO ZÜNDORF, DIE OSTVERTRÄGE 61 (1979); CLAUS ARNDT, DIE VERTRÄGE VON MOSKAU UND WARSCHAU 155 (1982).

102. See Helmut Steinberger, *Völkerrechtliche Aspekte des deutsch-sowjetischen Vertragswerkes vom 12. August 1970*, 31 ZaöRV 63 (1971).

103. See, e.g., the exchange of letters between the Government of the Federal Republic of Germany and the three Allied Powers on November 19, 1970 (concerning the Treaty of Warsaw), reprinted in PRESSE-UND INFORMATIONSAMT DER BUNDESREGIERUNG, DOKUMENTATION ZUR OSTPOLITIK DER BUNDESREGIERUNG, VERTRÄGE UND VEREINBARUNGEN (12th ed. 1988).

In order to assure parliamentary consent to the treaties, all three parliamentary groups jointly introduced a resolution meant to be of value for the interpretation of the treaties.¹⁰⁴ Paragraph 2 of that resolution states that the treaties take the existing borders as given (“Dabei gehen die Verträge von den heute tatsächlich bestehenden Grenzen aus”) and exclude the unilateral change of these frontiers. However, these treaty provisions were not prejudicing and preempting (“nehmen nicht vorweg”) a peace treaty with Germany as a whole and did not create a legal foundation for the existing frontiers (“schaffen keine Rechtsgrundlage für die heute bestehenden Grenzen”).

Both Poland and the USSR were notified of this resolution by the Federal Minister for Foreign Affairs who explained that the resolution was in accordance with the text of the treaties.¹⁰⁵ Seemingly, it was only vis-à-vis the Soviet Union that the German Minister also stated that the resolution contained the official position of the Federal Republic of Germany. No such statement has been reported to have been made to the Polish side. Neither the Polish nor the Soviet Government objected to the resolution.

Legal scholars have discussed *in extenso* whether the resolution was an instrument which was made by the Federal Republic in connection with the conclusion of the treaties and accepted by Poland and the USSR, respectively, as an instrument related to the treaties (article 31 1(b) of the Vienna Convention),¹⁰⁶ or whether it was a supplementary means of interpretation in the sense of article 32 of the Vienna Convention.¹⁰⁷ The Federal Government clearly took the latter view.¹⁰⁸

This interesting discussion has become obsolete due to the unification of Germany and the settlement of German-Polish differences with regard to Poland's western frontier. Again, the German Bundestag played a significant role in that process. On November 8, 1989, even before the Wall came down, the Bundestag passed a resolution¹⁰⁹ stating

104. Passed May 17, 1972; see *Verhandlungen des Deutschen Bundestages*, 6. Wahlperiode, 187. Sitzung, Stenographischer Bericht, 17. Mai 1972, at 10943<C>; the text of the resolution is reprinted at 10960.

105. See the answer of the Federal Government to a Parliamentary Inquiry, BT-Drs. VI/3540. There, the Government describes in some detail how the Ambassador of the USSR and the Head of the Polish Trade Mission were briefed. See also Jochen A. Frowein, *Zur verfassungsrechtlichen Beurteilung des Warschauer Vertrages*, 18 JIR (GYIL) 11 (1975).

106. In this sense, e.g., the then Chairman of the Committee on Foreign Relations of the Bundestag, Claus Arndt, *supra* note 101, at 64.

107. See, e.g., Frowein, *supra* note 101, at 113.

108. See response of a Junior Minister for Foreign Affairs to a Parliamentary Inquiry on Nov. 30, 1979, as reported by Axel Berg, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1979*, 41 ZaöRV 591 (1981).

109. Introduced, *inter alia*, by the parliamentary group who 20 years earlier had formed the

that the Treaty of Warsaw was the basis of the relations between the Federal Republic and Poland. Quoting the Treaty of Warsaw, the resolution stated the inviolability of existing frontiers and the respect for territorial integrity. It added that the Polish people, having been the first victims of the war started by Hitler's Germany, ought to know that their right to live within secure borders would not be put into question by Germans. This resolution was expressly mentioned by the German Minister of Foreign Affairs to his Polish counterpart on February 6, 1990.¹¹⁰ On March 8, 1990, the Bundestag again passed a resolution calling upon the executive branches of both German states and the Parliament of the GDR to recognize the right of the Polish people to live within secure borders by abstaining from any territorial claim.¹¹¹ On April 30, 1990, a joint resolution of the Executive Committees of the two German Parliaments again proposed a guarantee of Poland's western frontier.¹¹² The culmination of this development was a resolution of the Bundestag, introduced by all political groups, in which the German Parliament expresses its wish that questions concerning the German-Polish frontier would be settled in an international treaty on the basis of the determinations made in the Treaty of Warsaw and two treaties concluded between the former GDR and Poland.¹¹³ The Federal Government was called upon to convey the resolution as the expression of its own will to the Republic of Poland.

Even without regard to the Treaty of Warsaw, a very strong case can be made that these resolutions, together with numerous declarations of the Federal Government which often referred to the Bundestag's pertinent activities,¹¹⁴ were binding for the United Germany as a matter of international law. Thus, the Treaty concerning Poland's western border

opposition. See BT-Drs. 11/5589. For the acceptance by the Bundestag see Verhandlungen des Deutschen Bundestages, 11. Wahlperiode, 173. Sitzung, Stenographischer Bericht, 8. Nov. 1989, at 13062 <D>.

110. Bulletin 1990, at 185.

111. Text of the proposed resolution in BT-Drs. 11/6579; it was accepted by a nearly unanimous vote, BT-PIPr. 11. Wahlperiode, 200. Sitzung, at 15429 <A>.

112. Bulletin 1990, at 394-95.

113. The resolution describes the frontier in great detail, in a manner suitable for an international agreement, BT-Drs. 11/7465, which was accepted by a vote of 487 to 15, BT-PIPr. 11. Wahlperiode, 217. Sitzung, 21. Juni 1990, at 17277 <C>. In fact, the German-Polish Treaty of Nov. 14, 1990 almost literally takes over the formulations used in the resolution. See Bulletin 1990, at 1394.

114. See, *inter alia*, Statement by the Minister for Foreign Affairs at the 44th session of the U.N. GAOR, U.N. Doc. A/44/PV.8 (Sept. 27, 1989); the speech of Chancellor Kohl on January 17, 1990 in Paris, Bulletin 1990, at 61; the speech of the Minister for Foreign Affairs on the occasion of the visit of the Polish Minister for Foreign Affairs, February 6, 1990, Bulletin 1990, at 185; the speech of the Chancellor in the Bundestag on March 8, 1990, Bulletin 1990, at 265; the speech of the Minister for Foreign Affairs before the Assembly of the Western European Union, Bulletin 1990, at 309.

of 1990, important as it was politically, only reaffirmed the settled legal status as a matter of international law.

II. THE PARTICIPATION OF PARLIAMENT IN THE TERMINATION OF TREATIES

A. *De Jure Termination of Treaties*

Whenever a treaty is terminated or suspended under international law, the treaty will lose all its effects in the municipal legal system as well. From the perspective of the now prevailing "Vollzugslehre" this goes without saying.¹¹⁵ However, this result is conceded by all other theories with different explanations.¹¹⁶ This analysis is, of course, not applicable if the "act of consent" separates the domestic applicability of treaty provisions from the coming into force of the international agreement in question.¹¹⁷

The question is whether, according to the Basic Law's foreign relations provisions, the Bundestag has a say in the treaty termination process. Some argue that article 59, paragraph 2 of the Basic Law relating to treaty-making applies analogously to the *actus contrarius* it expressly governs.¹¹⁸ A lot can be said for this view; however, the Constitutional Court tends to perceive the right of the Bundestag to participate in foreign affairs as limited.¹¹⁹

The text of the Basic Law determines what branch of government is in charge of a given subject-matter. Hence, according to the prevailing view, the Bundestag having only been accorded the power to participate in the treaty-making process, cannot claim a right also to participate in

115. See *supra* text accompanying note 76.

116. KARL DOEHRING, *DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND* 195 (1984); GEIGER, *supra* note 41, at 196-97 (1985).

117. This has very rarely been the case. See, e.g., the act relating to the Convention relating to the Status of Refugees which ordered its provisions to come into force without regard to the entering into force of the Convention as a matter of public international law. See 1953 BGBl II 559, 560. The pertinent provisions came into effect in Germany Dec. 24, 1953, while the Convention only became internationally binding on April 22, 1954. Cf. 1954 BGBl II 613; Gustav Boehmer & Hannfried Walter, *Völkerrechtliche Praxis der Bundesrepublik Deutschland in den Jahren 1949-1955*, 23 ZaöRV 194 (1963).

118. See Friesenhahn, *supra* note 13, at 9; BAYER, *supra* note 19; compare the remarks of Doehring, *supra* note 9.

119. Eine Erweiterung der dem Bundestag durch Artikel 59 Abs.2 Satz 1 GG eingeräumten Mitwirkungsbefugnisse bei der staatlichen Willensbindung im Bereich der auswärtigen Beziehungen über den Kreis der dort genannten völkerrechtlichen Akte hinaus stellte einen Einbruch in zentrale Geltungsbereiche der Exekutive dar und liefe dem vom Grundgesetz normierten Gefüge der Verteilung von Macht, Verantwortung und Kontrolle zuwider. Judgment of July 17, 1984, BVerfG, 68 BVerfGE, 2 BvE 13/83, at 1, Leitsatz 1. a) (emphasis added).

the treaty-terminating process.¹²⁰ Accordingly, the Federal Government has terminated treaties without participation of the legislative organs.¹²¹

B. *Termination of Application by Conflicting Later Legislation*

The legislature may enact statutes expressly or impliedly incompatible with an earlier treaty. By doing so, Parliament again excludes the treaty provisions from the German legal order to which they gained access through the prior act of consent.¹²² Such an action would entail Germany's international responsibility. As it must be presumed that lawmakers intend to avoid such a result, a statute has to be interpreted, whenever possible, in accordance with Germany's international obligations. Thus, the Constitutional Court has held that legislation will only be understood as contrary to prior international treaty obligations if this is unequivocally expressed in the wording of the pertinent statute:

[All] statutes are to be interpreted and applied in accordance with the Federal Republic of Germany's international legal obligations, even if they have been enacted after the coming into force of a valid international agreement; absent a clear intent to the contrary, it cannot be assumed that the legislature wanted to deviate from international legal obligations or that it wanted to render the violation of the Federal Republic of Germany's international legal obligations possible.¹²³

III. THE IMPLEMENTATION OF TREATIES

A. *The Role of the Legislature*

The legislature plays a marginal role in the implementation of treaties. Besides the truly exceptional weapons like a "vote of no confidence" or conflicting later legislation,¹²⁴ the Bundestag's main possibility for influencing the Federal Republic's treaty practice is the critical discussion of pertinent issues in plenary sessions and committees. Both individual

120. See, e.g., BLECKMANN, *supra* note 45. *Contra* Friesenhahn, *supra* note 13, at 70; FASTENRATH, *supra* note 5, at 219; GEIGER, *supra* note 41, at 158.

121. Compare the termination of the Convention on the Suppression of the Circulation of and Traffic in Obscene Publications of September 12, 1924, 1974 BGBl II 912; see also Berg, *supra* note 108, at 602-03.

122. See Judgment of Dec. 17, 1975, BVerfG, 41 BVerfGE, 1 BvR 548/68, at 88, 121, where the Court expressly states that the Basic Law's "Völkerrechtsfreundlichkeit" does not go so far as to require the law-making organs to refrain from passing laws in conflict with treaty obligations.

123. Gesetze . . . sind im Einklang mit den völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland auszulegen und anzuwenden, selbst wenn sie zeitlich später erlassen worden sind als ein geltender völkerrechtlicher Vertrag; denn es ist nicht anzunehmen, daß der Gesetzgeber, sofern er dies nicht klar bekundet hat, von völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland abweichen oder die Verletzung solcher Verpflichtungen ermöglichen will.

Judgment of Mar. 26, 1987, BVerfG, 74 BVerfGE, 2 BvR 419/80, 740/81, 284/85, at 358, 370.

124. See *supra* note 96 and accompanying text.

Members of the Bundestag and parliamentary groups exercise their right to initiate parliamentary inquiries relating to treaty matters. The Federal Government has to answer the questions raised. Also, the Committees for Foreign Affairs of both the Bundestag and the Bundesrat do exercise considerable influence on the pertinent decision-making process.

Despite the fact that this paper does not deal with the relationship between EC law and German law, a special case deserves mentioning. According to article 2, paragraphs 2 through 4 of the Act of Consent to the Single European Act, the Bundesrat participates in all stages of the Federal Republic's involvement in the creation of EC legislation which deals with the Länders' exclusive legislative domain. If the Federal Government does not follow the Bundesrat's position, it has to explain in writing the reasons for doing so. Also, the Federal Government has agreed to be accompanied to sessions of the EC legislative bodies by up to two representatives of the Länder selected by the Bundesrat.¹²⁵

B. *The Role of the Executive*

The jurisprudence of the Constitutional Court has granted considerable leeway to the Federal Government.¹²⁶ Hence, insofar as the relationship between the contracting parties is concerned, the executive's authority is hardly restricted. It is within the Federal Government's province to determine whether another state has fulfilled its obligations under an international agreement. Also, the suspension of an international treaty as a countermeasure in reaction to an international wrongful act of another state is within the Federal Government's competence.¹²⁷

The internal implementation of a treaty falls primarily within the responsibility of the various German administrative authorities, both on the federal and Länder level. This, however, does not include the right to bind the judiciary with regard to the interpretation of a treaty.¹²⁸ To the

125. For a detailed description see Hahn, *supra* note 55, at 525. For a critical analysis questioning the constitutional validity of this compromise between the Federal Government and the Länder, see Jochen A. Frowein, *Bundesrat, Länder und europäische Einigung*, in *VIERZIG JAHRE BUNDESRAT* 285 (Bundesrat ed., 1989).

126. Cf. Judgment of Dec. 16, 1980, BVerfG, 55 BVerfGE, 2 BvR 419/80, at 349, 365; see Judgment of July 17, 1984, BVerfG, 68 BVerfGE, 2 BvE 13/83, at 1. "Einschätzungen und Wertungen außen- und verteidigungs-politischer Art obliegen der Bundesregierung. Das Grundgesetz zieht der Beurteilungsmacht, die der Bundesregierung insoweit zusteht nur die Grenze *offensichtlicher Willkür* . . ." *Id.* Leitsatz 3 (emphasis added).

127. Cf. KARL DOERING, *DIE PFLICHT DES STAATES ZUR GEWÄHRUNG DIPLOMATISCHEN SCHUTZES* (1959).

128. See, e.g., Hans Stoll, *Völkerrechtliche Vorfragen bei der Anwendung ausländischen Rechts*, in *4 BERICHTER DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT* (1962); Mosler, *supra* note 77, at 32; compare the decisions reported by Fritz Münch, *Deutsche Rechtsprechung zu völkerrechtlichen Fragen 1951-1957 (Teil A)*, 20 *ZaÖRV* 186, 199 (1959/1960).

contrary, as every act of a public authority may be attacked by citizens before the courts (article 19 (4) Basic Law), case law has considerable influence on the behavior of the various administrative authorities. In order to avoid repetition, we shall deal with the substantive law of internal treaty application in the following chapter which outlines the German courts' decisions dealing with treaties.

It seems appropriate, though, to add one caveat to the statement that the government cannot bind courts in their evaluation of international law. As has been mentioned before, the Basic Law grants the executive vast discretion in the field of foreign affairs and in external relations generally. At the same time, public international law considers the states' executives to be the "born" representatives of states in their shaping of international legal rules.¹²⁹ Thus, the Federal Government may actively participate in changing, amending or clarifying international law, both with regard to customary law or (quasi-)contractual relations. If a court is called upon to use international rules in a specific case, it may very well discover that the pertinent body of law has changed because of its government's acts or omissions. To that extent, and to that extent only, one may speak of a competence of the government to bind the courts in international law questions.¹³⁰

C. *Role of the Judiciary*

1. General

The Bundesverfassungsgericht has coined the term "Völkerrechtsfreundlichkeit"¹³¹ to describe the positive attitude of the Basic Law towards public international law. Nevertheless, the Court has always exercised the competence to examine the treaty (formally through the act of consent) as to its compatibility with the Basic Law, and in particular the fundamental rights provisions.¹³² Only once, however, has it held

129. Cf. Vienna Convention on the Law of Treaties, *supra* note 89, art. 7.

130. See Jochen A. Frowein, *Die Bindungswirkung von Akten der auswärtigen Gewalt insbesondere von rechtsfeststellenden Akten*, in Festschrift E. MENZEL 127 (1975); see also WILHELM WENGLER, *DIE VEREINBARKEIT DER ZUSTIMMUNGSGESETZE ZU DEN OSTVERTRÄGEN MIT DEM GRUNDGESETZ* (1973); Wilfried M. Bolewski, *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene* (1971) (unpublished thesis, University of Marburg).

131. See Judgment of June 30, 1964, BVerfG, 18 BVerfGE, 1 BvR 93/64, at 112, 120; Albert Bleckmann, *Die Völkerrechtsfreundlichkeit der deutschen Rechtsordnung*, 1979 DÖV 309; see generally CHRISTOPH ENGEL, *VÖLKERRECHT ALS TATBESTANDSMERKMAL DEUTSCHER NORMEN* (1989).

132. See generally FRANZ-CHRISTOPH ZEITLER, *VERFASSUNGSGERICHT UND VÖLKERRECHTLICHER VERTRAG* (1974); FOLKE SCHUPPERT, *DIE VERFASSUNGSGERICHTLICHE KONTROLLE DER AUSWÄRTIGEN GEWALT* (1973).

that an international treaty was partially incompatible with constitutional requirements.¹³³ As a general rule, the Court will spare no effort and, in fact, will go out of its way, to reconcile Germany's treaty obligations with its internal legal order,¹³⁴ not the least to avoid Germany's international responsibility.¹³⁵ Thus, the Court in its famous so-called "Näher-dran" decision of 1955¹³⁶ indicated that a *prima facie* unconstitutional treaty would withstand constitutional law scrutiny if its effects were to bring the situation "closer to" the requirements of the Basic Law than it had been before.¹³⁷ The same decision also stands for the notion that where treaty provisions may lend themselves to several interpretations, the one which is most compatible with the Basic Law must be preferred.¹³⁸

The courts recognize that they cannot influence the international treaty as such. The Constitutional Court emphasized this when it partly invalidated the act of consent to the Swiss-German double taxation Treaty.¹³⁹ Stating that the application of the treaty in the Federal Republic was excluded as a matter of constitutional law, it did not question its status as a binding international compact.¹⁴⁰

Some selected aspects of German practice relating to treaty application deserve mentioning.¹⁴¹ As a general rule, courts are reluctant to recognize the direct applicability of treaties in the domestic legal order.¹⁴² The Constitutional Court has stated that direct applicability of

133. Judgment of May 14, 1986, BVerfG, 72 BVerfGE, 2 BvL 2/83, at 200 (concerning the German-Swiss treaty concerning taxation).

134. With the exception of the very special decision Judgment of June 19, 1973, BVerfG, 36 BVerfGE, 2 BvF 1/73, at 1, 35. There, the Court interpreted the Treaty on Basic Relations between the Federal Republic and the GDR as if it had been a municipal statute without taking into account that there might be specific limitations regarding the interpretation of a treaty. For the procedural history of this case, see Judgment of May 22, 1973, BVerfG, 33 BVerfGE, 1 BvQ 2/72, BvR 203/72, at 195-99; Judgment of June 4, 1973, BVerfG, 35 BVerfGE, 2 BvQ 1/73, at 193-202; Judgment of May 3, 1973, BVerfG, 35 BVerfGE, 1 BvR 536/72, at 208, 211. All the other major treaties of the Federal Republic received the Constitutional Court's blessing.

135. Judgment of June 23, 1981, BVerfG, 58 BVerfGE, BvR 1107, 1124/77, 195/79 at 1, 34.

136. Judgment of May 4, 1955, BVerfG, 4 BVerfGE, 1 BvF 1/55, at 157, 168 (scrutinizing the German-French treaty concerning the repatriage of the Saarland into the Federation).

137. *Id.* at 168.

138. *Id.* Frowein, *supra* note 17, at 82.

139. Deutsch-Schweizerisches DBA vom 11. Aug. 1971.

140. Judgment of May 14, 1986, BVerfG, 72 BVerfGE, 2 BvL 2/83, at 200; see also Judgment of June 8, 1977, BVerfG, 45 BVerfGE, 1 BvL 4/75, at 83, 96 for the validity of treaties under international law violating the Basic Law.

141. See Frowein, *supra* note 17, for a comprehensive study of legal problems of the application of treaties in Germany.

142. Thus for example GATT has not been accorded direct effect. See Manfred Zuleeg, *Die innerstaatliche Anwendbarkeit völkerrechtlicher Verträge am Beispiel des GATT und der europäischen Sozialcharta*, 35 ZaöRV 341 (1975). The same holds true for extradition treaties, which according to German jurisprudence do not grant subjective rights to individuals. See, e.g., Judgment of Oct. 22, 1977, BVerfG, 46 BVerfGE, 2 BvR 631/77, at 214, 220.

treaties is the exception and a pertinent intent of the contracting parties has to be clearly expressed in the wording of the treaty.¹⁴³

2. Interpretation

In order to apply and interpret acts of consent to treaties in a way consistent with the international legal obligations of the Federal Republic,¹⁴⁴ courts have to apply the recognized methods of treaty interpretation. Thus, the courts in interpreting a treaty provision will begin with its wording.¹⁴⁵ In addition, they will take into account the systematic context and object and purpose of the treaty.¹⁴⁶ Also, where the *travaux préparatoires* of a treaty are available, German courts frequently use them either to confirm the interpretation reached on the basis of the wording and the object and purpose of the treaty or to clarify the meaning of the wording.¹⁴⁷ On several occasions, the Constitutional Court has given special weight to a declaration made by the Minister for Foreign Affairs in the context of the conclusion of a treaty.¹⁴⁸

It seems that the most extensive use of *travaux préparatoires* is being made by the ordinary courts¹⁴⁹ when interpreting the specific treaties concerning the unification of private law or private international law.

143. "Völkerrechtliche Verträge begründen in der Regel nur Rechtsbeziehungen im Verhältnis der vertragsschliessenden Parteien. Die Festlegung von Rechtspflichten für einzelne Bürger ist nach allgemeiner Ansicht eine Ausnahme, die bei entsprechend klarem Anhalt im Vertragstext als vereinbart gilt." Judgment of Jan. 13, 1976, BVerfG, 41 BVerfGE, 1 BvR 631/69, 24/70, at 126, 169. In Judgment of Oct. 20, 1977, BVerfG, 46 BVerfGE, 2 BvR 631/77, at 214, 224 the Court accepted the line of decisions according to which treaties of extradition do not establish rights for individual petitioners, absent a clear and express wording. See also Judgment of Feb. 14, 1979, BVerfG, 50 BVerfGE, 1 BvR 924/78, at 244, 248.

144. Judgment of June 23, 1981, BVerfG, 58 BVerfGE, 2 BvR 1107, 1124/77, 195/79, at 1, Leitsatz 4.

145. Compare, e.g., the following decisions: Judgment of Dec. 20, 1962, BGH, RIW/AWD 1963, 121; Judgment of June 12, 1963, BGH, 39 BGHZ, VII 2R 256/61, at 384, 387; Judgment of Jan. 31, 1966, BGH, 45 BGHZ, III ZR 118/64, at 58, 68; Judgment of Jan. 24, 1973, 35 Entscheidungen des Bundessozialgerichts [BSGE], Ax. 4RJ 59/72, at 137; Judgment of Feb. 5, 1965, BFH, 82 BFHE, VI 338/63 U, at 29, 32; Judgment of Nov. 9, 1966, BFH, 87 BFHE, Bundessozialgericht [BSG], No. I 29/65, at 273.

146. See, e.g., Judgment of Mar. 25, 1968, BVerfG, 24 BVerfGE, 2 BvR 251/63, at 33; Judgment of Dec. 9, 1970, BVerfG, 29 BVerfGE, 1 BvL 7/66, at 348; Judgment of Mar. 10, 1971, BVerfG, 30 BVerfGE, 2 BvL 3/68, at 272; Judgment of Jan. 10, 1966, BGH, 45 BGHZ, III ZR 212/63, at 30, 37; Judgment of July 31, 1968, BSG, 28 BSGE, Az YRJ 229/67, at 169; Judgment of Sept. 18, 1968, BFH, 93 BFHE, 1R 56/67, at 438, 443.

147. See, e.g., Judgment of Sept. 9, 1958, BGH, 12 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt], No. g.H.5 StR 64/58, at 36, 40-41, and the references compiled by Albert Bleckmann, *Deutsche Rechtsprechung zu völkerrechtlichen Fragen*, 31 ZaöRV 271, 329 (1971).

148. Judgment of July 7, 1975, BVerfG, 40 BVerfGE, 1 BvR 274, 209/72, 195, 194, 183/73, 247/72 at 141, 167; decision of the 2d Senate, Sept. 18, 1990, 32 BVerfGE, 2 BvE 90, 316, 320, sub B II of the merits.

149. I.e., ordinary courts refer to those courts having jurisdiction over general private law and criminal law cases.

The reason for this may well be that comparatively good documentation exists for many of these treaties. The High Court in Civil Matters has looked into the drafting history of the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air (October 12, 1929).¹⁵⁰ It has studied the interpretation of the drafting history by scholarly writers and has also considered the negotiation protocols which were handed to it by one party in the case.¹⁵¹ In the same way it has examined the drafting history of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958),¹⁵² though it has mainly referred to descriptions of this history by private authors.¹⁵³

When the Federal Government seeks the consent of the legislature for a treaty, it always puts before the legislative organs a Memorandum on the treaty ("Denkschrift") which regularly includes parts of the drafting history and a brief legal analysis of the content. Courts frequently refer to the "Denkschrift" and may well be influenced by the executive's view (often expressly or impliedly embraced by the Bundestag) of the drafting history. Although in many cases this description will not be sufficiently elaborate to cover details, nor will the legal analysis withstand closer scrutiny, courts do occasionally defer to it.¹⁵⁴ Thus, it may very well be that a judge called upon to decide a case in which the Convention on the Rights of the Child is relevant might follow the opinion expressed in the "Denkschrift" that its provisions only constitute interstate obligations, despite the more convincing arguments advanced in favor of a reading that certain provisions of the Convention do grant individual rights or create legal obligations for state authorities.¹⁵⁵ While a court might well come to that opinion on its own, it would act improperly if it simply followed the "Denkschrift," without an analysis on the basis of the established canon of treaty interpretation.¹⁵⁶

150. 1933 RGBl II 1040, 137 U.N.T.S. 11.

151. IPrax 1984, at 27, 29; see also Judgment of Mar. 19, 1976, BGH, Neue Juristische Wochenschrift [NJW], 1976, at 1583; Judgment of Mar. 23, 1976, BGH, NJW 1976, at 1587-88.

152. 1961 BGBl II 122.

153. IPrax 1982, at 143, 144.

154. Judgment of Feb. 25, 1960, BGH, 32 BGHZ, II ZR 125/58, at 76, 86; Judgment of Jan. 25, 1963, BFH, 76 BFHE, III 25/61 U, at 612, 620; Judgment of May 3, 1973, BVerwG, 42 BVerwGE, IC 35.72, at 148; Judgment of July 11, 1974, BVerwG, 45 BVerwGE, VI C 65.72, at 340; Judgment of Sept. 27, 1978, BVerwG, 56 BVerwGE, IC 22.76, at 274; Judgment of Sept. 27, 1978, BVerwG, 56 BVerwGE, IC 48.77, at 254. Compare also the Decision of the High Court for Social Security Law (Bundessozialgericht) reported by Monika Vierheilig, *Deutsche Rechtsprechung in völkerrechtlichen Fragen im Jahre 1980*, 42 ZaöRV 121, 124 (1982).

155. Compare Wolf, *supra* note 29, at 374, who also shows that certain parts of the German law concerning children born out of wedlock are not in accordance with the convention.

156. The Convention has so far not received the approval of the legislative organs. For the text of the Convention and the Denkschrift see BR-Drs. 769/90.

While no institutionalized procedure exists, courts often will give considerable deference to the opinion of the executive.¹⁵⁷ In particular, the Constitutional Court has frequently referred to the political context of a treaty. In that circumstance, however, this statement should not be seen as a reference to the drafting history but rather to the context in which the objects of the treaty must be understood. This was of special importance for the treaty with France concerning the Saarland and for the Treaties of Warsaw, Moscow and Prague.¹⁵⁸ German courts tend to use *travaux* reluctantly and in conformity with the principles laid down in articles 31 and 32 of the Vienna Convention on the Law of Treaties.

A recent decision of the High Court in Fiscal Matters,¹⁵⁹ however, demonstrates that courts are prepared to deviate from the executive's view. There, the court refused to follow the understanding of a treaty provision shared by both the German and the foreign authorities, holding that even if this understanding of the contracting parties constituted a subsequent agreement regarding the interpretation of the treaty or the application of its provisions (article 31 (3)(a) of the Vienna Convention), it did not have the force of law in Germany, as the Bundestag's act of consent only introduced the treaty into the German legal order and did not contradict later interpretation by the executive branches of the contracting parties. Noting that the Court did not have to apply the Vienna Convention directly, due to the fact that during the relevant time the Federal Republic had not yet ratified the Convention, and without examining the validity of the Bundesfinanzhof's point of view, the decision illustrates that the courts may well depart from what the executive considers the content of a treaty.

The above survey of the German legislature's participation in the treaty process indicates that whenever a subject matter is considered to be important by the political process, the (majority groups of the) Bundestag will exercise a considerable amount of influence in treaty-related foreign affairs. At the same time, though, the legal framework in place does not ensure as much parliamentary involvement in treaty matters as with regard to other legislation, despite the fact that today treaties regulate in great detail areas which, at the time the Constitution was drafted, would clearly not be considered the suitable subject of an international compact.

157. See recently Decision of Apr. 23, 1991, BVerfG, 84 BVerfGE, Joint cases 1 BvR 1170/90, 1174/90, 1175/90, at 90. See also Vierheilig, *supra* note 154.

158. Judgment of May 14, 1955, BVerfG, 4 BVerfGE, 1 BvF 1/55, at 157, 168; Judgment of July 7, 1975, BVerfG, 40 BVerfGE, 1 BvR 274, 209/72, 195, 194, 184/73, 247/72, at 141, 164.

159. Judgment of Feb. 1, 1989, BFH, 1990 Bundessteuerblatt II 4.

Thus, the much talked about "internationalization" of regulating activities does alter the role parliamentary organs play in our society. From a political perspective, one might deplore this development or one might consider it a perfectly acceptable adaptation of the parliamentary system to a changing international environment; this is a question to be answered another day. From a legal perspective, though, the pertinent developments during the Federal Republic's first 43 years can be reconciled with the framework set up by its Basic Law.

