Parliamentary Democracy and International Treaties*

Robert Schütze

Abstract

Classic constitutional thought has considered the power to conclude international treaties to fall within the executive's exclusive domain. But this nineteenth-century logic hardly convinces in the twenty-first century. For the function of international treaties has dramatically shifted from the military to the regulatory domain; and in the wake of this "new internationalism", the traditional divide between "internal" and "external" affairs has increasingly disappeared. Has this enlarged scope of the treaty power also trigger a transformation of its nature; and in particular: has the rise of "legislative" international treaties been compensated by a greater role accorded to parliaments? This article explores this question comparatively by looking at the constitutional law of the United States and the European Union. Within the United States, international treaties were traditionally concluded under a procedure that excluded the House of Representatives; yet with the rise of the Congressional-Executive-Agreement in the twentieth century, this democratic deficit has been partially remedied. We indeed find a similar evolution within the context of the European Union, where an increasing "parliamentarisation" of the treaty power has taken place.

* This is a significantly shortened and revised version of Chapter 11 of my "Foreign Affairs and the EU Constitution" (Cambridge University Press, 2014).

Introduction

Traditionally, foreign affairs are *non*-parliamentary affairs: the right to wage war and to make peace were seen as part of the royal prerogative; and since the treaty power was perceived as an appendage to the right of war (Haggenmacher, 1991) it was "naturally" considered to belong to the executive power. For Blackstone, it thus fell into "the king's prerogative to make treaties, leagues, and alliances with foreign states and princes". "Whatever contracts therefore he engages in, *no other power* in the kingdom can legally delay, resist, or annul." The sole check on executive abuses was "parliamentary impeachment" of those ministers that had (mis)advised to conclude a treaty (Blackstone 1899: 223-4). This view was widely shared in eighteenth century philosophical circles. Even the messiah of popular sovereignty did admit that "[t]he external exercise of power does not befit the People; the great maxims of State are not within its grasp" (Rousseau, 2007: 252).[1]

This reasoning seems much less persuasive today than several hundred years ago. For the internationalization of trade and commerce in the nineteenth century has added a new foreign affairs "occupation": regulatory international agreements. The amount of tariffs for goods needed to be regulated; river navigation had to be coordinated; and intellectual property rights required to be protected. And with the rise of the international *commercial* treaty, the idea of the treaty-making power as an exclusive part of the executive branch became doubtful. These doubts led Alexander Hamilton – a "founding father" of the United States – to place the treaty power in between the rival claims of the executive and legislative department (Hamilton, 2007: 365): "The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive." But while Hamilton's recommendation of a "fourth power" was not to be taken up by modern constitutionalism, his concern for the "particular nature of the power of making treaties" has remained a pressing constitutional question ever since.

For the transformation of the international treaty into a "regulatory" instrument did not pass unnoticed. National parliaments gradually realized that their hard-won *internal*

[1] J.-J. Rousseau (2007: 252) famously writes: "L'exercice extérieur de la puissance ne convient point au peuple ; les grandes maximes d'État ne sont pas à sa portée ; il doit s'en rapporter là-dessus à ses chefs qui, toujours plus éclairés que lui sur ce point, n'ont guère intérêt à faire au-dehors des traités désavantageux à la patrie ; l'ordre veut qu'il leur laisse tout l'éclat extérieur et qu'il s'attache uniquement an solide." However, it is important to bear in mind that for Rousseau democracy in this context meant direct democracy – not parliamentary democracy.

prerogatives to co-decision could be undermined by the monarch's power over *external* affairs. Benjamin Constant – the great constitutional thinker of the French restoration – thus urged (Constant, 1837: 78 – my translation): "In light of the royal prerogative in treaty making, if the royal power could bind a people to clauses that affected its internal affairs, no constitution could subsist. … [A]ll constitutional rules could be amended without discussion and with a stroke of a pen. Despotism and persecution, disguised as peace treaties, would return from abroad; and the king's ambassadors would be the real legislature of such a people." And in light of this danger to democracy, national parliaments were – unsurprisingly – eager to extend their rights of co-decision from the internal to the external sphere. Nineteenth century constitutionalism consequently witnessed first attempts to (partially) parliamentarise the treaty power;[2] yet the demand to democratize the treaty power would only gained momentum in the twentieth century. Nevertheless: the democratic credentials of the treaty power still represent an unresolved constitutional question today: for even modern constitutionalism accepts – otherwise unacceptable – limits on parliamentary democracy when it comes to the conclusion of international treaties.

What are these constitutional limits; and what are their underlying reasons? This article explores these questions by analyzing the democratic credentials of the treaty power in the United States and the European Union. Our answers will of course depend on the type of standard(s) we employ; and we shall here use *two* comparative standards – one internal, the other external. The internal standard tells us how "democratic" the treaty power is in comparison with the legislative procedures within a domestic constitutional order, whereas the external standard evaluates how "democratic" the American treaty power is in comparison with the European treaty power (and vice versa). Section 1 starts with an analysis of the U.S. treaty power in light of the internal standard offered by the domestic democratic order, and Section 2 will do the same for the EU treaty power. A *Conclusion* will finally – briefly – compare the respective democratic credentials of the United States and the European Union by using each other's external point of view.

[2] The 1831 Belgian Constitution – a model for many constitutional monarchies in its time – thus required the king to obtain the assent of the Belgian parliament for certain classes of treaties; and the idea of coordinating the treaty power with the legislative power also informed the 1871 German Imperial Constitution. The 1871 German Imperial Constitution here provided in its Article 11 (3) as follows: "Insoweit die Verträge mit fremden Staaten sich auf solche Gegenstände beziehen, welche nach Artikel 4 in den Bereich der Reichsgesetzgebung gehören, ist zu ihrem Abschluß die Zustimmung des Bundesrates und zu ihrer Gültigkeit die Genehmigung des Reichstages erforderlich."

1. The "Treaty Power" in the United States

Nowhere is the text of the U.S. Constitution more laconic and obscure than in the context of foreign affairs (Ramsey, 2009); and this textual "minimalism" is acute for the treaty power. The sole provision on the conclusion of international treaties by the Union is here Article II. Dealing with the powers of the President, it states: "He shall have Power, by and with the Advice and Consent of the Senate, *to make Treaties, provided two thirds of the Senators present concur*" (emphasis added). The exclusion of the U.S. "parliament" – the House of Representatives – was, in light of the "monist" stance of the U.S. Constitution vis-à-vis international treaties,[3] surprising and unique. What were the reasons for this un-democratic solution? Section 1(a) will explore this question, before we investigate the arrangements of the "New Internationalism" that followed the "New Deal" in Section 1(b). This new internationalism generated a new instrument: the Congressional-Executive Agreement; yet as Section 1(c) will show, the rise of (sole) executive agreements has partly overshadowed this democratic development.

a. Article II Treaties with the "Advice and Consent" of the Senate

When the U.S. Constitution was drafted, the treaty power was one of the few provisions *not* subject to prolonged philosophical scrutiny. The framers had originally allocated it to the Senate *alone*, but the Constitutional Convention had added the President at the last minute. This "mixed" solution corresponded to the federal character of the American

[3] Where a constitution chooses a monist philosophy towards international law, international law will be automatically part of national law. The U.S. Constitution has chosen such a monistic path through its Article VI – Section 2 (emphasis added): "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[.]" By contrast, the dualist theory insists that international law and domestic law are two completely separate legal orders. Dualist theory thereby reconciled the rival claims of national parliaments and the royal executive by splitting the concept of sovereignty into an internal and an external sphere. The refusal to acknowledge the *direct* parliamentary participation in the conclusion of international agreements "saved" the appearance of the monarch as the sole external representative of the nation. The royal sovereign could continue to be seen as vested with undivided external sovereignty.

Union, since it combined the "international" Senate – representing the States – with a "national" President. Article II thereby tied the conclusion of international treaties to the advice and consent of a qualified majority of States: two-thirds of the Senators would need to approve a treaty. This supermajority was a significant political safeguard of federalism (McClendon, 1931)..

How was an Article II treaty to be negotiated and concluded? The framers originally envisaged both the President and the Senate to be actively involved in the negotiation of treaties. For the Senate, this was the idea behind the phrase "*advice* and consent" (emphasis added). However: a first encounter with an *advising* Senate already proved too much for the Presidency; and American constitutionalism soon came to consider the power of external representation and treaty negotiation to fall within the exclusive domain of the executive: "[T]he President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; *but he alone negotiates. Into the field of negotiation the Senate cannot intrude*[.]" (US Supreme Court, 1936: 319). American constitutional practice has thus reduced senatorial "advice and consent" to mere "consent" (Henkin, 1996: 177). The President – or his appointed officers – will thus solely initiate, conduct and conclude the negotiation of an international treaty. And the presidential prerogative "carries with it an absolute veto over international lawmaking" (Hathaway, 2009-10: 209).

Where the President has negotiated a treaty, it must be referred to the Senate for consent. But where is the House of Representatives in the conclusion of Article II treaties? The House is not formally involved; and its exclusion from the treaty power has been explained as follows (Hamilton, 2007: 366-7 – emphasis added): "Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and despatch, *are incompatible with the genius of a body so variable and so numerous*. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. *The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project.*" The House was therefore excluded on the belief that parliamentary involvement was simply not suitable to the business of international affairs.

b. Article I: The (Ex Post) Congressional-Executive Agreement

While the House has no constitutional rights under Article II, the U.S. Constitution nonetheless recognizes congressional foreign affairs powers under Article I. It is thus Congress – not the President – that is competent "[t]o regulate Commerce with foreign Nations" (Article I – Section 8, Clause 3), to define and punish "Offences against the Law of Nations" (Article I – Section 8, Clause 10), and "[t]o declare War" (Article I – Section 8, Clause 11). Would these "legislative" powers include the external power to conclude international agreements with foreign States? Could Congress, with the assistance of the President, conclude international *agreements* outside the *treaty*-making procedure under Article II?

This distinction between "treaties" and "agreements" was indeed eventually developed, especially after the "New Deal" era (Ackermann & Golove, 1995), even if constitutional traditionalists have ferociously attacked this position (Borchard, 1944). Yet despite more recent doubts surrounding the conclusion of the North American Free Trade Agreement (NAFTA), the constitutionality of the so-called congressional-executive agreement has been firmly established. In parallel to the "treaty-making procedure" in Article II, U.S. constitutionalism has thus recognized an "agreement-making procedure" in Article I. Congressional agreements are here concluded under the "ordinary" legislative procedure set out in that Article I – Section 7 for internal legislation. This gives the House of Representatives an equal share, with the Senate, in the conclusion of international agreements. "[T]he congressional-executive agreement avoids lawmaking by less than a full, democratic legislature" (Henkin, 1990: 60).

While less difficult a procedure with regard to the Senate (there is no need for a two-thirds majority), the Article I procedure had added a new procedural hurdle: the inclusion of the House. And to make approval by the latter easier, Congress accepted – from 1974 to 2007 – a "fast-track procedure" for international trade agreements.[4] In essence: in exchange for consultation powers during the negotiation, Congress here agreed not to

[4] The "fast track" procedure was first provided for in the 1974 Trade Act. It was renewed in 1979, 1984, 1988, 1993 (expired: 1994). After an "interregnum" between 1994-2002, the 2002 Trade Act reintroduced the procedure, albeit under a different name: the "Trade Promotion Authority".

suggest amendments to the agreement. Through this compromise, Congress thus gained a power to "advice" the President during the negotiations; yet it partly lost its power to "consent". This pragmatic choice has nonetheless an "undemocratic" side effect. For it reduces the parliamentary prerogative of co-decision to a passive consent. For the House (and the Senate) will only be voting on the agreement *en bloc*. Under the Obama Administration, the fast-track procedure was recently given a new lease of life with the 2015 Bipartisan Congressional Trade Priorities and Accountability Act of 2015. The latter was seen as instrumental for the conclusion of the 2016 Trans-Pacific Partnership Agreement (TPP) as well as the Transatlantic Trade and Investment Partnership (TTIP) presently negotiated with the European Union. The future of both international trade treaties seems however highly uncertain in light of President-elect Trump's announcement to withdraw from both international agreements.[5]

c. Executive Agreements: Presidential Unilateralism – Old and Modern

Since its earliest days, U.S constitutional thought has allowed the President to conclude "agreements" under his own constitutional authority (Ramsey, 1998: 138). With time, it was equally accepted that an Article II treaty could delegate power to the President to conclude "executive agreements". And today, the "vast majority" of U.S. international agreements are indeed concluded by the President under delegated powers (Hathaway, 2009-10: 149). Under these so-called *ex ante* congressional-executive agreements Congress simply delegates "its" powers to the President who will subsequently conclude the agreement.

Are there constitutional limits to a delegation of treaty-making powers? The delegation of such powers to the President was famously challenged in *Field v Clark* (US Supreme Court, 1892). Yet the Supreme Court unequivocally backed the idea of wide presidential powers: "[I]t is often desirable, if not essential, for the protection of the interests of our people against the unfriendly or discriminating regulations established by foreign governments, in the interest of their people, *to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations*" (ibid.,

[5] Financial Times, 22 November 2016: "Trump vows to renounce Pacific trade deal on first day in office".

691 – emphasis added). This was confirmed in in *Curtiss-Wright* (US Supreme Court, 1936), where the Court clarified that "the international field must often accord to the President a degree of discretion and freedom from statutory restriction *which would not be admissible were domestic affairs alone involved*" (ibid., 320 – emphasis added). For foreign affairs, this de-activated the non-delegation doctrine from the start. No evidence could be more telling than the – peculiar – executive conclusion of 1947 GATT.[6]

2. The "Treaty Power" in the European Union

The Union legal order adopts – like the United States – a monist view vis-à-vis international treaties (Schütze, 2014: 343); and a Union treaty will be generally treated like Union legislation. What are the democratic credentials behind this form of "external legislation"? The central treaty-making procedure within the European Union can today be found in Article 218 TFEU. Under this procedure, the central institution in the making of Union treaties is the Council of Ministers. The latter embodies – like the U.S. Senate – the federal principle in the form of the Member States; and like its American counterpart, the Council thereby acts – as a rule – by a qualified majority. What, then, is the role of the European Parliament? When the Union was founded, the democratic nature of the EU treaty power(s) was as deficient as its scope was minimal. This has however significantly changed over time; and with the 2007 Lisbon Treaty, the treaty power of the European Union has – with the exception of the Common Foreign and Security Policy (CFSP) – been significantly "democratised".

a. The "Ordinary" Treaty Procedure: Article 218 TFEU

[6] The old 1947 GATT had never been submitted to the Senate nor to Congress. American adherence originally rested on the "Protocol of Provisional Application". The latter had been signed and proclaimed by President Truman under powers delegated by the Reciprocal Trade Agreement Act (as amended in 1945). This choice in favour of a "presidential" executive agreement was highly controversial. For an excellent apologia of the executive route, see: Jackson, 1967-68.

Article 218 (2) of the Treaty on the Functioning of the European Union (TFEU) acknowledges the central role of the Council in all stages of Union treaty-making: "The Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them." The provision here guarantees the Council an *indirect* role in the negotiation and a *direct* role in the conclusion of Union agreements. Yet despite these primary roles, Article 218 TFEU still requires the participation of other constitutional actors than the Council in various procedural stages; and the provision thereby distinguishes between the initiation and negotiation of the agreement, and its signing and conclusion. The Union executive completely dominates the first stage, while the second stage involves the European legislature.

Who may propose and who may negotiate Union agreements? Under Article 218 (3) TFEU, the Commission holds the exclusive right to make recommendations for agreements, except "where the agreement envisaged relates exclusively or principally to the common foreign and security policy". In the latter case, the right of recommendation belongs to the High Representative for Foreign Affairs and Security Policy. On a recommendation, the Council may then decide to open negotiations; and where it decides to do so, it must nominate the Union negotiator "depending on the subject matter of the agreement envisaged". Where is the European Parliament? Parliament is indeed not formally allowed to propose a new Union treaty, nor is it directly involved in the negotiation. However, Article 218 (10) TFEU has now constitutionalised its right to be fully informed during *all stages* of the procedure. This constitutional prerogative has been given concrete content through an inter-institutional agreement between the Commission and the Parliament.

The Council shall conclude the agreement on behalf of the Union on a proposal by the negotiator. But prior to that conclusion, the European Parliament might have to be involved. The rules on parliamentary participation in the conclusion of Union treaties are set out in Article 218(6) TFEU. The provision thereby distinguishes between two forms of parliamentary participation: consent and consultation. The latter constitutes the residual category and applies to all agreements that do not require consent.

But what classes of international treaties require parliamentary consent? These classes of international agreements are enumerated in the form of five situations. The first, second and third category may be explained by the constitutional idea of "political treaties". For association agreements as well as institutional agreements – and in particular: the

European Convention on Human Rights (ECHR) – will by definition express an important *political* choice with long-term consequences. With regard to these international treaties Parliament – the representative of the European citizens – must give its democratic consent. The demand for parliamentary consent equally applies to a fourth class of international treaties: "agreements with important budgetary implications for the Union" due to the special role the European Parliament enjoys in shaping the Union budget. But most importantly: Article 218 (6) (a) (v) expands the parliamentary consent requirement to all EU agreements that concern policy areas that internally require parliamentary consent; and with this fifth class of agreement, parliamentary consent has become the constitutional rule within the European Union!

b. In Particular: CFSP Agreements and the European Parliament

The conclusion of CFSP agreements did originally follow its own "specific" procedure. Formally, this changed with the 2007 Lisbon Treaty following which CFSP agreements are henceforth also concluded under the general treaty-making procedure set out in Article 218 TFEU. Substantially, however, the conclusion of CFSP agreements has remained "special".

This CFSP "specificity" finds its strongest expression in the complete lack of direct parliamentary participation. But are there nevertheless alternative routes to ensure a degree of parliamentary oversight and control here? We indeed find a rudimentary requirement to parliamentary *consultation* for CFSP matters in Article 36 TEU. The provision states (emphasis added): "The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the *main* aspects and the *basic* choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are *duly taken into consideration*. Special representatives may be involved in briefing the European Parliament. The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy."

Article 36 TEU stipulates parliamentary consultation for the "main" aspects and the "basic" choices within the Union's foreign and security policy – a constitutional limitation that consequently excludes Parliament from shedding light on the devils in the details. The inability to be consulted on *individual* foreign policy measures equally erodes the obligation imposed on the High Representative to ensure that the position of the European Parliament is "duly taken into consideration". Indeed: the right of "consultation" in Article 36 TEU boils down to a right of "information"; and until 2006, it was not even clear whether this was a right to be informed *in advance*. In the absence of real oversight rights, it is therefore hardly surprising that Parliament also lacks direct control rights over CFSP agreements. The only indirect control it might here exert is through the – blunt – medium of budgetary control. For expenditure arising under the Common Foreign and Security Policy will generally be charged to the Union budget; and this has given the European Parliament at least *some* control over the – basic – foreign affairs choices of the European Union.

c. Executive Agreements: The Treaty Powers of the Commission

Does Article 218 TFEU constitute the Union's *exclusive* treaty-making procedure; or has the European Union – like the United States – devised alternative procedures for the making of international agreements? Within the Union legal order, this question has primarily arisen with regard to whether there exists a procedure for executive agreements, and in particular: Commission agreements.

Will the European Commission – the Union's supranational executive – enjoy inherent treaty powers, like the U.S. President; and/or, can the Council delegate treaty powers to the Commission? The European Treaties (and their Protocols) provide ambivalent signals as to the Commission's treaty powers. The EU Treaties indeed do contain a small number of provisions that expressly entitle the Commission with the power to conclude international agreements on its own authority. For example: Article 220 TFEU (partly) charges the Commission to establish and maintain relations with international

organizations; and this competence is said to entail the power to conclude executive agreements (Kokott, 2012).[7]

But more importantly: has the EU legal order followed U.S. American constitutionalism and generally confirmed the existence of *parallel* external powers of Union executive? This question came before the European Court of Justice in *France v Commission* (European Court of Justice, 1994). France had brought annulment proceedings against an international agreement concluded by the Commission with the United States. The purpose of the administrative agreement was to promote cooperation in the field of competition law; and the French Government had claimed that the Commission was not competent to conclude this agreement, as this power was not expressly conferred onto the Commission, and that it was consequently reserved to the Council. The Commission counterclaimed that it could generally "negotiate and conclude agreements or contracts whose implementation does not require action by the Council" (ibid., para.31); and since this was the case in the field of competition law, the cooperation agreement fell within the scope of its executive powers.

The Court has roundly rejected this argument (ibid, para.41): "Even if the Commission has the power, internally, to take individual decisions applying the rules of competition, a field covered by the Agreement, that internal power is not such as to alter the allocation of powers between the [Union] institutions with regard to the conclusion of international agreements, which is determine by Article [218] of the Treaty." The Court here refused to derive external treaty powers from the internal executive powers of the Commission. Unlike American constitutionalism, EU constitutionalism has thus *not* adopted the idea of parallel external powers belonging to the executive by reason of its (internal) administrative powers.

Can the Union nonetheless delegate international treaty powers to the Commission? While constitutionally possible, the Union seems to have made little use of this option in its constitutional practice. All delegations of treaty power to the Commission must moreover concern on-political questions. This absolute limitation follows from the constitutional frame given to the "delegation doctrine" in the Union legal order (Schütze, 2015: 309-327).

[7] For illustrations of these administrative agreements, see only: Exchange of letters between the European Communities and the International Labour Organisation, (1990) OJ C 24/06); as well as: Exchange of Letters between the World Health Organisation and the Commission of the European Communities concerning the consolidation and intensification of cooperation, (2001) OJ C 1/7.

Conclusions (and Comparisons)

Classic constitutional thought traditionally considered the treaty power to fall within the executive's exclusive domain. The conclusion of international treaties was here said to demand secrecy and efficiency – two characteristics that counselled against parliamentary participation. This nineteenth-century logic however hardly convinces in the twenty-first century. For the function of international treaties has shifted from the military to the regulatory domain; and in the wake of this "new internationalism", the classic divide between "internal" and "external" affairs has increasingly disappeared.

Has the enlarged scope of the treaty power trigger a transformation of its nature? Has the rise of "legislative" international treaties been compensated by a greater role accorded to parliaments? It is undoubtedly "a remarkable feature in all States that the democratic process with regard to foreign affairs is infinitely slower, and always less complete, than within domestic affairs" (Rumpf, 1965: 111-115 – my translation). This article has explored this slow process comparatively by looking at the constitutional law of the United States and the European Union.

Section 1 started by analyzing the democratic credentials of the treaty power in the United States. While the Kantian plea for parliamentary involvement in foreign affairs was here heeded with regard to the power to declare war, it was – ironically – *not* heard in relation to the treaty power. For as we saw above, the US constitutional order originally excluded the House of Representative from the negotiation and conclusion of all international treaties. According to Article II of the U.S. Constitution, the treaty power belonged to the President and the Senate; and for a long time, the exclusion of the House of Representatives was *the* "undemocratic anachronism" of the U.S. foreign affairs system (Henkin, 1996: 217). It has been partially remedied by the rise of the congressional-executive agreement (CEA). Indeed: from an internal perspective, the CEA fully democratizes the treaty power because it is concluded on the basis of the "ordinary" legislative procedure set out in Article I of the Constitution. However, the scope of the CEA has remained limited; and even more importantly: the spectacular rise

of presidential agreements in the twentieth century has dramatically undermined parliamentary involvement in the conclusion of international agreements.

Section 2 analyzed the democratic credentials of the treaty power in the European Union. We saw here that the Union started out from a position similar to that of Article II of the U.S. Constitution: the conclusion of international treaties was left to the Commission – the Union's supranational executive – and the Council representing the Member States. With the rise of the European Parliament in the domestic sphere, this exclusion became increasingly problematic; and subsequent constitutional amendments have thus regularly increased its powers in the external sphere. Today, the European Parliament must indeed give its consent to the majority of international treaties concluded by the Union. The main exception to this rule are agreements concluded under the CFSP title; yet CFSP agreements will generally lack direct effects within the Union legal order and will thus not constitute "external legislation".

From a comparative perspective, what is the more democratic constitutional arrangement – the US or the EU solution? *Qualitatively*, the procedure under Article II of the U.S. Constitution is undoubtedly less democratic than the procedure under Article 218 TFEU. The exception here concerns CFSP agreement; yet even there, the – direct – legitimation brought by the Senate under Article II is arguably smaller then the – indirect – democratic credentials of the Council under Article 218 TFEU;[8] and in the majority of cases, the American President is likely to conclude the American counterpart of "CFSP agreements" as sole executive agreements.[9] By contrast, when compared to the Article I procedure for congressional-executive agreement, the treaty-making procedure under Article 218 TFEU is less democratic than its American counterpart. For while the former

[8] There are two elements to this point – one relating to the composition, the other to the function of the Senate/Council. First, and in terms of their respective composition, the Council of Ministers seems better to reflect the democratic idea of proportionate representation than the Senate. For even if the Senators are (since 1913) directly elected, each State – the biggest as much as the smallest one – will have two Senators. The composition of the Senate thus follows the federal idea of the "sovereign equality" of the States, instead of the democratic idea of "one person, one vote". By contrast, thanks to its system of weighted votes, the Council has traditionally represented not so much the Member *States* but rather their national *peoples*. Second, and in terms of their respective functions, the Council appears also more involved in the treaty-making process than the Senate (cf. E. Stein & L. Henkin, 1986): 42): "In comparison with the American system, the Council performs the Senate's original function of "advice" on on-going negotiations (albeit with a mandatory effect), the Senate's "consent" role, as well as the President's function of "making" the treaty.").

[9] For even if the President is (in)directly elected, this will not provide executive agreements with much democratic legitimacy, cf. O. Hathaway (2009-10: 224): "Even if the electorate were informed about executive agreements, however, a presidential election is an extremely blunt toot for accountability. The voters may disagree with the international lawmaking of a President, but vote for him because they approve of his handling of, say, the economy – an issue on which they hold more intense preferences."

gives full parliamentary participation, Article 218 TFEU generally reduces parliamentary involvement to "consent. Yet again: the fast-track procedure for Article I agreements has, in the past, equally reduced Congressional involvement to a mere take-it-or-leave-it choice.

What comparative conclusions can therefore be drawn? When judged by their respective "internal" standards, both the American and the European treaty powers suffer from a "democratic deficit". For the American system, this deficit principally stems from the Article II procedure and the widespread use of sole executive agreements. For the European system, this deficit derives from Parliament's lack of co-conclusion rights for treaties that fall into areas that internally require co-decision. When seen from an external perspective, however, the European Union treaty power appears to be more democratic than its American counterpart. This results from the – quantitatively – dramatic shift towards executive agreements in US foreign affairs. This shift has been said to "rest[] on a mistaken assumption that less democratic international lawmaking is more effective international lawmaking" (Hathaway, 2009-10: 147). But the dichotomy between "democracy" and "efficiency" may indeed turn out to be a false one; and in any event: a democratic extra-effort might be a price worth paying to legitimize "legislative" treaty-making in the twenty-first century.

References

B. Ackerman & D. Golove, Is NAFTA Constitutional, (1995) 108 Harvard Law Review 799.

W. Blackstone, The Commentaries On the Laws of England (editor: T.M. Cooley, Callaghan, 1899).

E. Borchard, Shall the Executive Agreement Replace the Treaty?, (1944) 53 Yale Law Journal 664.

C. Constant, Cours de Politique Constitutionnelle (Hauman, Cattoir et Comp, 1837).

E. Corwin, The Constitution and World Organization (Princeton University Press, 1944).

P. De Visscher, De La Conclusion des Traités Internationaux (Bruylant, 1943).

European Court of Justice – France v. Commission, Case C-327/91, [1994] ECR I-3641.

P. Haggenmacher, Some Hints on the European Origins of Legislative Participation in the Treaty-Making Function, [1991] 67 Chicago-Kent Law Review 313.

J A. Hamilton, Federalist No.75, in: A. Hamilton et al, The Federalist (edited: T. Ball), Cambridge University Press, 2007).

O. A. Hathaway, Presidential Power over International Law: Restoring the Balance, (2009-2010) 119 Yale Law Journal, 140.

L. Henkin, Constitutionalism, Democracy & Foreign Affairs (Columbia University Press, 1990).

L. Henkin, Foreign Affairs and the US Constitution (Oxford University Press, 1996).

J.H. Jackson, The General Agreement on Tariffs and Trade in United States Domestic Law, (1967-68) 66 Michigan Law Review 249.

R. Jennings & S. Watts (eds.), Oppenheim's International Law (OUP, 2008).

J. Kokott, Artikel 220, in: R. Streinz, EUV/AEUV Kommentar (Beck, 2012).

R. Earl McClendon, Origin of the Two-Thirds Rule in Senate Action upon Treaties, (1931) 36 American Historical Review 768.

M. Ramsey, Executive Agreements and the (Non)Treaty Power, (1998) 77 North Carolina Law Review 133.

M. Ramsey, The Constitution's Text in Foreign Affairs (Harvard University Press, 2007).

J. Rousseau, Lettres écrites de la Montagne (L'Age d' Homme, 2007).

H. Rumpf, Demokratie und Außenpolitik, in: W. Schütz (ed.), Aus der Schule der Diplomatie (Econ, 1965).

R. Schütze, Foreign Affairs and the EU Constitution (Cambridge University Press, 2014).

R. Schütze, European Constitutional Law (Cambridge University Press, 2015).

E. Stein & L. Henkin, Twoards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution, in: M Cappelleti et al, Integration through Law- Volume 1: Methods, Tools and Institutions (De Gruyter, 1986), 3.

US Supreme Court (1829) - *Foster v Neilson*, 27 U.S. 253.

US Supreme Court (1892) – *Field v. Clark*, 143 U.S. 649.

US Supreme Court (1936) –*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304.

Author Information

Robert Schütze is Professor of European Union Law, Durham University. Outside the Law School, he co-directs the Global Policy Institute together with Professor David Held, while he is also a regular Visiting Professor at the School of Government of LUISS Guido Carli University (Rome) and the College of Europe (Bruges). He is a co-editor of the Yearbook of European Law (Oxford University Press) and is the author of a classic textbook on "European Constitutional Law" (Cambridge University Press, 2015).