MIAU-T-73-003

University of Miami
School of Law

OCEAN LAW PROGRAM

COMMUNITY LEGAL PROBLEM SERVICES

Title: May the United States Constitutionally Bind Itself to a Provisional International Ocean Regime?

Requested by: U.S. Delegation Preparatory Conference on The Law of The Sea

Prepared by: W. Harvey Dalton, LL.M. Candidate
Ocean Law Program

Project No. R/L-1 in the University of Miami Sea Grant Institutional Program

Report No. A-1
April, 1973

MAY THE UNITED STATES CONSTITUTIONALLY BIND ITSELF TO A PROVISIONAL INTERNATIONAL OCEAN REGIME (PENDING RATIFICATION OF ANY AGREEMENT REACHED AT SANTIAGO)?

1. The question concerning whether or not the U. S. can bind itself to interim provisions implementing various provisions of any law of the sea regime agreed upon at Santiago between time of signature and ratification thereof by the President with Advice and Consent of the Senate apparently arises from a statement made by Mr. C. N. Brower, Acting Legal Advisor and Acting Chairman, InterAgency Task Force on the Law of the Sea, to the Senate Foreign Relations Committee on 1 March 1973. In that statement Mr. Brower concluded that: "it may be desirable (at the conclusion of the conference) for immediate provisional entry into force of some aspects of the international seabed regime. . .This approach can accommodate the fears of many states that the establishment of an interim regime might still not lead to the establishment of a permanent regime, since in fact what we would be doing would be to bring certain parts of the permanent regime and machinery into operation earlier on a provisional basis." (p. 5) Mr. Brower indicated that the U. S. intended to press for such an arrangement at Santiago. However, it was indicated that such a pro-

visional regime might require some form of Congressional action in order to be implemented domestically. This view is apparently shared by Mr. Leigh S. Ratiner, Director for Oceans, Department of Interior, who filed an appendix to Mr. Brower's statement, indicating that Congressional "legislation may be necessary during the interim to ensure U. S. participation in an adequate provisional system, since that system would have to enter into force at the conclusion of the conference." (p. 25)

The issue, then, consists of not only whether or not the U. S. may constitutionally bind itself during an interim period, but also whether or not legislation is necessary to accomplish this objective? In answer to this issue, it is suggested that a brief examination be made of the international law concerning the consent to be bound of federal republics in order to determine whether or not constitutional requirements are internationally relevant. Secondly, it must be determined whether the Executive may bind this country by agreement with other states without the Advise and Consent of the Senate. Finally, it must be determined if any Congressional or Senatorial action might be necessary in order to bind the U. S. during an interim period.

2. The first issue necessarily involves whether or not states contracting with federalist states must consider those states' constitutional requirements before they can consider a binding agreement in effect. The traditional view towards this issue was that a treaty made in disregard of constitutionally prescribed

limitations and procedures, or by an incompetent state organ, was for that reason void or voidable at the option of the state on whose behalf the treaty was concluded. But no treaty has been found by an international tribunal to be invalid for these reasons, and writers have, in deference to maintaining viability of international transactions, carved out supposed exceptions to the rule. These are:

(a) Waiver or estoppel if a state does not repudiate within a reasonable time;

(b) Requirements that the repudiating state pay damages for its mistaken conclusion; and

(c) Allowing repudiation only if the state's constitutional provisions are notorious and known to the other contracting states. (W. Friedman, O. J. Lissitzyn, R. C. Pugh, INTERNATIONAL LAW 343 (1969). Thus, Lord McNair considers Article II, section 2 of the U. S. Constitution as an example "of a fundamental constitutional provisions possessing international notoriety, so that other states cannot hold a State bound by a treaty when in fact there has been no compliance with constitional requirements of this type (McNair, LAW OF TREATIES, 63 (1961). Hackworth believes that the agreement concluded by the President <u>ultra vires</u> is valid and enforceable in international law and the other states may rely on that agreement regardless of whether or not the President exceded his authority (Friedman, Lissitzyn, & Pugh, at 344). Blix thinks that states invariably seek out

and accept as sufficient the consent of the state organs actually appearing able to secure performance of obligations, but not necessarily those constitutionally designated to do so (Friedman, Lissitzyn, & Pugh at 345). Fitzmaurice opines that the only logical consequence of the propositions put forth by various schools of thought is:

> States cannot be held in general to have knowledge of each other's constitutional law; a State which purports to be bound by an international obligation must be presumed to have complied with its own internal constitutional requirements. . .In the contrary event two remedies are open to the State: to proceed internally against the executive or its individual member having placed it in a prejudicial position and externally to denounce the treaty at the earliest possible moment, but it cannot plead that the treaty is void ab initio (Fitzmaurice, (1934) B.Y.I.L. 136).

Thus, it may be concluded that: "in spite of the apparent divergencies and some confusion there seems to be a fairly wide concensus that constitional provisions are neither a decisive factor nor even relevant, and that any consideration of their international relevance raises insoluble difficulties, hence, the various doctrinal constructions to circumvent these" (K. Holloway, MODERN TRENDS IN TREATY LAW 149, (1967)).

Finally, it should be noted that Article 7(1) of the Vienna Convention on the Law of Treaties states concerning consent to be bound that:

> A person is considered as representing a state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing consent to be bound by a treaty if:
> (a) he produces appropriate full powers, or
> (b) it appears from the practice of the states concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense full powers.

For an example of an oral representation by a foreign minister which was held to have created a binding obligation on the state, see The Legal Status of Eastern Greenland (Denmark v. Norway), P.C.I.J. 1933.

From the foregoing discussion it is concluded that the provisions of Article II, section 2, U. S. Constitution (requiring Advise and Consent of the Senate in the treaty-making process) have minimal effect on the authority of the Executive to conclude agreements which shall be internationally binding. Rather, "on the basis of analysis of constitutional and judicial practice in the U. S. it has been convincingly argued that the principle of constitutional separation of powers has had no effect on the international validity of treaties, although it could paralyse the execution of a treaty if submitted to judicial control, or if Congress refused either to vote the necessary funds for the performance of the t reaty or enact the necessary legislation"(Holloway at 213). This applies equally

to treaties ratified with Senate consent and to the system of executive agreements, discussed below. "Consequently, in its treaty practice the Executive is guided by the same considerations as those which prevail in other countries, namely, whether it has the power to execute the treaty it has concluded without the concurrence of the Legislature or other constitutional organ. This and not the 'notorious' character of Article II section 2, is the decisive factor in the determination by the Executive of the nature of the international agreement it has negotiated. . . ."(Holloway, at 213).

3. Having concluded, then, that the Executive may have the authority to conclude international agreements regardless of U. S. Constitutional restrictions contained in Article II section 2, the next question is whether or not the Executive may bind the United States to such agreements without compliance with those constitutional requirements? Article II, section 2, U. S. Constitution, provides that:

> He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. . . .

A full consideration of the deliberations and debates of the framers of the Constitution is beyond the scope of this study, but it should be noted that divergent views were held concerning the question of Senatorial participation in the treaty-making process during these Constitutional debates. John Jay's

Federalist No. 64 strongly defends the decision to make treaties the supreme law of the land, but emphasizes that this of itself makes active participation of the Senate in this process desirable. Hamilton, in Federalist No. 75 recognized that the treaty-making power is neither legislative nor executive, but is a distinct department, properly divided between the President and the Senate. Hamilton was fearful of allowing the President to make unsupervised executive agreements with other sovereignties. It is, in fact, very clear from the debates that the Senate, representing the States and constituting the upper house of the Federal Legislature was given authority to prevent by minority vote the ratification of any treaty concluded by the Executive (F. Morley, TREATY LAW AND THE CONSTITUTION, 17 (1953)).

It is well known, however, that an extensive practice of making executive agreements has developed over the years, and that currently a myriad of such agreements and committments are in existence, having been created through this process and completely avoiding the "Advice and Consent" provisions of the Constitution. The beginnings of the executive agreement doctrine run from President Washington's declaration of neutrality in the French-British conflict of 1793, even though the U. S. had a treaty of alliance with France. Alexander Hamilton defended the President's action, claiming that regardless of the Constitution the conduct of foreign affairs must be concentrated in the President. Jefferson and Madison violently disagreed,

and Madison caustically replied to Hamilton's arguments, causing the Executive to seek other ways to justify international arrangements without Senatorial impediment (Morley, at 17-18). Thus the executive agreement, which can be described as a formal arrangement with another sovereignty, concluded so far as the U. S. is concerned merely by the signature of the President or that of the Secretary of State as his agent, and generally involving political issues or changes of national policy and international arrangments of a more or less temporary nature, has to a great extent replaced the traditional treaty-making process in the Constitutional sense (Morley, at 18).

Divergent doctrinal constructions and justifications for the power of the Executive to conclude executive agreements have been put forth and staunchly defended by various commentators. Various schools of thought are summarized below:

(a) "Expressio unius est exclusio alterius"(the expression of one thing is the exclusion of another) has been argued as a grounds for the power. This involves an interpretation of Article I section 10 of the Constitution. Here the framers forbade the States "to enter into any Agreement or Compact with another State or with a Foreign Power" without the consent of Congress, but they failed to mention the power of the Federal Government to make arrangements other than treaties. Thus by failing, or refusing to exclude this power from the Federal Government, it is argued that the framers granted that power to the Federal Government (Holloway, at 214).

(b) Both powers have been granted: treaties by enumeration, executive agreements by implication or as "necessary and proper" (Article I section 8) to carry into execution the broad range of powers with respect to foreign affairs delegated to the national government (McLaughlin, The Scope of the Treaty Power, 42 Minn. L. R. 709 (1958)). Thus, it is stated that:

> It can scarcely be denied that the President needs no new powers beyond those expressly granted to him in the document to enable him to conduct negotiations with other governments and that he has the exclusive power to conduct such negotiations. Nor would it appear that any effective question can be raised about the powers of the whole Congress and the President either to frame policies for controlling the conduct of negotiations or to make any agreement concluded the law of the land. From a practical perspective all the President requires to make his negotiations with other governments effective is an assurance, on problems demanding committments beyond his own powers to fuffill, that the Congress will honor his negotiations and assist in fulfilling all necessary committments. For the giving of such assurance by the Congress, the broad legislative powers outlined above would appear to be fully ample. It is thus clear that wholly apart from the treaty-making clause, admittedly nonexclusive, the Constitution offers a completely adequate procedure for coping with the whole problem of international agreements (McDougal and Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 Yale L. J. 181 (1945)).

(c) "Inherent Powers" of the Presidency: This doctrine submits that power in the field of foreign relations does not so much depend on the Constitution, but is derived inherently from the fact of national existence; and "power in the field of foreign affairs" is not differentiated from the treaty power. Thus: "(T)he power to make such international agreements as do not constitute treaties in the constitutional sense. . ., none of which is

expressly affirmed by the Constitution, nevertheless exists as inherently inseparable from the conception of nationality"(Sutherland, J., in U. S. v. Curtiss-Wright Corp., 299 U. S. 304, 318 (1936). And, in U. S. v. Belmont, 301 U. S. 324 (1937), Justice Sutherland relied on the Curtiss-Wright case in giving effect to the Litvinov Assignment, an executive agreement, despite the contrary policy of New York. However, on nearly the same facts, Justices Douglas and Frankfurter in U. S. v. Pink, 315 U. S. 203 (1942), avoided the Sutherland thesis. Douglas attributed to Sutherland the view that "the conduct of foreign affairs is committed by the Constitution to the political department of the Federal Government (at 222-23), which is not Sutherland's position, and also declares for strict construction of treaties and agreements to avoid derogation from State authority "unless clearly necessary to effectuate the national policy" (at 230). Frankfurter finds ample basis in the power of the President to recognize governments and to settle foreign claims without mention of inherent powers. . . .See also the divergent opinions of the Justices in Youngstown Sheet and Tube Co. v. Sawyer, 343 U. S. 579 (1952). (McLaughlin, at 719, note 43).

No matter what doctrine is chosen to support the power of the Executive to conclude executive agreements with foreign states, it is clear that practice has firmly established the employment of such agreements as increasingly important instruments in the execution of American foreign policy (Morley at 19-20). According to the Restatement of the Foreign Relations Law, the President may conclude an executive agreement:

(a) in the exercise of his own constitutional authority as president;

(b) in pursuance of an authorization contained in a prior treaty;

(c) in pursuance of Congressional authorization (Restatement, Foreign Relations Law of the U. S., sections 119-121 (1965).

Those agreements based on subsection (a) are grounded in the President's powers as Chief Executive (Article II, section 1), Commander-in-Chief (Article II, section 2(1)), and the power to appoint ambassadors (with advice and consent of the Senate), and to receive foreign ambassadors (Article II, section 2 (2)(3)). Under subsection (b), the Restatement takes the view that an executive agreement concluded pursuant to a treaty is self-executing; and also under subsection (c) the agreement is self-executing if it evidences the intention of the parties that it become effective without further governmental action and if such effect is authorized by the authorizing act of Congress (Morley, at 20), (Holloway, at 212). As to the power of the President to conclude executive agreements under Congressional aegis, it is stated:

> . . .the delegated powers of Congress under the Constitution are in fact sufficiently extensive to enable Congress in practice to authorise the President to make an exclusive agreement relating to any matter of sufficient international concern to be properly the subject of international negotiation (Restatement, section 123 et. seq., comment (b), p.445)).

"It has also been held that the President's powers to conclude agreement under Congressional authority are as broad, if not unlimited, as are those vested in him in respect of Senate-approved treaties, to the point of interchangeability"(Holloway, at 216). Equally, the President's authority to conduct foreign relations of the United States "provides the broadest constitutional basis for the making of executive agreements"(Restatement, section 124, comment (a), p. 446). In this regard, it is stated that:

> He may make whatever committments or promises he desires, but the important consideration is whether he will be able to carry out his promises. . . . If he promises more than he can perform, his action is self-defeating. Thus a valid presidential agreement in national law includes the connotation that it is an agreement which can be carried out under the President's powers alone. Otherwise it might be entirely ineffective in national law, even if valid in international law. . . .(Byrd, TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES, 177 (1960).

Many agreements have been concluded under the aegis of Congressional authorization, when in fact the doctrine of separation of powers opposes delegations of legislative power to the executive branch. For example, the Congress has delegated such powers to the President in the Reciprocal Trade Agreements Act of 1934, the Postal Act of 1872, and in various general provisions contained in conventions and treaties approved by

the Senate(McLaughlin, at 766).

Under the purely Presidential powers delegated by the Constitution, it has been stated that a Joint Resolution of the Congress authorizing the President to impose an embargo upon sale of munitions to certain belligerents was superfluous, in that he could have done this in his own executive capacity. U. S. v. Curtiss-Wright Corp., 299 U.S. 304 (1936). Whether or not this be true there are certain areas in which the President possesses a primary power and responsibility, e.g. as commander-in-chief of the armed forces, which would clearly support his individual action in concluding agreements appropriate to his function (Tucker v. Alexandroff, 183 U.S. 424 (1902) (military security); U. S. v. Pink, 315 U. S. 203 (1942) (assignment of claims against Americans by U.S.S.R. as part of an agreement leading to recognition of the U.S.S.R. by the U.S.); see U. S. v. Belmont, 301 U. S. 324 (1937) also. The Rush Bagot Agreement of 1817, limiting naval armament on the Great Lakes was negotiated as a presidential agreement. The Attorney General in advising the President with respect to the exchange of overage destroyers for naval and air bases in 1940 emphasized, without relying exclusively upon his powers as commander-in-chief, "(I)t will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the

utilization of the naval and air weapons of the United States at their highest efficiency in our defense" (39 Ops. Att'y Gen. 484, 486 (1939)). See also the Security Agreement with Iceland of July 1, 1941, 55 Stat. 1547, E.A.S. No. 232. The Potsdam, Yalta, and Teheran agreements of the Second World War fell largely within the President's war powers(McLaughlin, at 766, note 191).

It does not appear that the varied pattern of authorization affects the international status of the agreements. They have all been considered as effective in engaging the international responsibility of signatories as treaties could be. In B. Altman and Co. v. United States, 224 U. S. 583, 601 (1912), the Court in referring to a commercial agreement with France remarked:

> While it may be true that this commercial agreement was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless, it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty. . . .

Thus, as regards the international effect of executive agreements, the conclusion is rather obvious. It can be stated as follows:

> The Constitution does not state anything about the "binding" effect of agreements other than treaties, but practice incorporates agreements as the major form of international relations and their domestic and international validity have seldom been questioned. If concluded under the authority of the United States, i.e. the Federal Government, their binding effect is established on both planes. The Government must show the source of its treaty-making powers, regardless of the appellation of the agreement, which might call for controversial concepts such as "inherent powers."(Holloway, at 219-20).

4. The next question to be reconciled is whether or not such agreements concluded by the Executive without the Advice and Consent of the Senate become the "supreme law of the land" under the provisions of Article VI, section 2. This Article provides in pertinent part that:

> 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. . . .

The question of course is whether the phrase "under the Authority of the United States" includes executive agreements. In this regard, it is submitted that:

> . . .the words "under the Authority of the United States" would seem to suggest a much wider category of international agreements (than merely treaties) since it could hardly be argued that the President's acts in foreign matters are not covered by that stipulation, unless they are approved by the Senate. In the light of Constitutional developments, both in doctrine and in practice, it may be argued that international agreements concluded by the President whatever domestic procedures are adopted, are agreements made "under the authority of the United States". Therein it seems to lie . . . the binding character, both on the international plane and in the municipal legal order, of a growing number of international agreements which are not treaties in the sense of Art. II, cl. 2. . . .(Holloway, at 300).

This view of Article VI is supported by judicial decision also. In Missouri v. Holland, 252 U. S. 416 (1920), Justice Holmes held that the two expressions contained in Article VI (referring to "the Laws of the United States" and "Treaties") were not identical and that treaties were not limited as are laws of the United States. The Court seemed to hold that the Federal Executive had power to conclude treaties on matters falling within the "reserved areas" of the Tenth Amendment, although in domestic law the principle of federal dualism had always been scupulously respected (Holloway at 299). Prior to Holland, the Supreme Court had based the distinction between treaties

and federal laws on matters affecting the "reserved areas" by reasoning that treaties essentially regulated relations between states and only incidentally affected domestic law (see Justice Sutherland's opinion in Curtiss-Wright). However, when treaties began to invade domestic law in that domestic implementation was often necessary, the Court was forced to reverse its position and uphold the exercise of federal powers on broader grounds.

Thus in the case of Congressional-authorized executive agreements the Court has interpreted so broadly the delegated powers of Congress under the Constitution, particularly under the "necessary and proper" clause that it has in practice resulted in recognizing in Congress the power to authorize the President to conclude executive agreements equal in importance to treaties in respect to scope and subject matter (U. S. v. Curtiss-Wright Corp., supra.). Other cases have likewise upheld the validity and effect of executive agreements. U. S. v. Schooner Peggy, 1 Cranch 103 (1801) held an agreement equivalent to an Act of Congress, superceding an earlier Congressional statute on a subject within the delegated powers of Congress. Takahashi v. Fish and Game Comm'n, 334 U. S. 410 (1948) and Asakura v. City of Seattle, 265 U. S. 322 (1924) demonstrate the Supreme Court's interpretation of the powers of Congress in respect of aliens in a manner to indicate that Congressional authorized executive agreements are coextensive

with treaties. Missouri v. Holland, 252 U. S. 416 (1920) held that the requirement of conformity of treaties to the Constitution relates in each case not to procedural or formal limitations, but to express prohibitions of the Constitution, viz. to such questions as the taking of private property without just compensation, the passing of ex post facto criminal laws or those relating to matters reserved to the states. Geofroy v. Riggs, 133 U. S. 258 (1890) and Ware v. Hylton, 3 Dall. 199 (1796) stand for the proposition that, with the exception of cession of territory and violation of personal guarantees, "it is not perceived that there is any limit to the questions which can be adjusted touching any manner which can be properly the subject of negotiations with a foreign country."

Consequently, international agreements, whether treaties or executive agreements become, pursuant to the terms of Article VI, clause 2, the Supreme Law of the Land and as such are binding on the Courts, notwithstanding anything in the laws or constitutions of the various states to the contrary (Holloway, at 301). And, as to Constitutional prohibitions and their effect on executive agreements, it is said that most of the express Constitutional prohibitions have no relevance or little to treaties. Where they do, they usually deal with limitations of a substantive character rather than form (see Hirota v. MacArthur, 338 U. S. 197 (1948) where the Supreme Court refused to rule on the validity of sentences awarded Japanese war

criminals by the International Military Tribunal, set up by executive agreement.

As to the domestic impact of executive agreements, it is said that those agreements occupy an anomalous position. They are not mentioned in the supremacy clause, and therefore may not occupy a position equal in dignity to that of statutes and treaties (McLaughlin at 767). On the other hand, it has also been argued that as for the three categories of executive agreements contained in the Restatement, their position is not very different from that relating to treaties. Thus, executive agreements made pursuant to treaty are governed by the same rules as the treaty itself. Those made pursuant to an Act of Congress offer no difficulty, even though they do not in a formal sense provide a "constitutional basis for the enactment of legislation independent and separate from the power to legislate that Congress has in its own right"(Restatement, section 146, comment (b)). But the area of delegated powers, express and implied, is so wide that once Congress has authorized the President to conclude an extensive agreement, it is not likely to invalidate it by conflicting legislation (Holloway, at 308). And, as to those agreements concluded by the President in his own right, these in principle supercede inconsistent provisions of the law of the various states, but not always those of earlier valid Acts of Congress. In this regard, it is stated that:

> In the case of purely presidential agreements there is a problem of more substance. They are not supreme law of the land by reason of any language in the supremacy clause, nor is it possible to say that they satisfy the political requirements which would justify assimilating them to any of the elements mentioned in that clause (McLaughlin, at 768).

Nevertheless, it is fairly clear that such agreements are binding and supreme over State laws and constitutions, U. S. v. Belmont, and U. S. v. Pink, supra.p 13. In regard to those cases, it is stated that:

> When taken with the peculiar facts of these cases to apply to an executive agreement incidental to the President's admitted right to recognize a foreign state the extremeness of the (Belmont & Pink) position is mitigated but not altogether removed. The President's right to make the agreement is certainly not in question, and the assertion that it takes effect as if it were the supreme law of the land need not be taken to mean it is free from such Constitutional limitations as would attach to the President's powers. Nevertheless, those powers are so broad and so little defined that it would seem, in Corwin's words, "more accordant with American ideas of government by law to require, before a purely executive agreement be applied in the field of private rights, that it be supplemented with a sanctioning Act of Congress"(citing Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY, 113-14 (11th ed. 1954))(McLaughlin, at 768). See also, Oliver, Executive Agreement and Emanation from the Fifth Amendment, 49 A.J.I.L. 362 (1959).

Examples of the application of Constitutional prohibitions against infringement of private rights are seen in Reid v. Covert, 374 U. S. 1 (1957). And, in regard to the position of the purely Presidential agreement vis à vis Federal laws, see U. S. v. Capps, 204 F.2d. 655 (4th C.A. 1953) aff'd on other grounds 348 U. S. 296 (1955) where it was held that an executive agreement was inconsistent with a Congressional statute regulating the activity involved, and therefore void. Although the opinion is not clear, because there apparently was some authorization in the statute allowing modification by executive agreement, the statement of principle has been considered correct (McLaughlin, at 771). The tendency of these cases is toward subordination of executive agreements to the elements of the supreme law of the land enumerated in the supremacy clause. Consequently, although in principle the Courts of the United States and in particular the Supreme Court tend to regard treaties as subordinate to the Constitution, hence subject to judicial review, there is in fact no instance of a treaty having been declared unconstitutional by the Courts "either for lack of competence to make it, or for lack of proper form' in spite of the ever-increasing number of executive agreements (Holloway, at 304). It may therefore be concluded that:

> . . .modern trends in treaty-making practice indicate that a greater emphasis is being placed on the effective performance of the treaty rather than a mere procedural conformity which, within the

> context of the present day modes of concluding treaties, has lost all relevance. . ...A perusal of the international instruments awaiting ratification by the President shows that the delay in the majority of cases is not due to absence of Senate consent but to that of enabling legislation or action by Congress. Thus more and more international agreements of any importance, whether concluded in the form of Senate-consented treaties or as Congressional-executive agreements, require action by Congress before they can be finalized (Holloway, at 356).

However, it is recognized that a close relationship must exist between the Executive and Congress in the conclusion of such agreements and in their implementation. It is thus stated that:

> An important reason for the need of close collaboration between Congress and the Executive is, on the one hand, the overlapping of Constitutional provisions relating to the powers of Congress and the Executive and, on the other hand, the principle of separation of powers. For if on the international scale the Executive can conclude a valid agreement on any subject-matter which falls within the power of Congress, in domestic law the agreemeent can only become effective if Congress enacts enabling legislation and refrains from enacting subsequent legislation contrary to the provisions of a previous treaty. Both conditions of effectiveness apply to Senatorial-consented treaties. It is, so to speak, this natural link between the conclusion of an international agreement and its implementation

> which has led to a close collaboration between Congress and the Executive. This is achieved by Congress delegating its legislative competence to the Executive, to enable it to act with the urgency needed, and by the Executive securing enabling legislation before definitively binding the State. This procedure was adopted for accession to the International Monetary Fund, the International Bank for Reconstruction and Development, FAO, WHO, and the International Organization for Refugees (Pub. Law 171 and 174, 79th Congress; 146, 643, and 843, 80th Congress). . . .The only criterion for validity, except violation of individual rights guaranteed by the Constitution, would seem to be. . .whether the President is able to implement the agreement in domestic law and whether he can mobilise sufficient popular support. . . .(Holloway, at 360-61).

5. Conclusions. Although the foregoing discussion has encompassed several aspects of the treaty-making power of the Federal Government, some of which may have no direct relationship to the primary issue under study, it is considered that it is necessary to examine and fully understand underlying concepts which form the basis of the competence of the Federal Government in its international relations. From this examination this writer concludes that several simple answers to the basic issue of the ability of the Executive to bind the country to international arrangements pending final ratification of any Law of

the Sea Convention are possible:

(1) The Executive is competent to negotiate international agreements with foreign states concerning matters of international concern and requiring the active participation of this nation.

(2) The Executive may bind the United States to agreements among nations of the world, as far as international obligations are concerned.

(3) The Executive's agreements may have binding domestic impact depending upon the scope of powers grounding the Executive's action, i.e. whether the agreement is concluded: (1) under the Constitutional authority of the President himself; (2) under authority of a preexisting treaty concluded with the advice and consent of the Senate; or (3) under the authority delegated to the President by the Congress through legislation or resolution.

Recognizing, from the foregoing analysis and conclusions that the Executive may Constitutionally conclude an agreement at Santiago (either the Convention on the Law of the Sea itself or a protocol thereto) providing for immediate implementation of provisions which are considered necessary for rational and orderly exploitation of the seabed during the interim between signature and ratification, it is recognized that wider support and authority for such an executive agreement would exist if support of the Congress were obtained comtemporaneously with such signature, or prior thereto. This would introduce the

Congressional power into the field, which, combined with that of the Executive, is coextensive with the treaty-making power with Advice and Consent of the Senate (see text, supra. p. 20). Consequently, it is suggested that in order to provide for a more or less foolproof system of provisional implementation of any law of the sea regime reached at Santiago, either a Joint Resolution of Congress "supporting and affirming the actions of the President in any matters relating to the exploration and exploitation of the oceans (note: not limited to merely the mineral and oil and gas exploration and exploitation) pending final ratification with the Advice and Consent of the Senate, and the conclusion of any agreements relating thereto" would more than adequately provide full Constitutional protection for any provisional agreement concluded. Joint Resolution is not necessary either, nor is Senate resolution to the same effect, or Senate "statement of intent" supporting an interim measure. Nevertheless, the realities of the situation within the Federal Government, particularly those presently strongly suggesting strong dualistic responsibilities between the Senate and the Executive would appear to demand Senatorial or Congressional support for Executive action in the Law of the Sea area before binding domestic effect would be assured. This may prove to be extremely important since implementation of any deep seabed regime will necessarily require some domestic regulation or legislation, the scope of which must be determined when a regime is efformed.