



MANNHEIMER ZENTRUM FÜR
EUROPÄISCHE SOZIALFORSCHUNG

The State as a Non-Unitary Actor: The Role of the Judicial Branch in International Negotiations

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Arbeitspapiere -
Mannheimer Zentrum für Europäische Sozialforschung
ISSN 1437-8574

Arbeitspapiere

Working papers

Nr. 23, 2000



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Uwe Kischel
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DFG Research Group 'Institutionalization of International Negotiation Systems'

IINS Research Paper No. 5

IINS ist eine von der Deutschen Forschungsgemeinschaft finanzierte Forschergruppe.
The research group IINS is financed by the Deutsche Forschungsgemeinschaft (DFG)

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Kischel, Uwe:

The State as a Non-Unitary Actor : The Role of the Judicial Branch in International Negotiations / Uwe Kischel. –

Mannheim : 2000

(Arbeitspapiere - Mannheimer Zentrum für Europäische Sozialforschung ; 23)

ISSN 1437-8574

Not available in book shops.

Token fee: DM 5,-

Purchase: Mannheimer Zentrum für Europäische Sozialforschung (MZES), D – 68131 Mannheim

WWW: <http://www.mzes.uni-mannheim.de>

Editorial Note:

This working paper has been written within the interdisciplinary research project "Institutionalization of international negotiation systems" (IINS), supported by the Deutsche Forschungsgemeinschaft (DFG).

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Abstract

The working paper discusses the role of the judicial branch in international negotiations on the conclusion of treaties, using the situation in Germany as an example. In a first part, the author examines whether the introduction of courts into the analysis of the institutionalization of international negotiation systems is impeded, from a theoretical point of view, by the unitary actor assumption often used in international relations theory. The author doubts the explanatory power of the unitary actor assumption and denies the possibility to transfer it from the realm of international relations with its modeling approach to the non-modeling realm of law. In a second part, the paper focuses on the role of national courts in the negotiation of international agreements, which, in Germany, must in principle conform with the constitution and are subject to judicial scrutiny. Five examples of major functions of courts are analyzed: first, the theory of approximation, where the negotiation starting position is turned into a constitutionally relevant factor, allowing certain derogations from constitutional requirements; second, the margin of appreciation afforded to the executive; third, the restrictions on the transfer of power to supranational organizations; fourth, the power of interpretation; and fifth, the power of initiation. The author concludes that the influence of courts in international negotiations cannot be ignored and must not be regretted. The courts ensure that the limits of governmental action are observed, while at the same time showing a remarkable understanding of the realities of international negotiations.

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A. Introduction

When analyzing the institutionalization of international negotiation systems, the commonplace assumption that States are the primary actors in international negotiations soon becomes too broad to provide the details necessary for a deeper understanding of the intricacies of negotiation processes and outcomes. It does not suffice any more to examine the organizational context in which the state is embedded; rather, the institutional design of the State itself must be taken into consideration. The State, thus, turns out to be not one, but several actors with their own preferences and their own legal prerequisites and restrictions, which can and will influence the starting position, the conduct, and the results of international negotiations (B). To view the State as a heterogeneous actor may contradict one of the core assumptions often used in international relations theory. From a legal point of view, however, all three branches of government influence negotiations on the conclusion of international agreements. While the importance of the executive with its primary responsibility for foreign affairs¹ is taken for granted, and the role of the legislature, mainly but not exclusively through national ratification requirements, has attracted considerable research,² the influence of the national judiciary in international negotiations merits some closer attention (C).

B. The unitary actor assumption in international relations

I. The State as a unitary actor

Much of international relations theory is based on the assumption that the State is a unitary actor. Even conflicting theories such as realism and neoliberal institutionalism concur in the belief that States may be regarded as hierarchically organized entities with one determinable preference-ranking, making it possible to evaluate gains and losses in the international sphere for the State as a whole.³

¹ On the often rather abstract discussion whether foreign affairs are primarily an executive function or a function shared between executive and legislature cf. e.g. Baade, Hans W.: *Das Verhältnis von Parlament und Regierung im Bereich der auswärtigen Gewalt der Bundesrepublik Deutschland*, 1962, 115ff.; Hailbronner, Kay: *Kontrolle der auswärtigen Gewalt*, VVDStRL 56 (1997), 7 (10f.); Wolfrum, Rüdiger: *Kontrolle der auswärtigen Gewalt*, VVDStRL 56 (1997), 38 (40); Grewe, Wilhelm G.: *Zum Verfassungsrecht der auswärtigen Gewalt*, AöR 112 (1987), 521 (521ff.); Schuppert, Folke: *Die verfassungsgerichtliche Kontrolle der auswärtigen Gewalt*, 1973, 33ff.; Bryde, Brun-Otto: *Sicherheitspolitik zwischen Regierung und Parlament*, Jura 1986, 363 (366ff.).

² Cf. e.g. Wolfrum (n. 1), 39ff.; Fastenrath, Ulrich: *Kompetenzverteilung im Bereich der auswärtigen Gewalt*, DVBl 1996, 937 (937ff.); Bernhardt, Rudolf: *Verfassungsrecht und völkerrechtlich Verträge*, in: Isensee, Josef; Kirchhof, Paul (eds.): *Handbuch des Staatsrechts*, t. 7, 1992, § 174, marg. note 11ff.; Baade (Anm. 1), p. 77ff.; Tomuschat, Christian: *Parliamentary control over foreign policy in the Federal Republic of Germany*, in: Cassese, Antonio: *Parliamentary control over foreign policy*, 1980, 25 (25ff.).

³ Cf. Keohane, Robert O.: *Neoliberal institutionalism: A perspective on world politics*, in: Keohane, Robert O.: *International institutions and state power - Essays in international relations theory*, 1989, 1 (2); Keohane, Robert O.: *Theory of world Politics: Structural realism and beyond*, in: Keohane, Robert O.: *International institutions and state power - Essays in international relations theory*, 1989, 35 (40, 62); Waltz, Kenneth N.: *Theory of International politics*, 1979, 60ff.; critically on these views Milner, Helen V.: *Interest, institutions, and*

Proponents of this point of view argue that it is impossible to understand world politics simply by looking inside of States. If the situation of actors affects their behavior and influences their interactions, then, it is said, attempted explanation at the unit level will lead to the infinite proliferation of variables, because at that level no one variable, or set of variables, is sufficient to produce the observed result. A heterogeneous approach supposedly does not comprehend what is causally important. For it is not only the individual characters and motives of the State actors that explain the results of international relations, but also causes that operate among the actors collectively, i.e. causes inherent in the international system. Looking inside of States omits these causes at the system level and tries to replace them by attributing characteristics, motives, duties, and the like to the actors. Replacing factors that derive from the system by such attributes, however, distorts the existing causal relationships.⁴ The texture of international politics remains highly constant in the face of major domestic changes. The similarity and repetition of international outcomes persists despite wide variations in the attributes and in the interactions of the agents that supposedly cause them.⁵

II. Domestic politics matter

From an interdisciplinary point of view, especially one influenced by legal training, the unitary actor assumption seems, at first, baffling. Common sense seems to reveal that domestic politics matter greatly in the conduct of foreign affairs.⁶ Party and coalition politics in the German government, the specific interests of the German Länder or the lobbying by trade, industry, and labor unions: none of these factors is restricted to purely internal affairs. Quite on the contrary, the growing internationalization on a European as well as worldwide level increases the importance and domestic impact of foreign policy and, thus, the interest of domestic actors in influencing it,⁷ as the continuing debate on globalization amply illustrates.⁸ Even a casual observer of political affairs could not fail to notice that, for instance, the sale of German military equipment to Turkey cannot be fully understood if the relationship between the Social Democrat and the Green parties, and even the internal struggles among the Greens are ignored. Similarly for instance, the dialogue between Germany and the Czech Republic on Germans displaced after World War II has, for a long time, been under the influence of the Bavarian CSU government and subject to intensive and successful lobbying of organizations of displacees in Germany.

information - Domestic politics and international relations, 1997, 233, 252; Ashley, Richard K.: The poverty of neorealism, in: Keohane, Robert O.: Neorealism and its critics, 1986, 255 (268ff.); including domestic politics also Snyder, Glenn H.; Diesing, Paul: Conflict among nations - Bargaining, decision making, and system structure in international crises, 1977, 74f., 479f.

⁴ Cf. for this line of arguments Waltz (n. 3), p. 65.

⁵ Cf. Waltz (n. 3), 66ff.

⁶ Thus the very harsh criticism by Ashley (n. 3), 270 ("the state-as-actor assumption is a metaphysical commitment prior to science and exempted from scientific criticism. [...] neorealism immunizes its statist commitments from any form of falsification"); from a lawyer's point of view cf. also Fastenrath (n. 2), 11ff.

⁷ Cf. eg. Wolfrum (n. 1), 43.

⁸ On the reverse influence of internationalization on domestic politics cf. the contributions in Keohane, Robert O.; Milner, Helen V. (eds.): Internationalization and domestic politics, 1996.

This rather intuitive perception about the relevance of actors below the State level is confirmed by more recent in-depth case studies. *Milner* has analyzed important negotiations that took place in the 1940's and 1950's, e.g. on the Bretton Woods Monetary Agreement or the European Defense Community, as well as the much more recent negotiations on the North American Free Trade Agreement and the Maastricht Treaty on European Monetary Union.⁹ All studies show that domestic politics influence international relations, rendering cooperation more difficult and affecting the terms of international agreements, and that failure to consider them will make it impossible to understand the provisions of such agreements. As a result, *Milner* was able to identify the structure of domestic preferences, the nature of domestic political institutions, and the distribution of information internally as the three factors that condition a State's ability to cooperate.¹⁰ To look at international relations while ignoring the inside of States would, as she points out, be like studying human emotions while ignoring the genetic makeup and the biochemical system.¹¹

III. Reality vs. modeling: an interdisciplinary problem

The argument in favor of the unitary actor assumption rests on two pillars. Even though the assumption must be rejected in its result, both pillars retain their value.

Firstly, the importance of factors that cannot be attributed to the actors individually but to the system as a whole is stressed.¹² When States are assumed to be heterogeneous rather than unitary actors, however, the influence of the international system on the results of, for instance, negotiations is not denied. To dissect the State actor adds factors to the picture, it does neither necessarily subtract other factors¹³ nor necessarily leave the scholar exclusively at the unit level or lower.¹⁴

Secondly, and more important in an interdisciplinary context, the unitary actor assumption deplors the infinite proliferation of variables.¹⁵ Dividing the State actor into a set of internal actors with their own preferences, agendas and restrictions will indeed and by definition add to the number of variables that must be taken into account. The exact number of factors will depend on the national system as well as on the model used. It remains unclear, however, why that number should be infinite. Refusing the unitary actor assumption opens the door for internal actors, it does not determine how many of them are allowed to pass through. Still, there will undeniably be proliferation. The question why such proliferation is to be deplored is at the basis of many initial misunderstandings in interdisciplinary research involving social scientists on the one hand, and lawyers on the other hand.

⁹ *Milner* (n. 3), 135ff.

¹⁰ *Milner* (n. 3), 234.

¹¹ *Milner* (n. 3), 255.

¹² *Waltz* (n. 3), 65f.

¹³ Cf. *Morrow*, James D.: Electoral and congressional incentives and arms control, *Journal of Conflict Resolution* 35 (1991), 245 (248) in the context of arms control ("Domestic politics forms a part of the story, one that has been underplayed until now. But the development of bargaining positions also depends upon the logic of [...] interests within the executive branch, and dynamics of the negotiations"); *Snyder/Diesing* (n. 3), 479f.; probably similar *Milner* (n. 3), 255 ("if one rejects the notion of a unitary state, one can still study systems").

Most lawyers, by professional training and professionally ingrained bias, endeavor to get a full grasp on reality. When solving a case or supporting a client, they must strive to gather the most complete information possible about the facts involved in order to be able to render a correct legal analysis. Of course, not all facts are important. If, for instance, a person claims damages because his car's automatic transmission has not been repaired correctly, the color of the car as well as age and sex of the holder will evidently be of no influence. Conversely, if that person demands a building permit for a garage, the fact that his car will not leave the garage for some time because its automatic transmission does not function lacks any import. It is, therefore, not unknown to the lawyer to reduce reality by consciously ignoring many facts that are not pertinent to the applicable legal rules.¹⁶ Nevertheless, the lawyer would never allow himself to ignore any factor revealing any factual influence on the legal matter under consideration. In the claim for damages, any factor that might have influenced the performance of the automatic transmission, or might shed any light on the question why it did not work properly after the repair had taken place, would have to be carefully explored and considered. When dealing with complicated causal relationships, lawyers tend to demand in-depth expertises by specialists and expect them to conclusively explain what happened, and how. They want neither simplifications nor generalizations.

Social scientist often prefer a completely different approach. They do not try to describe reality, but rather to model it. Such models will often work with simplifying assumptions which, to the outside observer, border on the ridiculous. It is not their objective, however, to correctly reflect reality, but to explain and, hopefully, predict certain results. If the model, using certain assumptions and a limited number of variables, manages to explain with a sufficient degree of plausibility why inflation rose, why juvenile crimes went down, or why certain negotiations failed, then the model can be considered a success. The model must, therefore, be workable. Any theory of international relations that uses too many variables - let alone an infinite amount - would lose its workability. It might be a correct model judged by its closeness to reality, but it is not a good one.

When proponents of the unitary actor assumption argue that it keeps down the number of variables which need to be taken into consideration, they rely on this aspect of workability. In principle, this argument is a cogent one. Yet its significance depends on the remaining explanatory power of such a workable, but much reduced model. Here, a number of case studies in international relations, especially those by *Milner*, have shown that more than one actor on the State level influences the conduct and result of foreign affairs so that such conduct and results cannot be disregarded without losing the possibility to correctly explain the behavior of States in the international sphere.¹⁷ The explanatory power of the unitary actor model has, thus, been sufficiently undermined to lose its

¹⁴ This, however, is maintained by Waltz (n. 3), 66.

¹⁵ Waltz (n. 3), 65.

¹⁶ Cf. e.g. Kischel, Uwe: Systembindung des Gesetzgebers und Gleichheitssatz, AöR 124 (1999), 174 (184).

¹⁷ Cf. Milner (n. 3), 135ff., 256ff.; Morrow (n. 13), 245, 248ff.; Miller, Steven E.: Politics over promise: Domestic impediments to arms control, International Security 8 (1984), 67 (68ff.); further examples in Snyder/Diesing (n. 3), 74f., 340ff., 510ff.; cf. also Wolfrum, Rüdiger: Vorbereitende Willensbildung und Entscheidungsprozeß

restrictive power in the analysis of international relations in general and international negotiations in particular.

Apart from its decreasing appeal in international relations theory, the unitary actor assumption is not fit to be transferred to legal analysis. It is an integral part of the modeling approach that is not used in law. Legal science does not model, but tries to analyze the law as it is, or as it should be, describing underlying principles and methods. No entity whose acts can have legal consequences may be left out of legal analysis. One might be tempted to liken the traditional view that States, and not their sub-units, are subjects of public international law, to the unitary actor assumption. However, this traditional view is not part of a model trying to restrict variables. It is simply a consequence of the legal view that States, and not their sub-units, have rights and duties under international law. The actions of sub-units such as courts or legislatures are by no means left out of the picture. Rather, their actions are attributed to the State as a whole. The State acts through its organs. Furthermore, in modern international law, actors below the State level such as the individuals and corporations¹⁸ or non-governmental organizations¹⁹ have attracted increasing attention by legal scholars, and are often regarded as subjects of international law in their own right. The legal analysis of negotiations, in particular, does not ignore these others actors.²⁰ Finally, when the focus is shifted from public international law to national public law, the different branches of government and the distribution of foreign affairs powers among them becomes a dominant theme.

IV. Political and legal actors

The different actors that compose the State may be analyzed from a political or - as here - from a legal point of view. As a working definition, an actor is a legal one if and insofar as he has the capability to perform acts that will have legally binding force - pass a bill, render a judgement, produce rules or regulations -, or if and insofar as his participation in such acts is subject to legal rules - parliamentary fractions participating in the preparation and debate of bills, groups with a right to be heard in administrative proceedings, individual judges in court chambers. From a political point of view, further actors will have to be added who may have a factual, but no legal influence - e.g. by means of lobbyism in parliament, peer pressure on judges, or bureaucratic inertia in administrative action.

The legal quality of an actor is not fixed, but will depend on the context. Political parties, for instance, have no legal, but only political influence on foreign affairs, whereas in the conduct of elections, they

beim Abschluß multilateraler völkerrechtlicher Verträge, IINS Research Paper No. 3, Arbeitspapiere - Mannheimer Zentrum für Europäische Sozialforschung Nr. 17, 2000, 3, 7.

¹⁸ Cf. Malanczuk, Peter: Akehurst's modern introduction to international law, 7th ed. 1997, 100ff.; Kischel, Uwe: State Contracts - Völker-, schieds- und internationalprivatrechtliche Aspekte des anwendbaren Rechts, 1992, 234ff.; Epping, Volker, in: Ipsen, Knut: Völkerrecht, 4th ed. 1999, 79ff., 14f.; on group rights cf. Riedel, Eibe: Gruppenrechte und kollektive Aspekte individueller Menschenrechte, BerDGV 33 (1994), 49 (59ff.).

¹⁹ Cf. Malanczuk (n. 18), 96ff.; Stoecker, Felix William: NGOs und die UNO - Die Einbindung von Nichtregierungsorganisationen (NGOs) in die Strukturen der Vereinten Nationen, 2000, passim, esp. 89ff.

are a constitutionally recognized factor.²¹ Employers and workers, as groups, do not legally participate in the conduct of a State's foreign affairs, while they are represented and have voting rights in the negotiation of new conventions and recommendations within the framework of the International Labor Organization.²² In a political analysis of the negotiation process leading towards the Maastricht treaty with its provisions on European Monetary Union, the German Bundesbank must be considered a key player. Bundesbank endorsement was necessary for the executive to obtain legislative approval, and the critical point of view of the reserve bank significantly changed the negotiations.²³ Legally, however, the Bundesbank had no influence at all. While, at the time, it was a key legal actor in German monetary policy, any participation in the negotiation and ratification of a treaty on European integration that transferred much of its power to a European Central Bank was outside the sphere of its competence. Thus, in the proceedings on the Maastricht treaty with its provisions on European Monetary Union before the German Federal Constitutional Court, the Bundesbank was not even among the entities that had a legal right to be heard. The Court only invited Prof. Schlesinger, the president, and Dr. Rieke, one director of the Bundesbank as informal "informers" ("Auskunftspersonen") on questions of Monetary Union.²⁴

The legal analysis of international negotiations aimed at the conclusion of an international agreement will have to consider the traditional horizontal²⁵ division of the State under the separation of powers doctrine into legislative, executive, and judiciary branch.²⁶ Of these powers, the second is most prominent in negotiations. Neither parliament nor the courts, but the executive will talk with foreign governments, send representatives, and perform the day-to-day business of negotiation.²⁷ When the state is treated as a unitary actor, it will most often be identified with the executive. The legislative branch with its important power to ratify has also been subject to much legal analysis, with foreign affairs being frequently regarded as a joint function of parliament and the executive.²⁸ This study, however, will focus on the role of the third branch of government, the judiciary, trying to point out some major functions of courts in international negotiations.

²⁰ Cf. e.g. Wolfrum (n. 17), 3, 7; for an economic analysis cf. e.g. Boockmann, Bernhard: Decision-Making on ILO Conventions and Recommendations: Legal Framework and Application, IINS Research Paper No. 2, Zentrum für Europäische Wirtschaftsforschung - Dokumentation Nr. 00-03, 2000, 23f.

²¹ Cf. Ipsen, Jörn, in: Sachs, Michael: Grundgesetz Kommentar, 2nd ed. 1999, Art. 21, marg. note 22, 34f., 42, 57ff.

²² Boockmann (n. 20), 4f., 25.

²³ Cf. Milner (n. 3), 218f., 221f., 225.

²⁴ BVerfGE 89, 155 (170f.); cf. also the decision on entry into the third stage of EMU BVerfGE 97, 350 (367), where the Bundesbank is not even mentioned.

²⁵ Aspects of vertical separation of powers, especially Länder and Bundesrat, of intra-ministerial cooperation, and of regional as well as local participation will not be addressed here; cf. e.g. on the role of the Länder Fastenrath (n. 2), 115ff.

²⁶ Cf. Fastenrath (n. 2), 54.

²⁷ On the more theoretical than practical role of the president according to Art. 59 para. 1 Grundgesetz see Pernice, Ingolf, in: Dreier, Horst: Grundgesetz Kommentar, vol. 2, 1998, Art. 59, marg. note 18ff.; Bernhardt (n. 2), marg. note 7f.; Fastenrath (n. 2), 199ff.; Seidel, Dietmar: Der Bundespräsident als Träger der auswärtigen Gewalt, 1972, 43ff.

²⁸ Cf. supra n. 1.

C. International negotiations and the judiciary

Negotiations aiming at the conclusion of an international agreement do not take place in a national legal void. International agreements in Germany are not the supreme law of the land. In the hierarchy of norms, they rather fall between ordinary statutes and constitutional law.²⁹ Consequently, an international agreement must conform with the German constitution (Grundgesetz; GG).³⁰ The results of the negotiation will have to be ratified and, thus, become subject to judicial scrutiny.³¹

In discussions, practitioners reveal that negotiators not infrequently enjoy a surprising amount of leeway from their respective governments, especially in bargaining over multilateral codifications. In such cases, the agent will experience little if any constraint from his principal. But even without concrete instructions, he will be directed by the demands of constitutional law, which in that sense serves as a principal of final resort. For example, the constitutional mandate of unification in the preamble of the Grundgesetz for decades compelled all West German representatives dealing with officials of the GDR to consider the prospects of unification in all negotiations. The right way to choose may have been open to discussion in many situation, but the goal as such could never be discarded.³² The State's representatives at the negotiation table have to bear such constitutional constraints in mind. The most basic decision in any international negotiation - the decision what national interests are - is not left exclusively to the executive but may also be predetermined by the national legal order and is, consequently, subject to judicial interference.

I. International negotiations and constitutional guarantees: The theory of approximation

The vital question, of course, concerns the content of the constitutional guarantees that constrain international negotiations. Since the constitution ranks higher than international agreements, *prima facie* all of its guarantees must be fully respected. In principle, there would then be no difference between the constitutional constraints on a national statute and those on an international agreement that will be applied in the national jurisdiction: neither one is dispensed from constitutional demands. Indeed, this is a starting point for court decisions and scholarly opinions.³³ Beyond its value as a

²⁹ Cf. Geiger, Geiger, Rudolf: Grundgesetz und Völkerrecht - Die Bezüge des Staatsrechts zum Völkerrecht und Europarecht, 2nd ed. 1994, 177; on the status of low-level administrative agreements that are not explored here cf. Schweitzer, Michael: Staatsrecht III, 5th ed. 1995, marg. note 463f.; Streinz, Rudolf, in: Sachs, Michael: Grundgesetz Kommentar, 2nd ed. 1999, Art. 59 marg. note 81.

³⁰ BVerfGE 1, 36 (14).

³¹ Cf. BVerfGE 36, 1 (13); 72, 66 (74f.); 72, 200 (238); 84, 90 (113); cf. Geiger (n. 29), 153; Schlaich, Klaus: Das Bundesverfassungsgericht - Stellung, Verfahren, Entscheidungen, 4th ed. 1997, 90, 100, 138.

³² BVerfGE 36, 1 (17f.).

³³ Cf. Geiger (n. 29), 148ff.; Bernhardt, Rudolf: Bundesverfassungsgericht und völkerrechtliche Verträge, in: Bundesverfassungsgericht und Grundgesetz, Festgabe aus Anlaß des 25jährigen Bestehens des Bundesverfassungsgericht, vol. 2, 1976, 154 (183); Hailbronner (n. 1), 15; Bleckmann, Albert: Grundgesetz und Völkerrecht, 1975, 227ff.; Schweitzer (n. 29), 228; Stern, Klaus: Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle - Das Bundesverfassungsgericht im Spannungsfeld zwischen Judicial Activism und Judicial Restraint, NWVBl 1994, 241, 245ff.; Schröcker: Das vertragswidrige Gesetz (Zweiter Teil), DVBl 1958, 410 (413f.); Schröder, Meinhard: Zur Wirkkraft der Grundrechte bei Sachverhalten mit

starting point, however, this principle does not take sufficient notice of the specific structure of international negotiations. Unlike the national legislature that decides alone, without outside interference, and is solely responsible for all of its legal acts, an international agreement is the result of intensive bargaining, of give and take, compromises, and package deals with other actors that are not subject to the German constitution. The outcome of such negotiations cannot be expected to conform totally with the German position, be it a political or a constitutional one. To be unable to compromise in certain areas might seriously hamper Germany's bargaining position.³⁴ On the other hand, constitutionally guaranteed freedom and equality rights should, by their nature, not be allowed to be bargained away. They are rights that are so important that even the sovereign power of the national legislature cannot abrogate them.³⁵ The German Federal Constitutional Court, far from being ignorant of this dilemma, has developed the so-called theory of approximation ("Annäherungstheorie")³⁶ to balance these conflicting interests.

1. Background

The theory of approximation allows, under certain circumstances, the German State to negotiate and conclude international agreements that, as purely national laws, would not pass constitutional muster.³⁷ The Federal Constitutional Court developed this theory when deciding upon the constitutionality of the Saar Statute,³⁸ a decision that merits closer attention.³⁹

In the aftermath of World War II, the Saar territory became part of the French occupation zone. Quickly, France successfully began efforts to detach the territory from Germany. These efforts accumulated in the Saar Constitution of December 1947, which gave the Saar an autonomous status, independent of Germany, and envisaged close economic ties with France. Compliance with the Constitution was to be supervised by a French High Commissioner with extensive powers. Subsequent agreements further strengthened this autonomy. The German government did not recognize the new regime for the Saar territory, particularly since political parties advocating closer ties to Germany had been systematically hampered or even banned. In 1954, Germany and France signed an agreement on the Saar Statute, which was intended to give the Saar territory a specific European status under the supervision of a European Commissioner responsible only to the Council of Ministers of the Western European Union. This Saar statute was subject to a public referendum

grenzüberschreitenden Elementen, Festschrift Schlochauer, 1981, 137 (138); BVerfGE 4, 157 (169) (speaking of the undeniable constitutional principle that any exercise of state power in the Federal Republic of Germany is bound by the Grundgesetz); on the applicability of the basic rights contained in the Grundgesetz to situations with transboundary elements cf. critically Hofmann, Rainer: Grundrechte und grenzüberschreitende Sachverhalte, 1994, 10ff.

³⁴ Cf. also BVerfGE 77, 170 (231) (to create a danger of incapacity to act on foreign policy matters cannot be the meaning of the constitution).

³⁵ Alexy, Robert: Theorie der Grundrechte, 1986, 406.

³⁶ The notion seems to have been first used by Schröcker (n. 33), 414.

³⁷ Clearly Zeitler, Franz-Christoph: Verfassungsgericht und völkerrechtlicher Vertrag - Die gerichtliche Kontrolle völkerrechtlicher Akte der Regierung nach deutschem, amerikanischem und englischem Verfassungsrecht, 1974, 267f.

³⁸ Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Französischen Republik über das Statut der Saar of March 24th, 1955, BGBl 1955 II, 295.

³⁹ BVerfGE 4, 157.

(which finally failed and thus led to the return of the Saar territory as a German Land), and was to last until the conclusion of a peace treaty.⁴⁰ The treaty was challenged in the Federal Constitutional Court by 178 members of the German Bundestag, and upheld.

The Federal Constitutional Court pointed out that in constitutional scrutiny of an international treaty which regulates Germany's political relations, it must not lose sight of the political position from which the treaty has arisen and of the political realities it seeks to shape or alter. This is particularly important when the political starting position has been created by the other party of the treaty under its special prerogatives as an occupying power which are not subject to constitutional constraints. The question then followed, whether the basic constitutional principle that any exercise of State authority in Germany is bound by the Grundgesetz could be extended to treaties negotiated under such conditions, so that only treaties which conform completely with the provisions of the Grundgesetz could be accepted as constitutional.⁴¹ The Court answered in the negative: The provisions of the treaty only need to show an inherent tendency, and need to have been undertaken with the will to come closer to the fully constitutional status, to prepare such a status at least as much as is politically attainable.⁴² This principle leads to the conclusion that, for a transition period, infringements of constitutional norms can be accepted if they have a direct link with the provisions showing such a tendency of approximation towards full compliance with the constitution, and as long as some core contents of constitutional provisions are observed. To rule otherwise would lead to an undesirable constitutional rigorism, impeding the bad to give way to the better because the best cannot be attained.⁴³

2. The constitutional influence of the negotiation starting position

The theory of approximation turns the negotiation starting position into a constitutionally relevant factor. When, by constitutional standards, the situation is worse without than with the new international agreement, then the government may conclude that agreement, even if its provisions do not conform with the constitution. Constitutional law thus respects the special situation of international negotiations, in which the government is not alone and cannot be expected to always attain full recognition of its own position. But constitutional law also gives specific directions to negotiating agents. They must at least try to come closer to the constitutional status, and this undertaking must be reflected in the provisions of the agreement.

a. Improvement of the starting position

The theory of approximation does not, however, generally exempt the government from constitutional guarantees when negotiating international agreements. Its main restriction, of course, is the requirement for the situation prior to the agreement to be less in conformity with the Grundgesetz. This

⁴⁰ BVerfGE 4, 157 (158ff.)

⁴¹ BVerfGE 4, 157 (168f.).

⁴² BVerfGE 4, 157 (169).

⁴³ BVerfGE 4, 157 (170).

does not necessarily require each and every single provision of the treaty to constitute an improvement or at least no change for the worse. When, for instance, the government in an agreement renounces certain debated rights of their citizens, this deterioration may be set off by a pronounced overall improvement of the legal situation.⁴⁴ This does not mean that any provision that severely encroaches upon constitutional rights can be justified by just any overall tendency of the agreement to promote such constitutional goals as peace and social justice. Not only would such extremes be prevented by a reasonable weighing of the positive and negative effects in determining the existence of an overall improvement,⁴⁵ but also by the requirement of a direct link between the constitutional infringement and the overall improvement.⁴⁶

b. Provisional nature of the agreement?

Other restrictions play a less clear role. Thus, in its early decisions, the Court required the not-quite-constitutional arrangement to be of provisional, interim nature.⁴⁷ In its actual application, this restriction on negotiating agents never carried very far, as even rather open periods of time such as "until the conclusion of a peace treaty" were accepted to be sufficiently provisional in the legal sense.⁴⁸

Apart from its limited scope, the provisionality requirement never made much sense. If the government is allowed to agree to a politically attainable amelioration even if it does not go all the way to constitutionality, there is no reason to exclude agreements on a final new status without a time limit, if such a final status is the best solution attainable through negotiation.⁴⁹ Furthermore, the fact that a status is legally without a time limit does not enjoin the government politically from trying to renegotiate the agreement later in order to come even closer to the constitutionally proscribed position. Consequently, the Federal Constitutional Court has, in later decisions, tacitly given up the provisionality requirement when it agreed to a final renunciation of certain rights,⁵⁰ or when it accepted provisions without interim character.⁵¹

⁴⁴ Cf. BVerfGE 27, 253 (282).

⁴⁵ On this weighing see Lerche, Peter: Das Bundesverfassungsgericht und die Vorstellung der "Annäherung" an den verfassungsgewollten Zustand, DÖV 1971, 721 (723f.); Zeitler (n. 37), 281ff.

⁴⁶ Cf. on this link BVerfGE 4, 157 (170); 12, 281 (286); Lerche (n. 45), 725; Zeitler (n. 37), 297f.; critically on weighing and direct link Engel, Christoph: Völkerrecht als Tatbestandsmerkmal deutscher Normen, 1989, 168f., who argues that the unconstitutional clause must promote the same interest that is infringed, *ibid.*, 169; one might, indeed, have to bear in mind that the requirement of some "directness" is often no more than the expression of an embarrassing lack of clarity on what one actually wants to say, cf. Nipperdey, Hans Carl: Tatbestandsaufbau und Systematik der deliktischen Grundtatbestände, NJW 1967, 1985 (1990).

⁴⁷ BVerfGE 4, 157 (169, 170); cf. also BVerfGE 12, 281 (290ff.); 15, 337 (349f.); 18, 353 (366); agreeing Hailbronner (n. 1) 29.

⁴⁸ Cf. BVerfGE 4, 157 (175); Lerche (n. 45), 722.

⁴⁹ Lerche (n. 45), 722; agreeing Engel (n. 46), 169; Tomuschat, Christian: Auswärtige Gewalt und verfassungsgerichtliche Kontrolle - Einige Bemerkungen zum Verfahren über den Grundvertrag, DÖV 1973, 801 (805 n. 29); cf. also Zeitler (n. 37), 292f., 295f. (relation between interim character and degree of approximation).

⁵⁰ BVerfGE 27, 253 (282); 41, 126 (167).

⁵¹ BVerfGE 95, 39 (46f.).

c. Absolute limits

As a further restriction, the Court sometimes mentioned that the international agreement may not infringe upon indispensable basic principles of the constitution and, as an example, cites the principles referred to in art. 79 para. 3 and in art. 19 para. 2 of the Grundgesetz.⁵² While the example of art. 79 para. 3 GG, which designates those parts of the constitution that are not subject to constitutional amendment even by the required 2/3-majority, is sufficiently clear, the exact meaning of art. 19 para. 2 GG, which protects the core content of the basic rights from any infringement, is highly debated. A majority of jurists largely identify this provision with the principle of proportionality,⁵³ which does not seem to be what the Court had in mind here. What other principles beyond these examples the Court might have thought about is open to debate. Even though the restriction for indispensable basic principles has never found any application, it can well be seen as a security valve for major and unacceptable infringements on basic constitutional guarantees.

One might wonder why the basic rationale of the theory of approximation should not apply here. Indeed, why should even a profoundly unconstitutional agreement not be accepted if the situation without that agreement is even worse? Leaving aside the fact that imagination would have to be strained to find a practical example, it must be borne in mind that the starting position, the pre-agreement status, here, is a situation for which the State under the Grundgesetz is not responsible. If it were otherwise, especially if the starting position was defined by another treaty concluded by the Federal Republic of Germany, then this starting position could itself be challenged on constitutional grounds. By negotiating and ratifying a new agreement, however, the situation receives the State's seal of approval. To let the State carry out an agreement that contravenes the core of its constitutional beliefs, cannot be accepted, even if the situation without the agreement - but also without the State's consent - is still less acceptable. There are, in other words, absolute limits to what the government can do even for the factual good of its people. A positive overall effect cannot outweigh the betrayal of our most basic convictions.⁵⁴

3. Utilization for all agreements

The theory of approximation has been developed and applied in the context of Germany's occupation after World War II and the successive reduction of its negative legal effects. Consequently, it has been argued that only these special historic circumstances made it possible to allow the German government to disregard constitutional provisions for the sake of improving the overall situation.⁵⁵

⁵² BVerfGE 4, 157 (170); 15, 337 (349); not mentioned in BVerfGE 95, 39 (46ff.).

⁵³ Cf. e.g. Dreier, Horst, in: Dreier, Horst: Grundgesetz Kommentar, vol. 2, 1998, Art. 19 para. 2, marg. note 11ff.; on the somewhat similar problem of Art. 19 para. 2 GG in the context of delegation of sovereign power to the EU cf. Kischel, Uwe: Der unabdingbare grundrechtliche Mindeststandard in der Europäischen Union - Zur Auslegung des Art. 23 Abs. 1 S. 1 GG, forthcoming in: Der Staat, part X.

⁵⁴ Contra Zeitler (n. 37), 296f.; cf. however Lerche (n. 45), 724 (speaking of a hardly problematic limit of absolute basic principles).

⁵⁵ Cf. Schröder (n. 33), 145; the specific political and historical background is also stressed by Cronauer, Harald: Der internationale Vertrag im Spannungsfeld zwischen Verfassung und Völkerrecht, 1986, 9f., but cf. *ibid.*, 20;

Along these lines, the Federal Constitutional Court, in its most recent decision on the subject, summarized the theory of approximation as pertaining to political agreements which gradually reduce an occupational legal order.⁵⁶ If this were true, approximation would not only have had an extremely limited field of application in the past. Since Germany has regained its full sovereignty and all remnants of the occupational status have been completely ended under Art. 7 of the Treaty on the Final Settlement with respect to Germany of September 12th, 1990⁵⁷, this field of application would also, by now, have vanished completely. The theory of approximation would be no more than a fleeting episode in the aftermath of the war.

The rationale of approximation, however, is completely independent of the specifics of occupational law. When deciding upon the validity of a treaty under domestic constitutional law, the Court should never lose sight of the political position from which the treaty has arisen and of the political realities it seeks to shape or alter. That in international negotiations Germany may not always be able to push its own - constitutional - position through completely, and that the negotiation starting position might be worse than the resulting agreement, are factors that must be taken into account whether an occupational order is taken back or not. When, for instance, the property of German citizens is expropriated by a foreign State and that State is permanently unwilling to pay any compensation at all,⁵⁸ the German government may be able to negotiate a lump sum agreement. Even if this compensation is far below full market value,⁵⁹ the overall situation has improved significantly and should not be allowed to be challenged on constitutional grounds.⁶⁰ Similarly, German property owners who live close to the border and wish to sue a neighboring State for transboundary emissions may have the necessary standing in German courts but may not be able to enforce any judgement in their favor in the foreign state. If the German government manages to negotiate a treaty that abolishes standing in Germany, but gives Germans the full rights to sue the foreign government in the foreign courts and to enforce any judgement of such courts, this overall improvement should not be hampered by possible constitutional doubts as to the removal of standing in Germany.⁶¹ There is no reason to distinguish such cases from those on occupational law. Simply, occupational law provides the most ready example of a country existing under an unconstitutional legal situation that it has not brought about itself and that cannot be altered by unilateral actions, but only through international negotiations. The theory of approximation is, therefore, applicable to any situation where constitutionally protected

Schuppert (n. 1), 96.; cf. also Stern (n. 33), 249, stating that the theory of approximation might have lost much of its relevance.

⁵⁶ BVerfGE 95, 39 (46).

⁵⁷ BGBl 1990 II, 1317.

⁵⁸ On the question if compensation is still required under rules of public international law cf. Kischel (n. 18), 308ff.

⁵⁹ On the determination of compensation in international law cf. Schäfer, Martin: *Entschädigungsstandard und Unternehmensbewertung bei Enteignungen im allgemeinen Völkerrecht*, 1997, 151ff.

⁶⁰ Cf. for this example Bernhardt, Rudolf: *Verfassungsrecht und internationale Lagen*, DÖV 1977, 457 (460).

⁶¹ Cf. for this example Engel (n. 46), 169f.; for a further example cf. *ibid.*, 173 note 777.

interests can be realized only partially, for reasons that are beyond the exclusive control of the German government.⁶²

This position is not only shared by many authors, but seems to underlie the most recent decision of the Federal Constitutional Court as well. The Court pays lip service to the restriction of approximation to occupational law, maintaining that limiting provisions of international agreements on the participation of civilian NATO personnel in hiring other personnel meet the requirements of this restriction.⁶³ Nevertheless, the Court could not fail to notice that more than 40 years have passed since Germany was under occupational rule and that it has by now regained complete sovereignty. This, it however argues, does not influence the applicability of the theory of approximation. For German membership in NATO is an essential part of German foreign policy. When negotiating NATO agreements, the Federal Republic is, therefore, subject to *foreign policy demands, which do not warrant any other constitutional evaluation than that applied to German negotiations on reducing its occupational status.*⁶⁴ The Federal Constitutional Court has thus accepted the application of the theory of approximation to situations with a negotiation starting position that is equivalent, but not identical to that of reducing an occupational status.

II. Margin of appreciation

When applying the theory of approximation to a concrete case, a problem will quickly appear that transgresses approximation and pervades judicial scrutiny of foreign politics in general and of international agreements in particular: Who decides whether the government, in the negotiation process, has come as close to the fully constitutional status as is politically attainable?⁶⁵ Who decides how great the risk of Soviet counter-measures was when medium-range missiles were deployed in West Germany? Who decides on the feasibility of hard or soft negotiation tactics? In the abstract: Who decides on the evaluation of the factual situation, of possible political action, of future consequences, and of the foreign policy decisions taken on this basis?⁶⁶

1. Necessity of a margin of appreciation

To leave this decision to the courts would conform with their accepted role in judicial review of legislative and executive action. However, even in a purely domestic context, legislature and executive

⁶² Cf. Engel (n. 46), 171; Hailbronner (n. 1), 28f.; Ress, Georg: Wechselwirkung zwischen Völkerrecht und Verfassung bei der Auslegung völkerrechtlicher Verträge, *BerDGV* 23 (1982), 7 (47); Bernhardt (n. 60), 460; Bernhardt (n. 33), 183; Geiger (n. 29), 152; Zeitler (n. 37), 263; Schuppert (n. 1), 99; ; Lerche (n. 45), 721ff.; Eibach, Gerhard: Das Recht der Europäischen Gemeinschaften als Prüfungsgegenstand des Bundesverfassungsgerichts, 1986, 79.

⁶³ BVerfGE 95, 39 (46).

⁶⁴ BVerfGE 95, 39 (46f.), emphasis added.

⁶⁵ On this requirement BVerfGE 4, 157 (169).

⁶⁶ Cf. for this framing of the question Hailbronner (n. 1) 20.

are given a certain margin of appreciation.⁶⁷ In the international context, the need for such leeway multiplies. Not only would the judges on the court often lack the specific knowledge of the situation. They would have to enter into long evidentiary stages that might not be politically wise, while their results would not necessarily be more dependable than the evaluation by the executive. Even more important, the assessment of what is attainable, what can be done, and what possible consequences are to be taken into account depends intensively on the momentary situation of the negotiators. Negotiations are no mathematical equations, subject to pure logic, where given facts lead to a determined solution.⁶⁸ Negotiators need a sense of atmosphere, must be able to read hidden signs and polite hints, acting on such insights without always being completely sure on the factual background. If it were otherwise, any intelligent expert on a given issue would necessarily be a good negotiator - and special training on negotiating techniques be entirely useless. Sometimes, a good negotiator must seize the moment to come to an agreement that otherwise might never be reached. None of these factors leads itself to judicial inquiry.

The Federal Constitutional Court has accepted the realities of international relations and gives a wide margin of appreciation to the executive in its determinations and prognoses in foreign affairs.⁶⁹ The Court argues that the executive has the necessary knowledge on the spot, carries the political responsibility,⁷⁰ and is not the only one to influence the result,⁷¹ that there are no judicially manageable standards,⁷² that is is not the task of the Constitutional Court to replace non-legal evaluations of the politically competent organs with its own evaluations,⁷³ and that the executive may legitimately be determined in the use of its latitude by political goal and values.⁷⁴

2. Scope of the doctrine

Usually, the margin of appreciation doctrine will be applied in situations of doubt, where the factual situation is not entirely clear or subject to different interpretations. Here, the court will not try to determine the facts by judicial means, but rather rely on the executive's account. The doctrine, however, carries further. In an early decision already, the Constitutional Court has been willing not only to follow the executive's lead in a situation of doubt, but to abandon a view of facts it had already assumed in an prior judgement, simply because the executive supplied a new point of view: Art. 1 of the so-called Überleitungsvertrag⁷⁵ (Transference Treaty) provided that German authorities were

⁶⁷ Cf. eg. Schulze-Fielitz, Helmuth, in: Dreier, Horst: Grundgesetz Kommentar, vol. 2, 1998, Art. 20 (Rechtsstaat), marg. note 178f.; Sachs, Michael, in: Sachs, Michael: Grundgesetz Kommentar, 2nd ed. 1999, Art. 20, marg. note 115.

⁶⁸ On some of the inner workings of negotiations cf. e.g. the remarks by Wolfrum (n. 17), 8f.

⁶⁹ Cf. e.g. Schwarz, Henning: Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik: Ein Vergleich Deutschland - USA, 1995, 205ff., 250ff.; Hailbronner (n. 1), 19ff.; Kokott (n. 2), 947f.; Stern (n. 33), 249.

⁷⁰ Cf. BVerfG (1st chamber of the Second Senate), NVwZ 1995, 81 (83).

⁷¹ BVerfGE 55, 349 (365).

⁷² BVerfGE 66, 39 (60f.).

⁷³ BVerfGE 66, 39 (61).

⁷⁴ BVerfGE 40, 141 (178f.); cf. for these reasons Hailbronner (n. 1), 19f.

⁷⁵ Convention on the Settlement of Matters Arising out of the War and Occupation, of October 23rd, 1954, BGBl. 1955 II, 405.

allowed to abolish or change most of occupation law, but that it remained valid until such abolition or change. The Federal Constitutional Court concluded that the allied powers had no interest to insist that German courts were prohibited from reviewing the constitutionality of occupational law or from declaring it inapplicable in such cases. Art. 1 of the Überleitungsvertrag allowed Germany to abolish nearly all occupational law on the day after the occupational regime ended, thus showing that the allied powers had given up any interest in the continuing validity of occupation law.⁷⁶ The federal government, in its brief to the Court, had not provided any details on this issue.⁷⁷ Two years later however, in another case involving the Überleitungsvertrag, the federal government maintained that, apart from legislative changes, no German authority was allowed to treat a provision of occupational law as invalid. During the negotiation process in 1952, the executive explained, the allied powers had insisted on such a rule despite German misgivings, because they were unwilling to accept that their legislative acts were treated as unconstitutional and invalid.⁷⁸ The Constitutional Court noted the divergence but showed no hesitation to accept the government's version and, consequently, to change part of its own legal reasoning without even mentioning the fact that the same government had not put forward any such facts two years earlier.⁷⁹

The leeway given to the executive in its appreciation of facts has shown its full power when the Constitutional Court refused to reconsider the executive's point of view even in the face of far-reaching new evidence. In the process of German reunification, the two German governments issued a Joint Declaration according to which expropriations based on occupational law that took place in the territory of the German Democratic Republic between 1945 and 1949 would not be rescinded, the property not be returned. This declaration was later incorporated into Art. 41 para. 1 of the Unification Treaty.⁸⁰ Upon constitutional complaint by former owners of such property, the Federal Constitutional Court upheld the treaty and based its decision, inter alia, upon the statement of the executive that the German Democratic Republic as well as the Soviet Union had insisted on these terms and that the Federal Government, according to its own discretion, had to agree in order to achieve German Unity.⁸¹ While complainants maintained that there was no statement, let alone proof, that the East German and Soviet governments had been unyielding in their position,⁸² the Court explained that under the circumstances described by the executive and by its representatives in the oral proceedings, the federal government could assume that the chance of unification depended on the acceptance of the provision concerning expropriations between 1945 and 1949. The appraisal of what could be achieved in view of the negotiation position, was subject only to the independent assessment of the federal government and not to judicial review.⁸³

⁷⁶ BVerfGE 12, 281 (291).

⁷⁷ Cf. BVerfGE 12, 281 (286f.).

⁷⁸ BVerfGE 15, 337 (340).

⁷⁹ Cf. BVerfGE 15, 337 (349).

⁸⁰ Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands - Einigungsvertrag -, BGBl. 1990 II p. 889.

⁸¹ BVerfGE 84, 90 (127).

⁸² BVerfGE 84, 90 (106).

⁸³ BVerfGE 84, 90 (128).

Five years later, the Court decided again on these issues.⁸⁴ Complainants provided a number of partly new documents to show that the question of restitution had by no means been vital to unification. One of the strongest arguments were two published interviews with Soviet president Gorbachev. Gorbachev said that he had never insisted on non-restitution, that the question had never been part of his talks with the German chancellor Kohl, but had only been discussed at lower levels. The alternative non-restitution or failure of German unification had never existed.⁸⁵ This position was further supported by Soviet foreign minister Shevardnadze who, in a different interview, denied that Soviet agreement to German unification had depended on non-restitution. There were no pre-conditions to unification. The topic had not been discussed either in Gorbachev's staff or in the foreign ministry.⁸⁶ In spite of this evidence, the Federal Constitutional Court refused to second-guess the executive's assessment. It insisted on the broad margin of appreciation in foreign policy, particularly in the conclusion of treaties, the contents of which cannot be determined unilaterally but depend on the consent of the other negotiating parties.⁸⁷ While the executive's discretion is not completely unlimited, it only ends where the executive's assessments has to be regarded as transgressing the borders of its duties. This, however, could only be the case where it should have been evident to the federal government that it assumed the wrong preconditions. Thus, the Constitutional Court saw itself in no condition to investigate whether the federal government had correctly grasped the objective negotiation starting position and had achieved the best possible result. This held true also for the question whether the federal government would have endangered the constitutionally binding goal of German unification by an unyielding insistence on certain positions, and was therefore allowed to fall behind such positions.⁸⁸ Concerning the negotiation position of the Soviet Union, the assessment of the German government did not have to be the only one possible, it simply needed some plausible support in the negotiation documents.⁸⁹ In view of the quite diverse contents of the material, the Court considered these conditions to be fulfilled. Even the statements of Gorbachev and Shevardnadze were considered to be open to different interpretation. The Soviet statements that there had not been an alternative between non-restitution and failure of German unification could be seen to imply that after the Joint Declaration on non-restitution, which was known to the Soviet government, there was longer any need for such a provision signed by Soviet representatives.⁹⁰

In sum, while this decision has found criticism,⁹¹ negotiators need not fear to be second-guessed by German courts in their factual assessment of the negotiation starting position, the development and the prospects of the negotiation process. The Constitutional Court has shown ample evidence that it is aware of the intricacies and problems of international negotiation. In particular, the Court will take into account that "objectively", i.e. to an outsider after negotiations have been concluded, the situation

⁸⁴ BVerfGE 94, 12.

⁸⁵ BVerfGE 94, 12 (18f.).

⁸⁶ BVerfGE 94, 12 (19f.).

⁸⁷ Cf. also BVerfGE 55, 349 (365)

⁸⁸ BVerfGE 94, 12 (35).

⁸⁹ BVerfGE 94, 12 (40).

⁹⁰ BVerfGE 94, 12 (43f.); cf. also BVerfG (1st chamber of the Second Senate), NJW 1997, 450 (450).

⁹¹ Cf. e.g. Kokott (n. 2), 947f.

might not look the same as to an insider during the process, who might even act under time constraints.⁹² Which of these two points of view is more correct and appropriate, would be next to impossible to decide. While the ex post facto view might be closer to the true facts, it is not available to the negotiators, who must work under conditions of partial insecurity. To let the ex post facto view prevail would not entail any reproach of the negotiators,⁹³ but it would seriously hamper their ability to assess the constitutional validity of possible negotiation results, thus impairing their negotiation position. Furthermore, it would destabilize the State's overall position in the international community, since any change in the available information could reopen the way for constitutional challenges to treaties already in force, potentially deteriorating that State's reputation as a reliable partner who will faithfully fulfill his international obligations.

III. Limits to the delegation of power

Another legal limit on negotiations that agents need to observe comes into play when sovereign powers are delegated to a supranational organization.⁹⁴ The main, but not exclusive,⁹⁵ field of application of these restrictions has been the law of the European Union. The Federal Constitutional Court in 1986 decided that art. 24 para. 1 GG does not permit to give up the identity of the German constitutional order by breaking into its basic framework, i.e. into its constitutive structure. Part of this essential structure that cannot be abandoned are the legal principles on which the basic rights provisions of the Grundgesetz are based. In delegating sovereign powers, a protection of basic rights that is essentially comparable to the protection under the Grundgesetz must, therefore, generally be ensured.⁹⁶ These restrictions have later been codified with respect to the European Union in art. 23 para. 1 GG, while Art. 24 para. 1 GG remains applicable to all other delegations. Art. 23 para. 1 GG now provides that Germany participates in the development of the European Union, which is bound by democratic, social, federal, and rule of law principles as well as by the principle of subsidiarity, and which ensures a protection of basic rights essentially comparable to that of the Grundgesetz.

The exact scope of the restrictions of art. 23 and 24 GG is subject to intensive debate which cannot be entered here in detail.⁹⁷ Nevertheless, the constitution has, again, taken the inherent limits of international negotiation into consideration. In an international context, Germany cannot expect to have its constitutional point of view prevail in all respects. Therefore, there is a broad consensus today - reflected in the wording of Art. 23 para. 1 s. 1 GG - that the constitutional standard that must be

⁹² On time constraints cf. BVerfGE 94, 12 (37).

⁹³ Cf. Kokott (n. 2), 947, favoring an ex post view.

⁹⁴ On the term "supranational" cf. Streinz, Rudolf: Europarecht, 4th ed. 1999, 41f.

⁹⁵ Cf. e.g. BVerfGE 58, 1 (28, 30f., 40f.).

⁹⁶ BVerfGE 73, 339 (375f., 387); 89, 155 (174f.)

⁹⁷ Citing only the basic literature on the topic would fill pages, cf. only the overview on the different opinions by Pernice (n. 27), Art. 23 marg. note 26ff., 47ff.; Scholz, Rupert, in: Maunz, Theodor; Dürig, Günter: Grundgesetz Kommentar, loose-leaf, Art. 23, marg. note 13ff.; Randelzhofer, Albrecht, in: Maunz, Theodor; Dürig, Günter: Grundgesetz Kommentar, lose-leaf, Art. 24 marg. note 68ff.; Streinz, Rudolf: Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht, 1989, 83ff.; Kischel (n. 53), passim.

fulfilled by a supranational power with a direct influence in Germany does not have to be exactly as high as the constitutional requirements on the German government, especially regarding basic rights.⁹⁸ To put it bluntly, a supranational organization like the European Union may, within certain highly debated limits, legally perform acts in Germany that the German government would not be allowed to perform. Furthermore, the formal rules on constitutional amendments have been partly modified in order to accommodate the needs of international negotiation and cooperation. Any transfer of sovereign rights causes an infringement of and a change in constitutionally proscribed competences, and must consequently be viewed as a material amendment to the constitution.⁹⁹ Nevertheless, under art. 24 GG, such an amendment does not need the usual 2/3-majority envisaged by art. 79 para. 2 GG. Rather, any statute passed with a simple majority will be sufficient.¹⁰⁰ Only for the European Union, the 2/3-majority has been reintroduced by art. 23 para.1 s. 3 GG.

In spite of these alleviations, agents must be aware of very specific and sometimes difficult constitutional restrictions in any negotiation on the conclusion or amendment of a treaty on supranational organizations. Coming within reach of such restrictions is likely to entail proceedings before the Constitutional Court that might in themselves be considered an internal and external political nuisance. If the Court comes to the conclusion that the restrictions have been breached, the executive must face the possibility that the treaty will be invalidated nationally.

IV. Interpretation

Negotiators should also bear in mind that while the actual negotiation process is largely in the hand of the executive, the application of the negotiation outcome, i.e. of a treaty, is largely subject to national judicial influence. This influence will come to bear mainly in two situations. Firstly, when a court has to deal with a claim of unconstitutionality, the validity of such a claim will depend on the exact meaning of the treaty, which therefore has to be interpreted by the competent court. In these situations, the interpretation by the court may even stop the treaty from ever entering into force. Unlike ordinary statutes, treaties and the statutes transforming them into national law are subject to judicial scrutiny even before they are formally executed by the German President and promulgated, thus allowing the Constitutional Court to pass a decision in time to prevent its international ratification.¹⁰¹ Secondly, there may be a dispute on the exact meaning of a treaty clause that has to be applied in a given case. When conditions of justiciability and standing are fulfilled, courts may get to decide such a dispute. Thus, a citizen might feel that he is exempted from taxation in Germany under a double taxation convention, while the internal revenue service disagrees;¹⁰² a foreigner may feel he is protected under

⁹⁸ Cf. Kischel (n. 53), part II ff. with further references

⁹⁹ BVerfGE 58, 1 (36).

¹⁰⁰ Cf. Pernice (n. 27), Art. 24, marg. note 28.

¹⁰¹ Cf. BVerfGE 1, 396 (413); Ulsamer, Gerhard, in: Maunz, Theodor; Schmidt-Bleibtreu, Bruno; Klein, Franz; Ulsamer Gerhard: Bundesverfassungsgerichtsgesetz, loose-leaf, § 76 marg. note 17.

¹⁰² Cf. BVerfGE 30, 272, where a provision of a double taxation treaty relating to progressive taxation was held to be unconstitutional.

the Convention relative to the Status of Refugees,¹⁰³ while the competent national agency may wish to expel him; or certain claims against a State may be non-justiciable under a treaty clause such as Art 5 para. 2 of the London Agreement on German External Debts of February 27th, 1953,¹⁰⁴ while the exact field of application of that clause is subject to doubt.¹⁰⁵

1. Independence of judicial interpretation

When proposing and agreeing on the wording of each clause in an international agreement, negotiators need to keep the interpretive powers of courts in mind. Otherwise, such clauses might in practice be given a meaning which they were not intended to have. Thus, in spite of excellent negotiation tactics, the negotiator might not get what he thought to have bargained for because of the intervention of his own courts.¹⁰⁶

National courts have, however, largely accepted that international agreements must be interpreted according to international, not national rules of interpretation.¹⁰⁷ Negotiators, therefore, do not have to keep more than one system of interpretation in mind. The customary international law rules on interpretation have largely been codified in Art. 31-33 of the Vienna Convention on the Law of Treaties.¹⁰⁸ These provisions have helped to clarify an old debate between those who saw interpretation of a treaty as a means to discover the subjective intent of the parties, and those who see the objective wording of the treaty as the determining factor. The basic provision of Art. 31 para. 1 of the Convention - stipulating that a treaty shall be interpreted in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose - as well as Art. 32 - mentioning the preparatory work of the treaty and the circumstances of its conclusion only as supplementary means of interpretation, to be used when the meaning would otherwise remain ambiguous or obscure, or be manifestly absurd or unreasonable - make clear that the method of interpretation in international law is primarily an objective, and not a subjective one.¹⁰⁹ Consequently, negotiators cannot rely on courts to establish the meaning of a given clause by trying to determine the real, subjective intent of the parties during the negotiation process. Rather, any clause should - theoretically - be constructed in a way to represent this intent of the parties as exactly as possible in its objective wording. Additionally, in many countries including Germany, negotiators cannot rely on the courts feeling bound by an interpretation provided by the executive branch, either. A court might ask the executive's opinion when faced with an interpretative problem, but due to separation of powers considerations, the judicial

¹⁰³ BGBl 1953 II, 560.

¹⁰⁴ BGBl 1953 II, 333.

¹⁰⁵ Cf. BVerwGE 35, 262.

¹⁰⁶ Cf. for the employment of a certain concept of interpretation proposed in the literature Fitzmaurice, Sir Gerald: *Vae victis or woe to the negotiators! Your treaty or our "interpretation of it?", AJIL 65 (1971), 358 (368)* ("woe to the negotiators (...). It would not be *their* treaty that would emerge from the fray, but another that someone else thought was the one they should have entered into.") (italics in the original).

¹⁰⁷ Cf. Schreuer, Christoph: *Wechselwirkung zwischen Völkerrecht und Verfassung bei der Auslegung völkerrechtlicher Verträge*, BerDGV 23 (1982), 61 (66ff.); Ress (n. 62), 38f.; Hailbronner (n. 1), 25f.; Geiger (n. 29), 180; Cronauer (n. 55), 215f.

¹⁰⁸ Cf. Verdross, Alfred; Simma, Bruno: *Universelles Völkerrecht*, 3rd ed. 1984, 491.

¹⁰⁹ Cf. Heintschel von Heinegg, Wolff, in: Ipsen, Knut: *Völkerrecht*, 4th ed. 1999, 116f.; Verdross/Simma (n. 108), 491f.; Brownlie, Ian: *Principles of public international law*, 5th ed. 1998, p. 632.

branch will decide independently, based on its own reasoning, and not feel bound by statements of other branches.¹¹⁰

2. Ambiguity of terms

The ideal of clear and unambiguous treaty clauses that will minimize the possibility of judicial interference, of course, is often not attainable in practice. Not only is the creation of clear legal norms a well-known general problem. A norm that has reached any degree of abstraction will almost always be open to interpretation. More importantly, in the international context, clear clauses may not be feasible at all. For clear and unambiguous clauses require a clear and unambiguous common will of the parties, a requirement that frequently is not met. Especially for highly political treaties, formula compromises are a typical feature.¹¹¹ Parties will sometimes openly agree to disagree, but more frequently choose highly ambiguous words to cover up their dissent with diplomatic and legal terminology. With formula compromises, a court that needs to provide an answer to the question at hand will experience a lot of leeway in interpreting and applying the clause. There cannot be any guarantee that the solution it finds will conform to the expectations or the negotiation position of its respective executive.

A well-known example of such ambiguity is the principle of subsidiarity in Art. 5 para. 2 TEC, according to which the Community shall take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states and can, therefore, by reason of the scale or effects for the proposed action, be better achieved by the Community. This principle is and can be used either to achieve a high degree of decentralization, or to promote the growing of community competences.¹¹² The German Constitutional Court, in its decision on the constitutionality of the Maastricht Treaty, took a view of the subsidiarity principle that was favorable to the protection of national interests. The rather open wording of the principle did by no means prevent the Court from choosing this specific - and quite plausible - interpretation. Quite on the contrary, it led it to include in the judgement an additional supportive measure to strengthen its interpretation: Realizing that the effectiveness of subsidiarity in countering the erosion of member states' competences as interpreted by the Court depended on the practice of Council of Ministers, the justices declared that the German federal government was constitutionally bound to use its influence in the Council in favor of a strict application of subsidiarity.¹¹³

¹¹⁰ Cf. e.g. Schreuer (n. 107), 63f.; Bleckmann (n. 33), 255f.

¹¹¹ Hailbronner (n. 1), 26.

¹¹² Cf. Zacker, Christian; Wernicke, Stephan: *Examinatorium Europarecht*, 1997, 105 (ideal for the crystallization of different europolitical models); Beutler, Bengt; Bieber, Roland; Pipkorn, Jörn; Streil, Jochen: *Die Europäische Union*, 4th ed. 1993, 85; Huber, Peter M.: *Recht der Europäischen Integration*, 1996, 152f.

¹¹³ BVerfGE 89, 155 (210f.). It may be added that the well-known need to decrease ambiguity has led the member states to introduce into the 1997 Treaty of Amsterdam a special protocol dealing with the application of the principle of subsidiarity.

3. Constitutional interpretation of agreements

The interpretive powers of courts with regard to international agreements may come as a special surprise to negotiators when the interpretation is not based on international law principles only, but determined by the demands of national constitutional law.

A claim of unconstitutionality will not always cover all possible interpretations of a certain treaty clause, but will only be valid if certain interpretations are adopted. Now, the German Grundgesetz has often been described as favorable to international law.¹¹⁴ In line with this tendency, the Federal Constitutional Court will, when interpretation is still open and several possibilities present themselves, prefer such interpretations that will prevent a verdict of unconstitutionality.¹¹⁵ Consequently, far-fetched interpretations, even if they are unconstitutional, will never lead the Court to declare the respective treaty unconstitutional.¹¹⁶

The constitutional interpretation (verfassungskonforme Auslegung) of treaties can be criticized since it constitutes a deviation from the ordinarily required interpretation according to international law rules only.¹¹⁷ Courts may be suspected to stop the process of interpretation early in order to achieve a sufficient degree of ambiguity that will allow the constitutionally required interpretation to pass.¹¹⁸ Furthermore, one could doubt the very existence of such ambiguity, since without the constitutional problem, courts would certainly neither leave the case undecided nor randomly choose a certain interpretation, but rather arrive at a specific interpretation in application of international law rules.¹¹⁹

When purely national methods are allowed to influence interpretation, treaties can undesirably acquire completely different meanings in different countries. True, such disagreements can appear without national law influences, as well. If only international law rules are applied, however, States are capable of discussing the question or use other methods of peaceful settlement because they agree on the basis upon which the dispute is to be solved. The national law peculiar to one of the parties, on the other hand, is not shared as a common basis. It invokes the danger of a dispute involving a difference in basic principles, the solution of which will put much strain on the pragmatic capacities of the parties. Consequently, a general distrust towards all national law influences on treaty interpretation is quite appropriate.

Constitutional interpretation, however, is not a method that is incorporated into the original process of interpretation. Rather, it is an add-on that will be applied after interpretation by international law

¹¹⁴ Cf. eg. Tomuschat, Christian: Die staatsrechtliche Entscheidung für die internationale Offenheit, in: Isensee, Josef; Kirchhof, Paul (eds.): Handbuch des Staatsrechts, vol. 7, 1992, § 172, marg. note 27ff.; Steinberger, Helmut: Allgemeine Regeln des Völkerrechts, in: Isensee, Josef; Kirchhof, Paul (eds.): Handbuch des Staatsrechts, vol. 7, 1992, § 173, marg. note 43, 63; Stern (n. 33), 245; Bleckmann (n. 33), 241; Bernhardt (n. 33), 160; BVerfGE 18, 112 (121).

¹¹⁵ BVerfGE 4, 157 (168); 36, 1 (14); cf. also BVerfGE 30, 272 (289f.) (dissenting opinion Justice Seuffert).

¹¹⁶ BVerfGE 4, 157 (168); for an extensive discussion cf. Zeitler (n. 37), 215ff.; Cronauer (n. 55), 34ff.

¹¹⁷ Hailbronner (n. 1), 26; Bernhardt (n. 33), 187f.; Bernhardt (n. 60), 461; for further critics cf. Cronauer (n. 55), 53ff.; Zeitler (n. 37), 230f.

¹¹⁸ Ress (n. 62), 43f.; Cronauer (n. 55), 255ff.

¹¹⁹ Cf. Ress (n. 62), 42 note 165.

methods has taken place, that is limited by the possible results of these interpretive methods, and that may never transgress the boundaries drawn by international law. The Constitutional Court has clearly stated that constitutional interpretation will only allow a choice if and in so far as there are several possible results of the interpretive process.¹²⁰ Consequently, constitutional interpretation can never lead to results that could not have been reached by international law methods alone. A court that would stop the interpretation by international law rules prematurely - for instance taking only the terms of the document into account and not object and purpose - in order to achieve sufficient ambiguity would apply the theory of constitutional interpretation incorrectly. On the other hand, it can hardly be denied that a court not using constitutional interpretation would not be stuck with several possible meanings among which it could not decide, but would choose one of these meanings as the best, as the correct one. This possible clarity of result, however, does not contradict the ambiguity argument used in constitutional interpretation. Interpretation and application of legal norms are no purely logical, mathematical operations that lead to a clear-cut result, with any other result being simply false.¹²¹ That a judge or lawyer needs to and will arrive at such a specific result does not mean that he will regard other results as wrong. He will find them less convincing, less well arguable, less well constructed, but still accept them as possible alternatives. Apart from clearly untenable interpretations, there is frequently a grey zone of several interpretations that are legally possible, the comparative value of each being subject to doubt and legal arguments without any single clear and convincing solution that could finally banish all others. When the methods of interpretation do not lead to a single solution, and, therefore, by definition, other factors come into play, it is not illegitimate to use national constitutional values through constitutional interpretation.

Since constitutional interpretation does not lead to results that could not have been reached by international law methods alone, Germany will not be forced to insist on national peculiarities in the international arena, thus rendering the settlement of any dispute much more difficult. Rather, it will always be possible to argue on the basis of international law alone. When an agreement contains ambivalent language, any signatory State may in good faith¹²² interpret it according to the rules of international law and use this interpretation when acting under the treaty. As long as the interpretation does not contradict the rules of international law, it is of no importance what other interests of the State are supported by its choice of interpretation. Few would doubt the legitimacy of the executive choosing an interpretation that will further its own political agenda. Equally, national courts - or, again, the executive, that is bound by constitutional demands just like the judicial branch - should be allowed to choose an interpretation that will conform with the national constitution. Unlike an interpretation with political background, such a constitutional interpretation even serves the legal interests of the international community: it saves the treaty from a verdict of nullity, that the executive would be forced to carry out regardless of any international law to the contrary. Constitutional interpretation thus helps to ensure respect for international law and to stabilize international relations.

¹²⁰ BVerfGE 4, 157 (168); cf. also Zeitler (n. 37), 248f.; Bernhardt (n. 33), 186; critical on the actual application of that principle Cronauer (n. 55), 49, 259.

V. Initiation

Courts are not only actors in international relations because their views must be taken into consideration and may influence the validity and interpretation of negotiation outcomes. Courts can also initiate negotiations, even if such situations are rare as they touch the core of foreign policy and the corresponding responsibilities of the executive and the legislative branches.¹²³ Thus, when a group of German local authorities filed a lawsuit to prevent military low altitude flights above their territory, the administrative court enjoined the Federal Republic of Germany from undertaking flights below a certain altitude. As to flights by NATO allies, the court realized that German authorities did not have the right to prohibit them. Instead, it obligated the Federal Republic to at least try and commence negotiations with its NATO allies on new low altitude flight zones and on a temporary stay of all low altitude flights above the claimants territory,¹²⁴ Similarly, courts sometimes give the executive direct orders on certain aspects of negotiations. Thus, the Federal Constitutional Court has required the competent organs firstly to insist, in any negotiation with the German Democratic Republic, that agreements which by their content could be extended to Berlin should be so extended, and secondly only to conclude the agreement if the legal situation of Berlin and its citizens was not abridged compared to the legal situation under the Grundgesetz.¹²⁵

D. Summary and conclusion

Much of international relations theory is based on the assumption that the State is a unitary actor (B.I.). Common sense as well as a number of case studies in international relations, however, show that more than one actor on the State level influences the conduct and result of foreign affairs. Such actors cannot be disregarded without losing the possibility to correctly explain the behavior of States in the international sphere (B.II.). Moreover, the unitary actor assumption is not fit to be transferred to legal analysis. It is an integral part of the modeling approach, which is not used in law. Rather, legal analysis of international negotiations aimed at the conclusion of an international agreement will have to consider separation of powers (B.III.). In particular, negotiators have to bear in mind the influence of the national legal order and, consequently, the possibilities and scope of judicial interference (B.IV.).

The German judiciary is not ignorant of the specifics of international negotiations. It has realized that the terms of an international agreement are not under the sole responsibility of a national government, but result from intensive bargaining with other actors that are not subject to German legal constraints. The outcome of such negotiations cannot be expected to conform totally with the German position. Consequently, the Federal Constitutional Court has developed the theory of approximation, which

¹²¹ Cf. Alexy, Robert: *Theorie der juristischen Argumentation*, 1983, 17.

¹²² Cf. Art. 31 para. 1 Vienna Convention on the Law of Treaties.

¹²³ Cf. the restrictive view by Wolfrum, Rüdiger: *Tiefflüge vor den Verwaltungsgerichten: Anmerkungen zu Urteilen des VG Darmstadt und des VG Oldenburg*, NVwZ 1990, 237 (239).

¹²⁴ VG Oldenburg, NJW 1989, 1942 (1947); cf. on this decision Wolfrum (n. 123), 237ff.

¹²⁵ BVerfGE 36, 1 (32f.).

turns the negotiation starting position into a constitutionally relevant factor: The government may conclude an international agreement that does not conform with constitutional requirements if the situation created by the agreement is at least closer to the constitution than before (C.I.). Moreover, the Federal Constitutional Court has accepted the realities of international relations by giving a wide margin of appreciation to the executive in its determinations and prognoses in foreign affairs (C.II.). Very specific and sometimes difficult constitutional restrictions have been placed on the possible outcomes of negotiations on the transfer of power to supranational organizations. Nevertheless, there is a broad consensus today that the constitutional standard that must be fulfilled by a supranational power with a direct influence in Germany does not have to be exactly as high as the constitutional requirements on the German government (C.III.). Furthermore, the application of the negotiation outcome, i.e. of a treaty, is largely influenced by the national judiciary, which enjoys extensive powers of interpretation, based on international law and sometimes on constitutional considerations, that should be kept in mind by negotiators (C.IV.). Finally, courts can sometimes initiate negotiations or give the executive direct orders on certain aspects of the bargaining process (C.V.).

The influence of courts on international negotiations could be regretted, because the presence of an additional actor renders an already complex situation even more complicated. Indeed, the role of courts, which decide on the validity of a treaty on the basis of its contents, define those contents, give the executive a more or less wide margin of appreciation, set specific goals or even initiate negotiations altogether, is a factor that negotiators should not ignore. Negotiators can, however, at least try and use these additional constraints to their favor by openly admitting them. The fact that a country has no other choice than to insist on a certain point because its courts force it to do so, may sometimes prove to be an argument that is as valid as a mere political desire. When negotiating changes in the framework of the European Union, for instance, one could imagine that Germany would not be completely unsuccessful in explaining to other member States that certain stipulations would not pass muster in the Constitutional Court, and that the German government has no immediate way whatsoever to change that situation. Such an explanation may come handy, even if the government is by no means unhappy with the requirements set by the Constitutional Court. In that sense, the influence of the courts can sometimes be used as a convenient scapegoat for political goals.

Even more importantly, courts do not act on an independent political agenda but on the basis of law. They impress the will of the people, often in its constitutional expression, upon the government and ensure that the limits of governmental action in a free and democratic society are not ignored even in the conduct of foreign affairs. At the same time, courts show a remarkable understanding of the specific circumstances under which international negotiations are conducted and successfully try to find a balance between the requirements of national law and the demands of international relations.