
J.Y. Interpretation No. 329 (December 24, 1993)*

Treaties Subject to the Parliamentary Deliberation of the Legislative Yuan Case

Issue

What is the meaning of a “treaty” under the Constitution? What shall be sent to the Legislative Yuan for parliamentary deliberation accordingly?

Holding

The term “treaty” in the Constitution refers to an international written agreement concluded between the Republic of China (“R.O.C.”) and other States or international organizations. It includes those concluded under the designations of "Treaty" or "Convention"; it also includes agreements concluded under "Agreement" or like designations with legal effect and with their contents directly involving important matters of the nation and/or rights and duties of the people. Those concluded under the designations of “Treaty,” “Convention,” or “Agreement” and containing ratification clauses must certainly be sent to the Legislative Yuan for parliamentary deliberation. Other international written agreements shall also be sent to the Legislative Yuan for parliamentary deliberation unless their contents were authorized by law or with the prior approval of the Legislative Yuan, or if their contents are identical to what has been provided by municipal laws.

Reasoning

[1] The President shall, in accordance with the provisions of this Constitution,

* Translation by Wei-Sheng HONG, based upon the previous translation by Fort Fu-Te LIAO

exercise the power of concluding treaties; the Premier and Ministers shall refer treaties subject to the parliamentary deliberation of the Legislative Yuan to a Cabinet Meeting of the Executive Yuan for resolution; the Legislative Yuan shall have the power to deliberate on and approve treaties. All these mechanisms are stipulated in Article 38, and Article 58, Paragraph 2 and Article 63 of the Constitution accordingly. Treaties concluded according to constitutional provisions hold the same status as laws. Therefore, the term “treaty” in the Constitution refers to an international written agreement concluded between the R.O.C.—including its authorized institutions and groups—and other States—including their authorized institutions and groups—and/or international organizations. It includes those concluded under the designations of “Treaty” or “Convention”; it also includes agreements concluded under “Agreement” or like designations with legal effect and when their contents directly involve important matters—such as defense, diplomacy, finance and economics—of the nation and/or rights and duties of the people. Among them, those concluded under “Treaty”, “Convention”, “Agreement” or like designations and containing ratification clauses must certainly be sent to the Legislative Yuan for parliamentary deliberation. Other international written agreements shall also be sent to the Legislative Yuan for parliamentary deliberation unless their contents were authorized by laws or with the prior approval of the Legislative Yuan, or if their contents are identical to municipal laws, for instance, if the contents reiterate what laws have provided, or the contents have already been enacted into law. International written agreements that are not subject to the parliamentary deliberation of the Legislative Yuan or other agreements not considered as treaties but entered into by competent authorities or their authorized institutions or groups should be processed by competent authorities, depending on the nature of the agreement, following the regulation-setting procedure or general administrative procedure. Needless to say, the Regulations Governing the

Processing of Treaties and Agreements enacted by the Ministry of Foreign Affairs shall be amended in accordance with this Interpretation.

[2] Treaties involving an alternation of the boundaries of the nation, according to Article 4 of the Constitution, shall also be resolved by the National Assembly.¹ Agreements concluded between Taiwan and Mainland China are not regarded as international written agreements referred to in this Interpretation; therefore, it should also be specified that the issue of whether or not these agreements should be sent to the Legislative Yuan for parliamentary deliberation falls outside of the scope of this Interpretation.

Background Note by Wei-Sheng HONG

The Constitution of the Republic of China (Taiwan), like that of many other States, provides provisions governing the competence of and procedure for the conclusion of treaties. Whilst it is not uncommon for a State to include in its Constitution provisions that govern the key issues surrounding the conclusion of treaties, due to Taiwan's unique status domestically and internationally, the interpretation and application of these provisions became difficult and controversial. The difficulty and controversy stem from the term that triggers the entire constitutional mechanism—a “treaty”. Article 2, Paragraph 2(a) of the 1969 Vienna Convention of the Law of Treaties defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation[,]” yet such a definition fell short of tackling the unique situation facing Taiwan. In short, given that most States do not formally recognize Taiwan and maintain only unofficial

¹ Translator's note: The National Assembly was later abolished in 2005 and the procedure provided by Article 4 of the Constitution has been replaced by Article 1, Paragraph 1 of the Additional Article of the Constitution.

diplomatic relations with Taiwan, a substantial part of the foreign affairs of Taiwan are governed by instruments concluded between the government of Taiwan or its authorized groups or institutions and foreign governments or their authorized groups or institutions. Shall those instruments be regarded as treaties as defined in the Constitution and be governed by the constitutional regime set up for treaties? Similar questions arise from the conclusion of instruments between the government of Taiwan or its authorized groups or institutions and the government of China or its authorized groups or institutions.

For a long period of time, even though the Legislative Yuan had made several resolutions demanding that the Executive Yuan send these instruments to the Legislative Yuan for deliberation, those resolutions were not strictly followed. The determination of the nature of these instruments and whether to process them in accordance with the constitutional regime governing treaties fell largely to the discretion of the executive branch, leaving the controversy unresolved. The fact that the Ministry of Foreign Affairs enacted the Regulations Governing the Processing of Treaties and Agreements to govern the issue further added to the controversy, as the Legislative Yuan considered the content of this regulation as falling beyond the competence of the Ministry of Foreign Affairs and unconstitutionally interfering with the power conferred by the Constitution on the Legislative Yuan for the conclusion of treaties. In 1992, the Mainland Affairs Council of the Executive Yuan authorized the Straits Exchange Foundation to enter into four written agreements with the Association for Relations across the Taiwan Straits, the authorized institution of Mainland China, in Singapore, escalating the controversy even further. Though the executive Yuan merely intended to submit these four agreements to the Legislative Yuan for record, Members of the Legislative Yuan requested that the four agreements be sent to the Legislative Yuan for the parliamentary deliberation in accordance with the Constitution. This incident later led to the petition for this Interpretation, whose

holding and reasoning are shown above.

The fact that four of the fifteen Justices of the Constitutional Court added four Dissenting Opinions to this Interpretation—a rare situation in that era—hinted at the degree of controversy over the issue. Readers may consider that this Interpretation offers a rather ambiguous answer to the controversy. Further still, by excluding agreements concluded between Taiwan and China from the scope of this Interpretation, the Constitutional Court offered no response to the situation that precisely led to this Interpretation and left the controversy unsettled.

The Regulations Governing the Processing of Treaties and Agreements enacted by the Ministry of Foreign Affairs referred to by this Interpretation were eventually replaced by the Conclusion of Treaties Act enacted by the Legislative Yuan in 2015, more than two decades after the announcement of this Interpretation. Nevertheless, the Conclusion of Treaties Act adopted a similar approach to that which this Interpretation adopted, excluding the application of the Act to those agreements concluded between the government of Taiwan or its authorized institutions and the government of Mainland China or its authorized institutions. The lack of a clear mechanism governing the competence and procedure over the conclusion of these agreements was considered one of the underlying causes for the historical student-led protests resulting in the occupation of the Legislative Yuan in 2014—the Sunflower Movement, a turning point of cross-strait relations in the recent history of Taiwan. Nevertheless, an Act for the Supervision of Cross-Strait Agreements that governs agreements concluded between the government of Taiwan or its authorized institutions and the government of China or its authorized institutions has not yet been legislated at the time of the publication of this book.

