

JUDICIAL DECISION AND RETHINKING THE CONSTITUTIONAL PRINCIPLES CONCERNING TREATY MAKING POWER AND PROCESS OF THAILAND

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ABSTRACT

This paper aims to examine the treaty making power and process in recent constitutional provisions reforms in Thailand. It aims to analyze whether the constitutional provision has affected the treaty-making crisis. This study relied on the theory of the sovereignty of state exercised by the executive branch in compliance with the treaty making power concept, the separation of powers, and the checks and balances doctrine. The findings revealed that Thailand's constitutional amendment related to treaty making processes, proposing a negotiation framework approved by the legislative branch or public participation during a prior negotiation period, is not in compliance with the treaty making concept and state practices of foreign countries. However, Thailand has already reformed the constitutional provision. The implications are that there must be an amendment to the Constitution defining the processes and characteristics of treaties that shall be approved by the legislative branch.

Keywords: *Treaty making power, law of treaty, negotiation framework, public participation*

I. INTRODUCTION

Treaty making power principles emerged in the year 1932 with the Constitution of the Kingdom of Thailand B.E. 2475 (1932), now the Constitution of the Kingdom of Thailand (Temporary) B.E. 2557 (2014). Principally, the King reserves the prerogative to conclude treaty and international agreements, such as peace treaties, armistice treaties, and treaties with foreign countries and international organizations. This power gives the state sovereignty concerning international affairs and relations.

However, Constitutional power to exercise sovereignty related to treaty making rests not only in the executive branch of government but also rests in the legislative branch, to which the constitution gives sovereignty in terms of check and balances over the treaty making power. Moreover, the constitution provides the constitutional court power concerning the adjudication of conflicts between the executive and legislative branches over treaty making power and processes.

It is apparent that the exercise of treaty making sovereignty under the checks and

balances doctrine¹ results in hindering international relations and treaty making in Thailand in unprecedented ways. Thailand's treaty making problems have resulted from a non-clarified constitutional provision with respect to the question of who is privileged with the treaty making power. At same time, the legislative branch now only preserves "parliamentary participation"² in terms of checks and balances and is no longer meant to conclude treaty making alongside the executive branch. In particular, the legislative branch only preserves power related to essential treaties that impact the national interest.

Before the conclusion of a treaty period, the executive branch has a "duty" to propose a negotiation framework for approval by the legislative branch and it also has a duty to provide information to the public and a public hearing, in compliance with "public participation" rules. In other words, the new principles in the Constitution seem designed to give something like "control and monitoring" authority to the legislative branch. The use of such power by the legislative branch, however, is not in accordance with the principles and doctrines of "the separation of powers," "checks and

balances," and "parliamentary participation." Thus, it can be said that this exercise of power by the legislative branch in the new principles of Thailand's constitution is contrary to the principles of the law.

Any failure to conclude treaties is caused, therefore, by essential "misunderstandings in principle" related to both the organization and the exercise of each organ of power involved in the process of treaty making, especially the power of the "Administrative Court's" jurisdiction to monitor the exercise of executive power in "international agreements." Under "constitutional authority," treaties are called an "act of the government" and treaty making power is not, therefore, viewed as a "legal authority" but is instead called an "administrative act" and is under the jurisdiction of law enforcement or other laws and regulations. This, oversight of this power is under the jurisdiction of the Administrative Court.

In the Joint Communiqué on Preah Vihear case³, the constitutional court widely interpreted this power by adding the word "may" related to treaties that change the territory of the Kingdom of Thailand, but the

¹M J C Vile's, *Constitutionalism and the Separation of Powers: Montesquieu* (Liberty Fund, 2nd ed, 1998) [11] <<http://oll.libertyfund.org/pages/montesquieu-and-the-separation-of-powers>>.

²Luzius Wildhaber, 'Parliamentary Participation in Treaty-Making, Report on Swiss Law-Europe' (1991) 67 *Chicago-Kent Law Review* 437, 439.

³Joint Communiqué on Preah Vihear Case [The Constitutional Court of Thailand] No. 6-7/2551, 8 July 2008 reported in [2008] 125 (108A) *The Royal Gazette of Thailand* 21-22.

constitutional provision no longer specifies this word. The decision of the Constitutional Court can impact treaty making by the executive branch. Thus, it is not clear what kind of treaties or international agreements need to be approved by the legislature. Therefore, the executive branch always submits treaties and international agreements to Parliament for approval before concluding them in order to disperse the political responsibility of the executive branch.

As noted above, the research question for this paper raised the two following issues. First, what factors in Thailand's constitution related to treaty making powers and processes impact the international relations process? Second, how should Thailand's constitution be reformed in compliance the doctrines of the separation of powers and checks and balances as well as the Vienna convention?

Therefore, this paper will examine the treaty making power and process conflict between the Executive and Legislature and analyze the extent to which the rules and the judicial decisions have impacted, or may impact, the separation of powers and checks and balances doctrines. Part I will provide overviews of the treaty making power concept and theory, the functions of the constitutional organ, and the separation of powers. Part II will examine the existing

principles of treaty making process for states which are in compliance with the Vienna Convention on the Law of Treaties. Part III will study the state practices of the USA and France in relation to treaty making power and processes and provide a comparison of such features on their legal and practical grounds. Part IV will discuss the treaty making power problem and crisis of Thailand. Finally, Part IV will rethink and re-envision Thailand's treaty making power and process.

II. LEGAL MATERIALS AND METHODS

This paper lies on several relevant international conventions and relevant domestic laws concerning treaty making power. It uses Vienna Convention on the Law of Treaties 1969 and relevant customary international law relating to the making of international treaties. It further analyses Thailand's Constitution as well as other relevant domestic laws.

This paper uses a normative juridical method, including reviewing and analyzing the treaty making power and process of the Vienna Convention on the Law of Treaties and the constitutional provisions of Thailand. The relevant treaty making power concepts, separation of powers, and check and balances doctrines are analyzed. The approach in this paper is statute-based and

comparative. It also tries to discover whether there is a conflict of power between the judicial branch, the constitutional and administrative courts, and the executive and legislative branches regarding treaty processes.

III. RESULT AND DISCUSSION

Judicial Review And Treaty Making Crisis: Organ, Power And Process

Since the topic examined here concerns the treaty making crisis of Thailand, it is necessary to rethink and re-envision the constitutional principles related to, firstly, treaty making power theory; secondly, international law and treaty making power; thirdly, treaty making power and processes among the USA, France and Thailand; fourthly, the adjudicated problem of exercising treaty-making power in Thailand; and, lastly, remaining problems to the reform of the treaty-making process and power principles in Thailand.

Treaty Making Power

It is appropriate to begin with an examination of the nature of the treaty making power concept and theory. This

concept is also described as the mechanism of exercise of sovereignty in terms of cooperation among state parties through international relationships and agreements. An evident instrument for this aim, the purpose of a treaty is to express clearly the legally binding agreements that emerge from concluding an international agreement. At the same time, the treaty making power concept generally involves the exercise of the authority of executive branches in international relations. This concept emerged from analyzing the function of the constitutional organ in compliance with domestic and international law. Principally, the exercise of this power, including restricted power, must be performed in compliance with the Constitution of each state.⁴

There is no doubt of the international role in the conduct of the international relations of the government on behalf of the state⁵ through a state representative. It can be said that this is the exercise the state jurisdiction under the “Principle-Agent

⁴Charles S Clancy, ‘An Organic Conception of the Treaty-Making Power vs. State Rights as Applicable to the United States’ (1908) 7 (1) *Michigan Law Review* 19, 34
<<http://www.jstor.org/stable/1274085>>; Arun Panuphong, *Diplomacy and International Affairs*

(Faculty of Political Sciences, Thammasart University Press, 1986) 4.

⁵United Nations, *Treaty Handbook* (United Nations Publication, 2012) 3.

Theory”⁶ or “Mandate Theory”,⁷ which is related to administrative power held by the executive branch in international relations. Moreover, historical data have supported the concept that state practice in international relations are constituted by an envoy on behalf of the monarchy serving as a sign that shows the relationship between the countries. In the treaty making power concept under international law, however, this power is no longer run by the state,⁸ since each state has given consent to be bound by international agreements.

This study also found that the substantive features⁹ of the separation of powers are explained best as a function of the constitutional organ,¹⁰ which defines the role and authority of the organ overseeing treaty making power rather than the formal separation of powers. Therefore, the allocation of such power must consider the extent to which such powers are characteristic of "political power" or "legal

power”.¹¹ This is important, in part, because the power that is exercised by a political or a legal authority can affect consideration of the “liability of the state”, especially of whether that power involves a “political responsibility” or a “constitutional responsibility”,¹² as in the case of an impeachment. However, treaties are not a legal responsibility with supreme authority held by the Judicial Branch or the Supreme, Administrative or Constitutional Courts.

Vienna Convention On The Law Of Treaty

The principles of the Vienna Convention of 1969 affirm that the Executive shall have the power and duties to exercise sovereignty in relation to making treaties. The International Commission of the United Nations has established a concept for drafting conventions that aim to conclude in mutual agreement between parties.¹³

⁶Laurence R Helfer and Timothy Meyer, *The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence* (5 May 2015) Duke University, School of Law 1, 4-5 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6134&context=faculty_scholarship>.

⁷Prasit Eakkabuttra, *International Law Volume I: Treaty* (Winyuchon, 4th ed, 2008) 101.

⁸*The Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980) preamble, art 6 and art 7. (*‘Law of Treaties Convention’*)

⁹Pornson Leangboonlertchai, *Rule of Law Development: German and France* (19 March 2014)

Public Law Net 1 <<http://www.pub-law.net/publaw/view.aspx?id=1639>>.

¹⁰Theodore Georgopoulos, *The Checks and Balances Doctrine in Member States as A Rule of EC Law: The Cases of France and Germany* in EUSA 8th International Conference, 27-29 March 2003, Nashville Tennessee 3 <http://aei.pitt.edu/6493/1/001523_1.PDF>.

¹¹W J Stankiewicz, *Aspects of Political Theory: Classical Concepts in an Age of Relativism* (Cassell and Collier Macmillan, 1976) 69-70.

¹²Pornson Leangboonlertchai, *Problems on Politician Impeachment* (19 March 2014) Public Law Net 1-2 <<http://www.pub-law.net/publaw/view.aspx?id=1438>>.

¹³Helfer and Meyer, above n 8, 1.

Hence, the regime of international law was set up specifically for the purpose of outlining treaty making procedures, including how to conclude treaties, the completeness and the incompleteness of treaty making, and exclusive rights for establishing and annulling treaties. Most importantly, International law shall not intervene in matters defined under the domestic law, such as which organs under the Constitution have the power to make treaties.

This research yielded two conclusions:

1) international law affirms that the Executive shall have the authorities and duties to exercise the power of sovereignty in relation to making treaties because it affirms that the states have the power to make treaties because it determines only the procedures but does not indicate which organ under the Constitution shall have such power; and 2) the representative of the State must hold the title of Executive or be elected based on the exercise of the Executive's power.

Further, international law affirms that the State has the power to make treaties,¹⁴ but it does not affirm that the government, on behalf the Executive, shall have the sovereign power to conclude a treaty. The

State itself, under international law, is entitled to be considered abstract and non-physical juristic person.¹⁵ Moreover, any action of the State shall be accomplished concretely and legitimately by a variety of state authorities or representatives as provided by law. As a result, exercising the State's sovereign power in relation to treaty making shall not be accomplished unless the government action is done because, in the context of the international law, the government shall have the right to conclude treaties on behalf the State.¹⁶

However, the 1969 Vienna Convention does not stipulate specifically that the government's so-called Executive Branch is the key organ having treaty-making power. The study found that when the issue was raised during the discussion agenda on drafting the Convention of Vienna in 1968, most argued that the government's power may be expressed in mixed States, including Union, Federal State and Political Sub-Divisions. Last but not least, the Assembly accepted that any independent state that adopted the Convention shall have power to make treaties, which is not a power exclusively provided by the Constitution or domestic law. Some States may restrict treaty-making powers¹⁷ to the central

¹⁴*Law of Treaties Convention* art 6; Alina Kaczorowska, *Public International Law* (Routledge, 4th ed, 2010) 176.

¹⁵Pasit Eakkabutra, *International Law Volume II: State* (Winyuchon, 2nd ed, 2011) 13-14.

¹⁶Jaturon Tirawat, *International Law* (Winyuchon, 3rd ed, 2012) 212.

¹⁷Helmut Steinberger, *Constitutional Subdivisions of States or Unions and their Capacity to Conclude Treaties Comments on Art. 5 Para. 2 of the ILC's 1966 Draft Articles on the Law of Treaties* (Max-

government of a Federation,¹⁸ for example, while others may provide that each State or administration shall have the power to make treaties on only some matters.¹⁹

Finally, the Assembly voted to remove the capability of each State to conclude international agreements when each State could not specify clearly using a few words its treaty making powers and practices, meaning that “the government” and not “the state” shall have the power to make treaties. For multi-state nations, this provokes ambiguity over whether the power of making international agreements shall belong to the central government or to each state’s government, which is another reason it is stipulated that only the State, conceived as “the government”, shall have the power to conclude treaties, not another organ under domestic law.²⁰

Notwithstanding, subject to the provisions of the Vienna Convention, in terms of Full Power, the Convention designates a person or persons as state representative to conclude treaties. People with Full Power²¹ and people making treaties ex-officio include President of the State, the Head of the government, or even

the Minister of Foreign Affairs. Not only may the legal status of a person with either ex-officio or full powers have been bestowed without power of attorney, but these persons also, in accordance with their domestic laws, take on the role, power, and duties of the Executive. These persons are not given the power to make laws or to decide on legal problems.

This study has shown that although international law does not stipulate that the Executive shall have the power to conclude treaties, under the principles of international law, only the Executive has the power to conclude international treaties and agreements.

A Comparative Study On Treaty Making

The central issue of this study is that the Executive is the key organ that exercises the sovereignty to make international treaties whereas the Legislative is a secondary organ that exercises power to participate at some stages in the treaty-making process.

Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 1967) 411, 418 <http://www.zaoerv.de/27_1967/27_1967_3_c_41_1_428.pdf>.

¹⁸United Nations, *United Nations Conference on the Law of Treaties*, First session Vienna, 26 March – 24 May 1968, Official Records, Summary Records

of the Plenary Meetings and of the Meetings of the Committee of the Whole (United Nations, 1969) 60 <http://legal.un.org/diplomaticconferences/lawoftr eaties-1969/vol/english/1st_sess.pdf>.

¹⁹Ibid 64; Steinberger, above n 19, 420.

²⁰United Nations, above n 20, 68-69.

²¹*Law of Treaties Convention* art 7.

A. Key Organ Exercising Treaty-Making Power

The reason why the author of this study would like to draw attention to a comparative study between the USA and France is that the provisions of Thailand's Constitution in the context of treaty making were drafted, initially, to be similar to those of France. Further, Thailand has maintained a dual-court system comprising the Court of Justice and the Administrative Court. In addition, there are similarities between Thailand and the USA with respect to Legislature's participation in proposing a treaty negotiation framework for prior approval by the Legislature itself.

In the context of this study, it could be said that the treaty-making practices of the USA,²² the Republic of France²³ and Thailand tend in the same direction: these are in the hands of the Executive (called the president, or the government), which is considered the key organ exercising sovereignty to make treaties with other States or international organizations.²⁴

Similarly, these three countries all have the power to conclude treaties of different forms in accordance with their constitutional provisions, but these provisions vary in procedures and processes. For example, in the United States, as a result of political evolution and necessity,²⁵ the president is responsible for formally concluding two forms of international agreements: treaties and executive agreements.²⁶ It is presumed that the conclusion of formal treaties shall be accomplished upon at least a two-thirds vote of the Senate. For this reason, the executive in the United States has developed alternate forms of international agreement that do not have to meet this requirement. Unlike in Thailand or France, an "executive agreement" can be carried out regardless of prior approval of the Senate.

Notwithstanding, with consideration to the "forms" of general treaty-making powers, there are not differences, as each country's laws conform to the general principle providing that the "treaty-making power is in the hands of the Executive". In

²² International Legal Research Tutorial, *U.S. Treaties and Agreements-The Process*, (28 August 2014) Duke Law [2] <https://law.duke.edu/ilrt/treaties_3.htm>; Amos S Hershey, 'Treaty-Making Power with Special Reference to the United States' (1926) 1 (5) *Indiana Law Journal* 261, 262 <<http://www.repository.law.indiana.edu/ilj/vol1/iss5/2>>.

²³ Amos S Hershey, 'Treaty-Making Power with Special Reference to the United States' (1926) 1 *Indiana Law Journal* 261, 262.

²⁴ Jantajira Aimayura, et al, *Check and Balance Mechanism to Executive Branch Power on Free Trade Negotiation* (Thailand Research Fund, 2006) 12-13.

²⁵ United States Senate, 'Executive Agreement' *Treaties* (20 August 2013) [1] <<http://www.senate.gov/artandhistory/history/mon/briefing/Treaties.htm>>.

²⁶ Manit Jumpa and Pornson Leangboonlertchai, *United States Constitution: The Explanations on the Principles and Case Law* (Winyuchon, 2009) 98.

other words, the Executive has the final power of making treaties regardless of the Legislature's participation in the initial process.

B. Secondary Organ Exercising Specific Power of Approval

It is generally recognized that the power of the US Senate, the French General Assembly, or even the Parliament of Thailand are not different in principle. The Legislature of these three countries has only the power and duties to give approval before expressing consent to be bound by the executive and to ratify their accession, approval or acceptance. The US Senate gives approval for making all types of treaties whereas Thailand and the Republic of France's Legislature are each responsible for approval of some forms of treaty, especially treaties of importance that may affect national security and interests. These treaties, for example, relate to the nation's territory, trade, finances, or agreements modifying provisions that have the status of statutory law,²⁷ for example. Different forms of treaty have arisen from the fact that Thailand and the French Republic are not

similar with respect to society, politics or economy, especially in matters that originated from the country's necessity and social and political contexts.

Nevertheless, difficulty has arisen with regard to making treaties in Thailand. Subject to the country's constitutional provisions, it seems that all forms of treaty should be approved by the Parliament, like in the USA.²⁸ However, there is a tendency to interpret some enacted matters of the constitution, including treaties broadly affecting the durability of the economy and society and treaties significantly involving the national investment and budget. In such interpretations, all categories of treaty that affect broadly the society or significantly bring about commitment to the national budget have a direct and indirect impact on social and budgetary aspects of the country.

Overall, the tendency of courts has been to interpret the true definition of "significantly" or "broadly" according to the spirit of the constitution. Though Thailand's constitution provides that the National Assembly's approval shall be required for concluding some categories of treaty, those words in the constitution's provisions

²⁷Gerald L Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' (2012) 45 *Cornell International Law Journal* 257, 260 <<http://scholarship.law.cornell.edu/cilj/vol45/iss2/1>>; Pierre M Eisemanm and Paphaële Rivier, 'France' in *Nation Treaty Law and Practice*,

Duncan B Hollis et al (eds.) (Martinus Nijhoff Publishers, 2005) 253, 259.

²⁸รัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช ๒๕๕๐ [Constitution of The Kingdom of Thailand B.E. 2550 (2007)] § 190 cl 2.

suggest that all treaties shall be made on the condition that the Senate gives prior approval, as in the USA.

According to this study's examination of the legislative branch's involvement in making of treaties, the author has found that the legislative branch in France has less treaty-making power and duties than in Thailand and the USA,²⁹ especially in the context of inspection of the exercise of the treaty-making power of the executive branch. It could be said that in the matter of concluding "international commitments",³⁰ the French Parliament has little role, and its power is restricted to approve and disapprove, not to modify, the provisions thereof.

Meanwhile, the US Senate used to have a considerable role in participating in initial processes, which included setting up the objectives and negotiation framework of the treaty as well as approving the Executive's negotiation framework. This form of power may cause difficulty in making treaties, however, and this sophisticated process led to the US President

having the exclusive power to conclude an executive agreement—"congressional executive agreements, agreements pursuant to treaties and Presidential or sole executive agreements"³¹—, which is not considered a treaty statutorily and, thus, does not require the advice and consent of two thirds of the Senate.³²

The problems and practices in the USA are similar to those coming to Thailand soon. The executive branch is committed to drafting a negotiation framework and submitting it to the Legislature for approval. Moreover, the executive must provide for the constitutional principle of "the people's participation" and "direct democracy". In accordance with the constitution, the Executive, thus, declares a negotiation framework to the people for a "public hearing"³³ before a treaty negotiation is conducted.³⁴ This principle is an important cause of inconvenience and obstruction that has arisen in treaty making now in Thailand. The procedure under domestic law is significant because it has a consequence for the constitutionality of treaties.

²⁹New Zealand Law Commission, *The Treaty Making Process Reform and the Role of Parliament*, Report 45: Appendix A: France (December 1997) [A43] <<http://www.nzlii.org/nz/other/nzlc/report/R45/>>.

³⁰*La Constitution du 4 octobre 1958* [French Constitution of 4 October 1958] art 53.

³¹The Congressional Research Service (CRS), Library of Congress, United States of Congress, *Treaties and Other International Agreements: The Role of the United States Senate* (United States Government Printing Office, 2001) 4-5.

³²*United States Constitution* art II § 2 cl 2; Ibid 6.

³³รัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช ๒๕๕๐ [Constitution of The Kingdom of Thailand B.E. 2550 (2007)] § 190 cl 3.

³⁴Benjamin Sukanjanajtee, *Promoting ASEAN Economic Community through Greater Participation and Transparency in Treaty Making Procedures: Thailand's Internal Process and ASEAN Rules of Procedure*, Embracing the New Role of ALA after the ASEAN Charter, 11th General Assembly 2012, 14-19 February 2012, ASEAN Law Association 8 <<http://www.aseanlawassociation.org/11GAdocs/workshop4-thai.pdf>>.

Nevertheless, on the basis of international law, the procedures or incompleteness of such domestic laws do not have an effect on international relations and obligations.³⁵

More importantly, it has been questioned why the US constitution provides that all categories of treaty will be made upon the Senate's approval and not the entire Legislature's. Traditionally, the Senate is entitled representatives from each state; thus, when the Federation of States make any treaties that may cause commitments that fall to another state, it is provided that the state's representatives shall play a partial role in initial processes, which includes setting the objectives and negotiation framework as well as reviewing the framework for advising on and consent to the negotiation framework. This principle is enacted in the US constitution in conformity with the "Agent Theory"³⁶ on treaty-making power.

Given the nation's history, the US constitution provides that the Senate shall be involved in and informed of the initial processes of making treaties and that each state's representative shall be competent on this matter as citizen. The Senate's role in relation to treaty making seems to be that of an assistant to the President on behalf of the

Federation of States. In contrast, the French Parliament, as the nation's legislative branch, shall not have powers other than those of certifying, by enactment as an Act, the President's ratification, affirming the view of Professor Luchaire.³⁷ However, the exercise of power in Thailand's Legislature is not that of an assistant of the executive branch of government responsible for concluding the international relationship and agreement, like in the US Senate, but it uses its power for inspection of and control over the exercise of executive power.

C. Which Organ Having Power to Rule on the Conflict between the Key and Secondary Organ

In the context of organs having the power to rule on any dispute in relation to the conclusion of treaties, the regulatory practices exercised by the USA, Thailand, and France and are dissimilar. In other words, the determination of practices is made on the basis of their own features and domestic law contexts.

The Republic of France established a "political organ" having the power to rule on any dispute in relation to treaty making. This organ is not given legal status as a judicial

³⁵*Law of Treaties Convention* art 27, art 46.

³⁶Helfer and Meyer, above n 8, 4-5.

³⁷Francois Luchaire, 'The Participation of Parliament in the Elaboration and Application of Treaties-

Europe' (1991) 67 (2) *Chicago-Kent Law Review* 341, 358
<<http://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss2/4>>.

organ but was established and provided its power and duties under the Constitution on the basis of the origin and power of “political power”, namely the “Constitutional Council”. There is “a composition” of members originally made up in judicial and political contexts, such as President of the Republic, former senators, former representatives, etc.³⁸

Significantly, in term of exercising power to rule on any legal dispute in relation to the conclusion and enforcement of treaties, the organ having trial and adjudication power shall be set up specifically for ruling on the “constitutionality of international commitment”. These are sometimes called, by public law scholars,³⁹ “engagements internationaux.” “International Commitments” that have not been enforced on the Republic of France shall belong to the jurisdiction of the Constitutional Council.⁴⁰ As a result, the Council is a key organ, one with constitutional power to oversee the

constitutional review of the executive’s exercise of treaty making power.⁴¹

On the other hand, “treaties” previously enforced shall be taken into the Conseil d’Etat’s—or the Supreme Administrative Court’s—consideration whenever the executive branch’s exercise of power must conform to the doctrine of the “legitimacy of treaties”—that is to say, whenever they exercise rule by means of “political power” or “legal power.”⁴²

In the USA, the organ having the power to rule on treaties is the “Supreme Court” of the United States,⁴³ which exercises judicial and legal power but not political power in form of a judicial organ because the US legal system is not a “dual-court system”—with a Court of Justice and an Administrative Court—like Thailand⁴⁴ and France.⁴⁵ As regards the exercise of treaty-making power, the US Constitution provides that the Supreme Court of the

³⁸*La Constitution du 4 octobre 1958* [French Constitution of 4 October 1958] art 56; Ministry of Justice, *The French Legal System: Judicial System* (Ministère de la Justice, 2012) 3-7 <http://www.justice.gouv.fr/publication/french_legal_system.pdf>.

³⁹Nantawat Boramanant, *The France Constitutional Court: Part 2* (20 December 2004) Public Law Net 3-4 <<http://www.pub-law.net/publaw/view.aspx?id=176#m15>>.

⁴⁰Noelle Lenoir, ‘Constitutional Council and the European Convention of Human Right: The French Paradox’ in *Judicial Review in International Perspective* (Kluwer Law International, 2000) 145, 162.

⁴¹E Lauterpacht and C J Greenwood (eds.), 98 *International Law Reports* (Research Center for International Law, University of Cambridge, 1994) 180.

⁴²*La Constitution du 4 octobre 1958* [French Constitution of 4 October 1958] art 55; René Chapus, *Droit administratif general Tome 1* (Montchrestien, 14 édition, 2000) 137 cited in Banjerd Singkanati et al, *The Reviewing Constitutionality of Law, Which Impact to Human Rights* (Constitutional Study Institute, Thailand Constitutional Court, 2009) 185.

⁴³*United States Constitution* art VI § 2.

⁴⁴รัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช ๒๕๕๐ [Constitution of The Kingdom of Thailand B.E. 2550 (2007)] § 199.

⁴⁵French Ministry of Foreign Affairs, *The French Justice System* (June 2007) Embassy of France in Washington, D.C 2 <http://ambafrance-us.org/IMG/pdf/Justice_ag.pdf>.

Federation shall have an exclusive power to rule on a treaty-making dispute.⁴⁶

As a result of the difference in their legal systems and the different origins of the judicial functions in the USA and France, their practices surrounding the adjudication in the matter of treaty making are not similar. In Thailand, it is provided that the function and power of adjudicating any dispute arising from the exercise of the Legislative's and the Executive's power shall be within the Constitutional Court's jurisdiction.⁴⁷

Most importantly, in practice, the Administrative Court has tried and adjudicated a case in relation to the conclusion of a treaty accomplished by the Executive branch, which did not conform to the constitutional provision.⁴⁸ The Administrative Court's decision on this matter led to widespread academic and political criticism of the legality of the judiciary. The question is whether the Administrative Court intervened in the Executive's legal function in the dimension of international relations.⁴⁹

In brief, the duties of an organ having the power to rule on a treaty-making dispute

is based on the political context of each country, and these developments informed their various domestic laws.

Adjudicated Problem Of Exercising Treaty-Making Power In Thailand

According to the findings of this study, problems caused by the judicial organs' decisions can be separated into three groups: first, ambiguity in the context of categories of treaty in principle and submitting processes for the Legislature's approval; second, the problem of enforcement and interpretation of constitutional provisions; and third, with respect to the courts' jurisdictions, whether any treaty-making dispute should be submitted to the Administrative Court.

A. Ambiguity in the Context of Categories of Treaty in Principle and Submitting Process for the Secondary Organ's Approval

The constitutional principles related to treaty-making bring about different interpretations. The constitutional provisions use some words that have led to

⁴⁶United States Constitution art III § 2.

⁴⁷รัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช ๒๕๕๐ [Constitution of The Kingdom of Thailand B.E. 2550 (2007)] § 190 cl 6.

⁴⁸รัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช ๒๕๕๐ [Constitution of The Kingdom of Thailand B.E. 2550 (2007)] § 223 cl 2.

⁴⁹Vorajet Pakeerath, *Act of Government and the Supreme Administrative Court Order No. 547/2551 (Preah Vihear Temple [Prasat Phra Wihan])* (5 October 2008) Public Law Net 3-4 <<http://www.pub-law.net/publaw/view.aspx?id=1292>>.

different interpretations, especially treaties affecting “economic and social stability broadly” or even treaties resulting in “significant” binding effects upon the trade, investment and budget of the country.⁵⁰ Therefore, by virtue of the spirit of the constitution, it should be indicated how many types of treaty and what the characteristics of each treaty type are. In connection with this, the author studied explanation and discussion documents written by the Drafting Commission of the Constitution of the Kingdom of Thailand 2007 (B.E. 2550); yet, there was no evidence showing that the ideas discussed and exchanged on the meanings of key words in the Constitution.⁵¹ The Commission expressed some concern about the true definitions of each word because some words led to the possibility of different interpretations. The commission did not clarify their exact meanings.

Further, the constitutional provisions made treaties of the legislative branch irrelevant to the concept of treaty-making power, which, in practice, is in the Executive’s hand. Subject to the Constitution, the Legislature has so much dominance over Thailand’s treaty making

procedure and negotiation power that the Executive was affected as a result of Legislative intervention. This does not comply with the concept of “parliamentary participation” in matters of the negotiation framework submitted to the Legislature for approval and the public dissemination required for a public hearing on such a framework, which, in theory, must be accomplished before the Executive’s treaty making with other countries.

This practice does not conform to the exercise of the Executive’s power and causes the inefficiency of its treaty making. For example, Bilateral Investment Treaties (BITs) with more than 54 countries⁵² are still suspended in the process of negotiation. This delay is caused by a complicated treaty making procedure that includes submitting the negotiation framework and reporting it to the National Assembly, especially in case of international treaties, as stipulated in the Constitution. Submission of a negotiation framework to the National Assembly seems to take a long time.

Recently, there was delay at the conclusion of international agreements with ASEAN-Korea Free Trade Area (FTA),

⁵⁰รัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช ๒๕๕๐ [Constitution of The Kingdom of Thailand B.E. 2550 (2007)] § 190 cl 2.

⁵¹Office of the Representative of Thailand, *Meeting Report of Drafting Constitution of the Kingdom of Thailand Committee No. 33/2550* (24 June 2007) 90-92

<http://library2.parliament.go.th/giventake/content_meeting/062550.html>.

⁵²International Economic Department, Ministry Foreign Affairs of Thailand, *The Information on Promotion and Protection Investment Treaties* (15 August 2016) <<http://www.mfa.go.th/business/th/cooperation/134>>.

ASEAN-Japan FTA, ASEAN-India, and ASEAN-Australia-New Zealand FTA.⁵³ While the Cabinet approved these treaties, the new constitutional principles provide a more complicated process. In particular, the National Assembly's approval is required. Meanwhile, other ASEAN countries have the power to conclude the above-mentioned agreements and have enforced them without trouble since 2007 (B.E. 2550), followed by Thailand two years later (in 2009). This reveals that the enforcement of agreements in Thailand has been slower than in other ASEAN Countries.⁵⁴

B. Problem on Enforcement and Interpretation of Constitutional Provisions.

Compounding the ambiguity of the treaty-making principle, there have been some questions about the Constitutional Court's rulings in cases of disputes involving the exercise of the treaty-making power. In 1999, for example, in a case involving a letter of intent sent to the IMF requesting academic and financial support, the Constitutional Court ruled that this

agreement signed with IMF was not in the nature of a treaty on the grounds that the letter of intent did not include two concepts based on international law concerning unilateral action. When a government cannot abide by the commitments provided in its letter of intent, the Court concluded, there shall not be any state responsibility arising therefrom. The other decision involved the absence of subjectivity⁵⁵ as shown in the letter of intent because neither the Thai government nor the IMF had the intention to create binding effects because of this action. This ruling is considered case law now and shall be followed subsequently.

Notwithstanding, in 2000, when Thailand agreed to ratify and implement the Convention of Biological Diversity (CBD), a case was filed in the Constitutional Court for adjudication. The Court ruled that this convention had the consequence of creating a change of state jurisdiction in a "substantive" context considered to belong to the exercise of sovereignty of the Executive. The Court also affirmed that such treaty making shall not only lead to state jurisdiction change of "maritime territory" but also be taken into the Legislature's

⁵³Department of Foreign Trade, Ministry of Commerce of Thailand, 'Taxation Utilization from FTA' (2011) 1 (1) *Trade Reference Journal* 1, 8-21 <<http://fta.dft.go.th/LinkClick.aspx?fileticket=ofjHFTyfRX0%3D&tabid=92&mid=446>>.

⁵⁴Duanden Nikomborirak, et al, *The Study the Impact of Article 190 of the Constitution of the Kingdom of Thailand B.E. 2550 on Treaty Making related to*

Trade and Investment in Thailand (National Research Council of Thailand, 2009) 5-10, 5-11.

⁵⁵Prasit Pivawatanapanich, *Treaty Making Problems of the Constitution of Thailand B.E. 2550* (30 September 2015) Faculty of Law, Thammasart University 14-17 <http://law.tu.ac.th/files/news/2555/Agust/322_prasit.pdf>.

consideration for approval. Evidently, this problem has arisen from a wide interpretation that does not conform to the spirit of the constitution stating that treaties on “geographical change” in relation to maritime territory, such as exclusive economic zones and continental shelves, shall be under Thailand’s sovereign right and state jurisdiction. The Constitution does not emphasize state jurisdictional changes, however, originating from the exercise of sovereignty, including law enactment and enforcement as well as case trials and adjudication.

Another incident seems important is the case of the Japan-Thailand Economic Partnership Agreement (JTEPA), which was filed with the Administrative Court. It needed to be decided whether a case in relation to treaties should be within the Administrative Court’s jurisdictional competence. The decision on this matter laid down new case law.

No disputes arising from making treaties are within the Administrative Court’s jurisdictional competence. Pursuant to the Supreme Administrative Court’s order, it is provided that the exercise of the Cabinet’s power “involved in the National

Assembly”, or the legislature branch, for the purpose of “international relations”, or the exercise of the administrative power of the Cabinet, as constitutional organ, is provided by the Constitution, not on behalf of a State official. The signing of such an agreement involved the use of executive power in international relations. Consequently, such treaty-making power was not within the jurisdiction of the Administrative Court.⁵⁶

Nevertheless, the Administrative Court’s 2008 order does not comply with the 2007 order against JTAPA. As regards the signing of the Joint Communiqué between Thailand and Cambodia regarding the bid to have the Preah Vihear ruins listed as a World Heritage Site, the Administrative Court held that the Minister of Foreign Affairs and the Cabinet’s signing of the treaty was carried out on behalf of the Thai government as a “State Official” in connection with foreign affairs. This involved the use of administration power in general, which is within the Administrative Court’s jurisdiction in accordance with the Act on the Establishment of the Administrative Court and the Administrative Court Procedure B.E. 2542 (1999). Thus, such an act by the government shall be deemed an “administrative act”⁵⁷ carried out by State

⁵⁶Vorajet Pakeerath, *Act of Government and Order of Central Administrative Court of Thailand* (13 August 2015) Public Law Net 1-2 <<http://www.pub-law.net/publaw/view.aspx?id=1264>>.

⁵⁷Amorn Juntarasomboon, *Order No. 984/2551 of Central Administrative Court of Thailand Correct or*

Not? (Temporary Protective Measures from Suitcase for Revoking the Joint Communiqué between Thailand and Cambodia as Register the Preah Vihear as World Heritage Site) (10 November 2015) Administrative Court of Thailand 24 <<http://www.admincourt>

officials falling under the jurisdictional competence of the Administrative Court. The Administrative Court's decision on this matter led to economic and political criticism stating that it did not comply with law previously laid down by the court itself in the case of the Administrative Court's fair trial and adjudication against JTEPA related to the use of the executive power on treaty making.

The Joint Communiqué in question was filed with the Constitutional Court, which gave the ruling on the grounds that it was related to a treaty that "may provide for a change" in the Thai territory and "may lead to a vast impact on economic and social stability of the country".⁵⁸ Thus, the National Assembly must approve the Joint Communiqué as provided by the Constitution. The Constitutional Court's ruling brought about widespread criticism, especially because the Court added the word "may" to its interpretation of the original provision of the Constitution. This word, in

fact, is not provided in the Constitution because a legislation function is not provided to the judiciary. Jurists call this type of act "judicial legislation."⁵⁹

It is obvious that the Administrative and Constitutional Court's rulings on various treaty disputes are not provided on similar grounds because some shall be in compliance with the constitutional provisions while others shall not.

This was shown in the Constitutional Court's ruling in the case of a letter of intent requesting academic and financial support from the IMF (International Monetary Fund)⁶⁰ and the Convention of Biological Diversity (CBD),⁶¹ as well as the Administrative Court's decision against JTEPA⁶² along with the Joint Communiqué between Thailand and Cambodia to have Preah Vihear listed as a World Heritage Site, which Cambodia made by means of a unilateral act.⁶³

go.th/attach/news_attach/2008/08/Article20080807.pdf>.

⁵⁸Joint Communiqué on Preah Vihear Case [The Constitutional Court of Thailand] No. 6-7/2551, 8 July 2008 reported in [2008] 125 (108A) *The Royal Gazette of Thailand* 23-25.

⁵⁹Pivawatanapanich, above n 55, 18.

⁶⁰International Monetary Fund (IMF) Case [The Constitutional Court of Thailand] No.11/2542, 25 May 1999 reported in [1999] 116 (63A) *The Royal Gazette of Thailand* 9-10.

⁶¹Convention of Biological Diversity (CBD) Case [The Constitutional Court of Thailand] No.33/2543, 5 October 2000 reported in [2001] 118, (68A) *The Royal Gazette of Thailand* 82-84.

⁶²Japan-Thailand Economic Partnership Agreement (JTEPA) Case [The Supreme Administrative Court of Thailand] No. 178/2550, 30 March 2007 reported in The Administrative Court of Thailand 11

<<http://www.admincourt.go.th/admincourt/upload/admCase/Document/judgement/PDF/2550/01013-500193-2F-500330-0000042684.pdf>>.

⁶³Joint Communiqué on Preah Vihear Case [The Supreme Administrative Court of Thailand] No. 547/2551, 8 September 2008 reported in The Administrative Court of Thailand 23-24 <<http://www.admincourt.go.th/admincourt/upload/admCase/Document/judgement/PDF/2551/01013-510530-2F-510908-0000055648.pdf>>.

Both courts' rulings⁶⁴ on these matters have been criticized widely with respect to the Judiciary's stability and creditability in relation to the sovereign power of the Executive. This led to trouble and confusion surrounding the exercise of treaty making sovereignty in Thailand.

Recent comparative studies show that the practice and the Constitution of the Republic of France stipulate that the "Constitutional Council" shall adjudicate and try any disputes arising from the concluding of treaties based on "political power" as provided by the Constitution. When there is a problem regarding the "constitutionality of international commitments",⁶⁵ the matter in question must be decided "in the process of treaty making." Also, when a treaty comes into force and there is a question regarding the "legality of international obligations", like the enforcement of laws enacted as a consequence of international agreements, it shall be within the Conseil d'Etat's or Supreme Administrative Court's function of trial and adjudication on the grounds that the problem has arisen from "legal power".

The author realizes that the Constitutions of Thailand and France specify similar principle legislation and similar dual-court systems. Thus, as provided by the

French Constitution, the exercise of power of the Constitutional organs should be implemented to lay down functions and principles that will be enforced in Thai Judiciary trials and adjudications of cases in relation to treaty making.

C. Problem Arisen from the Courts' Jurisdiction: Should the Matter of Treaty Making Fall within the Administrative Court's?

It is generally known that the United States has a single-court system, unlike France and Thailand, which have dual-court systems. In the US, the federal court exercises jurisdiction over questions of the exercise of either the political or legal power of the executive branch. Meanwhile, in Thailand and France, the exercise of political power shall only be inspected and reviewed when the use of power in question is one belonging to the executive or legislative branch, especially in cases involving the exercise of power of the Executive in connection with determining the administration policies that shall be checked and controlled by political process of the Parliament. This type of power is conferred directly to the Legislature with "political

⁶⁴Joint Communiqué on Preah Vihear Case above n 58, 23.

⁶⁵*La Constitution du 4 octobre 1958* [French Constitution of 4 October 1958] art 54; Luchaire, above n 39, 351.

accountability”⁶⁶ that must fall within “the Constitution” and not within Administrative Law.⁶⁷

On the other hand, the Judicial Branch only has the power to rule on disputes involving the legality of case law.⁶⁸ For cases involving the exercise of the legal power of other organs, the balance of power as well as the use of sovereignty must be consistent with “the principle of checks and balances”, which is also under the jurisdiction of the Judicial Branch. In addition, use of the “legal power” of the Executive over “acts and subordinate legislation” falls within the purview of the Judiciary. On the contrary, the use of “political power” by the Executive constitutes the use of “constitutional power”. For example, in principle, the initiation of international relations shall not fall within the authority of the judicial power⁶⁹ unless the case involves constitutional principles and provisions, as required for the balance of political power.⁷⁰

There remains, however, the important question of how the problem of the Administrative Court’s jurisdiction over the exercise of political power provided for in

the Thai Constitution should be resolved. In the case of the Joint Communiqué submitted to the Central Administrative Court, the Administrative Court does not have conferred power to rule on “the constitutionality” of the treaty making of the Executive even though the Foreign Affairs Minister is of a “State official”. This is because, in making treaties, the minister is considered “ex officio”, as provided by the 1969 Vienna Convention, or is considered a “State representative” under the Constitution (i.e., not under other laws or regulations). This principle is consistent with the Constitution of the France Republic and the Supreme Administrative Court’s Order in 2007 in the case of JATAPA.

Most importantly, the issue that needs to be reconsidered is what principle should be explained in cases of the Administrative Court’s decision on the Executive’s exercise of political power to make treaties. If the Administrative Court were competent to control and check the Executive’s functioning,⁷¹ would this lead to difficulties making treaties for the Executive Branch in the future.⁷² In the opinion of the author, whether the Administrative Court will be

⁶⁶ Borvornsak Uvanno, *Legal Science Analyzing on the Central Administrative Court Order Related to Protective Measures for Temporary Relief in Joint Communiqué between the Thailand and Cambodia* (30 September 2015) King Prajadhipok’s Institute 3-4 <http://kpi.ac.th/media/pdf/M10_71.pdf>.

⁶⁷ Ibid 3; Pakeerath, above n 56, 2.

⁶⁸ Pornson Leangboonlertchai, ‘US Constitution and Limitation Power of the Federal Court’ (2553) 1 (1) *ABAC Law Journal* 60-61.

⁶⁹ Ibid, p. 60.

⁷⁰ Uvanno, above n 66, 4.

⁷¹ Ibid 5.

⁷² Pakeerath, above n 56, 3.

conferred legitimate power to rule on such actions depends on the constitutional legislators' intention. Control over the exercise of political power in relation to international agreements conferred to the Administrative Court should be restricted and modified by the enactment of the principles and functions of the constitution as well as the exercise of power of the Administrative Court. Nevertheless, the question remains, "What legal concept and theory shall be applied by the constitutional drafting legislator to confer jurisdictional competence to the Administrative Court in the matters of dispute arising from international treaty making?"

Reform Of Treaty-Making Power And Process Principle In Thailand And Remaining Problems

Since the Constitutional Court's ruling in the Joint Communiqué case—which stated that the Court had jurisdiction over any treaty or international agreement that "may" provide for a change in Thai territory—led to uncertainty in terms of treaty-making powers and the types of treaties that the National Assembly must approve, the 2007 drafting of a constitutional amendment under Prime Minister Yingluck Shinawatt's government was proposed. As noted above, the Court's ruling brought about widespread criticism. Thus, the constitutional drafting committee proposed

that the word "explicitly" be inserted in place of "may". However, the new treaty-making process delete an emphasis on the legislative's power of submitting and approving all negotiation frameworks that, in principle, are laid down in the Executive's power; further, all of these frameworks are required to be heard by means of public participation. While legislative members protested this concept, the draft constitution was consistent with international practices as well as legal requirements for the Executive's treaty making.

Nonetheless, this draft of the Constitution was denied on the grounds that its modification process had not been subject to existing Constitutional provisions. Indeed, one of the reasons the draft constitution is void is the political interest game that surrounded it.

In 2014, General Prayut Chan-o-cha staged a military coup against the government and assumed control of the country under concepts provided by the interim 2014 constitution (B.E.2557). The new constitution is now being elaborated. The interim constitution did not elaborate the power of the Executive in terms of submission of a treaty negotiation framework for the Legislature's approval, nor any terms of public participation. Under irregular circumstances, "the National Legislative Assembly shall act as the House of Representatives, the Senate, and the

National Assembly,”⁷³ which are normally elected by people. In the interim constitution, there are only five categories of treaty which shall be approved by the legislature, including treaties significantly involving trade and investment. Notably, however, the word “significantly” is still used, allowing more Judicial interpretation of what types of treaties are involved “significantly” in trade and investment. This amendment, thus, cannot meet with success.

Meanwhile, the draft constitution prepared by the Constitutional Drafting Committee, headed by Professor Dr. Bovornsak Uvanno, has failed to get approval again. This draft constitution contained the same principles for treaty-making processes, with no amendment. Mostly, principles and core contents in this draft charter were unchanged compared to the 2007 Constitution (B.E. 2550); this is especially important in matters of submission of treaty negotiation frameworks for the legislature’s approval and public participation in negotiation processes being run by the executive.

The above principle is contrary to the concept that treaty-making power belongs to the executive. While the author recognizes the value of the constitutional principles underscoring legislative and public

participation, he must recognize, also, that the role of the legislative and public branches will be expressed only “after the negotiation complete”, most likely leading to the legislature’s approval and the treaty’s ratification. Such a process emerges from the balance of legislative power over treaty making. Fortunately for Thailand, the proposal for this reformed treaty-making principle has been rejected twice.

There was another attempt to reform Thailand’s treaty-making power when the second Constitution Drafting Committee was nominated by the government and headed by Mr. Meechai Ruchuphan. Recently, the new Constitution charter, drafted by Mr. Meechai Ruchuphan, was approved by the majority of Thai voters through the referendum vote. The core principles and elements of this charter are still similar to those of the currently-enforced Interim Constitution of 2013 (B.E. 2557).

Meanwhile, and even more problematically, this revised constitution stipulates that the executive shall not be responsible for proposing a treaty negotiation framework for the legislature’s approval, and significant public participation in this process is not provided. Nevertheless, this draft constitution was finally approved by Thai voters and sent to be reviewed for the

⁷³รัฐธรรมนูญแห่งราชอาณาจักรไทย (ฉบับชั่วคราว) พุทธศักราช ๒๕๕๗
[Constitution of The Kingdom of Thailand
(Interim) B.E. 2557 (2014)] § 6 cl 2.

elaboration of its facts. According to the author, the treaty-making principle and process should be reformed on the grounds that determining the type of a given treaty leads to various interpretations: there are between five and eight types of treaty, and many detailed provisions will need to be written to prevent a wrong interpretation. Particularly, imperative time should be provided in case a treaty submitted to the legislature is not completed and approved by the legislature within sixty days.⁷⁴ Such a treaty shall be deemed approved based on legal presumptions, subject to the Constitution's provisions.

That principle seems to remove delays and difficulties in making treaties, but the question remains why, under a checks and balances system, the Constitution does not assume that the treaty should be considered rejected if it is not approved by the legislature within sixty days. This means of checks and balances results in efficiency. However, in case a treaty concerns the national interest, there is no reason why the legislature so much more delays on the process of approval than provided. Also, the majority of National Assembly members are composed of government members; thus determining these legal assumptions causes loss of opportunity and efficiency of the

legislative' check and balance on the exercising executive's power.

It is doubtful whether these legal assumptions will facilitate the Executive's power in making treaties that risk losses to the country's interests, or even to some stakeholders. When there is a conflict between the executive and legislative branch in relation to treaty making, the draft constitution stipulates that the executive or government shall only have the authority to submit it to the Constitutional Court for trial and adjudication regardless of legislative participation. This provision cuts down the legislature's role in oversight. If the Executive disagrees and does not submit the conflict case to the Constitutional Court, the legislature shall not exercise its Constitutional power to check the legitimacy of the executive's exercise of political power. In brief, although the treaty-making process has been amended, difficult conditions on this matter remain in Thailand.

IV. CONCLUSION AND SUGGESTION

Despite several reforms of the Constitution, the treaty-making crisis and its related problems has remain, especially the problem of unconformity to concepts indicating that the treaty making power belongs to the Executive while exercise of

⁷⁴ ร่างรัฐธรรมนูญแห่งราชอาณาจักรไทย ฉบับที่ ๒ [2nd Drafting the Constitution of The Kingdom of Thailand B.E. 2559 (2016)] § 178 cl 2.

executive power must depend on the Legislature's role under the concept of "checks and balances". There has been a problem of how to maintain checks and balances in connection with treaty making. Likewise, all treaty categories should be determined clearly and there should be a thorough correcting or removing of modifying words such as "significantly" or "widely, which can bring about various and incorrect interpretations.

This analysis suggests five approaches to addressing this crisis: 1) amending the constitutional provisions to indicate clearly how many categories of treaty there are and what each category of treaty is without the use of modifying words that can lead to various interpretations; 2) enacting subordinating laws following the categories of treaty and treaty-making process, especially those involving concrete public participation; 3) amending the provisions of the Constitution under the title "Legal Assumptions" by removing the phrase "the treaty shall be approved" and inserting "the treaty shall not be approved" instead, in case the legislature cannot complete the consideration within sixty days since the current such provisions are contrary to the principle of checks and balances required by a parliamentary system; 4) amending the constitutional provision by stipulating that Parliament shall have the authority to submit to the Constitutional Court a dispute between

the legislative and the executive in relation to the exercise of treaty-making power, as provided by the principles of separation of powers and checks and balances; and 5) amending the provisions to determine clearly the jurisdictions of the Administrative Court and the Constitutional Court in cases of any dispute arising from treaty making to make them more similar to the Constitution of the Republic of France by stipulating that the Constitutional Court shall have the jurisdiction to adjudicate and try "the constitutionality" of "international commitments", which shall not be enforced on Thailand until the Constitutional treaty-making process is complete. Any such action should fall within "the Constitutional Court's" jurisdiction, which is of the core judicial organs exercising "constitutional power" to oversee any dispute arising from Constitutional Review of the Exercise Treaty Making Power between the Executive and the Legislature. Notwithstanding, any review of the "legality" of treaties which "come into force throughout the Kingdom" should be provided to fall within the Supreme Administrative Court's jurisdiction to determine whether the exercise of the Executive's power conforms to the principle of "the legality of treaties".

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REFERENCES

Journal Articles

Boramanant, Nantawat, ‘France Constitutional Court: Part 2’(20 December, 2004) Public Law Net 1 <http://www.pub-law.net/publaw/view.aspx?id=176#m15>

Clancy, Charles S, ‘An Organic Conception of the Treaty-Making Power vs. State Rights as Applicable to the United States’ (1908) 7 (1) *Michigan Law Review* 19 <http://www.jstor.org/stable/1274085>

French Ministry of Foreign Affairs, *The French Justice System* (June 2007) Embassy of France in Washington, D.C 1 http://ambafrance-us.org/IMG/pdf/Justice_ag.pdf

Helfer, Laurence R and Timothy Meyer, *Evolution of Codification: A Principal-Agent Theory of the International Law Commission’s Influence* (5 May 2015) Duke University, School of Law 1 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6134&context=faculty_scholarship>

Hershey, Amos S, ‘Treaty-Making Power with Special Reference to the United States’ (1926) 1 (5) *Indiana Law Journal* 261 <http://www.repository.law.indiana.edu/ilj/vol1/iss5/2>

International Legal Research Tutorial, U.S. *Treaties and Agreements-The Process*, (28 August 2014) Duke Law https://law.duke.edu/ilrt/treaties_3.htm

Leangboonlertchai, Pornson, ‘US Constitution and Limitation Power of the Federal Court’ (2553)1 (1) *ABAC Law Journal* 52.

Leangboonlertchai, Pornson, *Rule of Law Development: German and France* (19 March 2014) Public Law Net 1 <http://www.pub-law.net/publaw/view.aspx?id=1639>

Luchaire, Francois, ‘Participation of Parliament in the Elaboration and Application of Treaties-Europe’ (1991) 67 (2) *Chicago-Kent Law Review* 341 <http://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss2/4>

Neuman, Gerald L, ‘Brakes that Failed: Constitutional Restriction of International Agreements in France’ (2012) 45 *Cornell International Law Journal* 257

<http://scholarship.law.cornell.edu/cilj/vol45/iss2/1>

New Zealand Law Commission, *Treaty Making Process Reform and the Role of Parliament*, Report 45: Appendix A: France (December 1997) <<http://www.nzlii.org/nz/other/nzlc/report/R45/>>

Pakeerath, Vorajet, *Act of Government and the Supreme Administrative Court Order No. 547/2551(Preah Vihear Temple [Prasat Phra Wihan])* (5 October 2008) Public Law Net 1 <http://www.pub-law.net/publaw/view.aspx?id=1292>

Steinberger, Helmut, *Constitutional Subdivisions of States or Unions and their Capacity to Conclude Treaties Comments on Art. 5 Para. 2 of the ILC's 1966 Draft Articles on the Law of Treaties* (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 1967) 411 http://www.zaoerv.de/27_1967/27_1967_3_c_411_428.pdf

Stewart, Francois and Jones Source, 'Treaties and Treaty-Making' (1897) 12 (3) *Political Science Quarterly* 420 <http://www.jstor.org/stable/2139665>

United States Senate, 'Executive Agreement' *Treaties* (20 August

2013)

<http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm>

Uwanno, Borvornsak, *Legal Science Analyzing on the Central Administrative Court Order Related to Protection Measures for Temporary Relief in Joint Communiqué between the Thailand and Cambodia* (30 September 2015) King Prajadhipok's Institute 1 <http://kpi.ac.th/media/pdf/M10_71.pdf>

Vile's, M J C, *Constitutionalism and the Separation of Powers: Montesquieu* (Liberty Fund, 2nd ed, 1998) <http://oll.libertyfund.org/pages/montesquieu-and-the-separation-of-powers>

Wildhaber, Luzius, 'Parliamentary Participation in Treaty-Making, Report on Swiss Law-Europe' (1991) 67 *Chicago-Kent Law Review* 437.

Books

Aimayura, Jantajira et al, *Check and Balance Mechanism to Executive Branch Power on Free Trade Negotiation* (Thailand Research Fund, 2006)

Eakkabuttra, Prasit, *International Law Volume I: Treaty* (Winyuchon, 4th ed, 2008)

Eisemanm, Pierre M and Paphaële Rivier, 'France' in *Nation Treaty Law and Practice*, Duncan B Hollis et al (eds.) (Martinus Nijhoff Publishers, 2005)

Jumpa, Manit and Pornson Leangboonlertchai, *United States Constitution: The Explanations on the Principles and Case Law* (Winyuchon, 2009)

Kaczorowska, Alina, *Public International Law* (Routledge, 4th ed, 2010)

Lauterpacht, E and C J Greenwood (eds.), *International Law Reports: Volume 98* (Research Center for International Law, University of Cambridge, 1994)

Lenoir, Noelle, 'Constitutional Council and the European Convention of Human Right: The French Paradox' in *Judicial Review in International Perspective* (Kluwer Law International, 2000)

Stankiewicz, W J, *Aspects of Political Theory: Classical Concepts in an Age of Relativism* (Cassell and Collier Macmillan, 1976)

The Congressional Research Service (CRS), Library of Congress, United States of Congress, *Treaties and Other International Agreements: The Role of the United States Senate* (United

States Government Printing Office, 2001)

United Nations, *Treaty Handbook* (United Nations Publication, 2012)

United States of Congress, *Treaties and Other International Agreements: The Role of the United States Senate* (United States Government Printing Office, 2001)

Reports

Georgopoulos, Theodore, *Checks and Balances Doctrine in Member States as A Rule of EC Law: The Cases of France and Germany* in EUSA 8th International Conference, 27-29 March 2003, Nashville Tennessee http://aei.pitt.edu/6493/1/001523_1.PDF

Office of the Representative of Thailand, *Meeting Report of Drafting Constitution of the Kingdom of Thailand Committee No. 33/2550* (24 June 2007) http://library2.parliament.go.th/give_intake/content_meeting/062550.html

Sukanjanajtee, Benjamin, *Promoting ASEAN Economic Community through Greater Participation and Transparency in Treaty Making Procedures: Thailand's Internal Process and ASEAN Rules of Procedure*, Embracing the New Role of ALA after the ASEAN Charter,

11th General Assembly 2012, 14-19 February 2012, ASEAN Law Association

<http://www.aseanlawassociation.org/11GAdocs/workshop4-thai.pdf>

United Nations, *United Nations Conference on the Law of Treaties*, First session Vienna, 26 March – 24 May 1968, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole (United Nations, 1969) <http://legal.un.org/diplomaticconferences/lawoftreaties-1969/vol/english/1st_sess.pdf>

Cases

Convention of Biological Diversity (CBD) Case [The Constitutional Court of Thailand] No.33/2543, 5 October 2000 reported in [2001] 118, (68A) *The Royal Gazette of Thailand* 71

International Monetary Fund (IMF) Case [The Constitutional Court of Thailand] No.11/2542, 25 May 1999 reported in [1999] 116 (63A) *The Royal Gazette of Thailand* 1

Japan-Thailand Economic Partnership Agreement (JTEPA) Case [The Supreme Administrative Court of Thailand] No. 178/2550, 30 March 2007 reported in The Administrative Court of Thailand 1 <http://www.admincourt.go.th/admincourt/upload/admCase/Document/judgement/PDF/2550/01013-500193-2F-500330-0000042684.pdf>

Joint Communiqué on Preah Vihear Case [The Constitutional Court of Thailand] No. 6-7/2551, 8 July 2008 reported in [2008] 125 (108A) *The Royal Gazette of Thailand* 1

Joint Communiqué on Preah Vihear Case [The Supreme Administrative Court of Thailand] No. 547/2551, 8 September 2008 reported in The Administrative Court of Thailand 1 <<http://www.admincourt.go.th/admincourt/upload/admCase/Document/judgement/PDF/2551/01013-510530-2F-510908-0000055648.pdf>>

