MEMORANDUM

1. The treaty power of the United States extends to all proper subjects of negotiation between the government of the United States and the governments of other nations.

Hackworth, Digest of International Law, Vol. 5, says at p. 8:

"* * * In its international relations, the United States is as competent as other nations to enter into such negotiations, and to become a party to such conventions, without any disadvantage due to limitation of its sovereign power, unless that limitation is necessarily found to be imposed by its own Constitution.

"* * * the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens * * *; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign."

2. The treaty power is unlimited except by constitutional restraint against the action of the government or of its departments.

"It is uniformly conceded (although, by reason of the fact that no treaty has ever been held to conflict with the Federal Constitution, the authorities consist only of dicta) that a treaty cannot be considered as the law of the land within the meaning of the Federal Constitution, and as such binding on the courts, if in making it the limits of the treaty-making power have been exceeded. * * *

"It accordingly becomes appropriate to review in this connection what the courts have said and held as to the extent of the treaty-making power. * * * The chief subject of controversy has been as to whether the reserved rights of the states constitute a limitation upon the treaty power. The courts while in theory recognizing the supremacy of state law in its proper sphere, have in some instances given effect to treaty stipulations which have come perilously near to invading the provisions of local law.

On the other hand, the view has been advanced by commentators on the constitution, that the reserved rights of the states constitute no limitation upon and have no effect upon the power in the federal government to make treaties, because the treaty power in its scope, being unlimited, applies to every subject of agreement between nations, among which are necessarily included rights derived from the states, and, therefore, that in respect of the treaty-making power there are no reserved rights of the states because they were included in the grant of the treaty power."
4 ALR 1388.

Justice Field in Geofroy v. Riggs (1890) 133 U.S. 258.

"The Treaty power as expressed in the Constitution is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and from that of the state. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of any of the states, or a cession of any portion of the territory of the latter without its consent. * * * But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

Treaties involving the following subject matters have been held within the treaty-making powers:

a. Immigration. Baker v. Portland (1879) 5 Sawy. 566. Fed.Cas. No. 777

b. Admission of Aliens to Citizenship, United States v. Reid (1934) 73 F(2) 153. (Cert.den. 299 U.S. 544)

c. Subjects of other contracting powers shall not be subject to higher taxes than those imposed on citizens of the United States, Nielsen v. Johnson, infra

d. Transfer, devise or inheritance of property, Lonza v. United States (1938; D.C.) 22 F.Supp. 716.

e. Removal of disability of Aliens to inherit, Techt v. Hughes, (1920) 229 N.Y. 222, 128 N.E. 185, 11 ALR 166 (Cert.den. 254 U.S.643).

f. Acquisition of territory, Wilson v. Shaw (1906) 204 U.S. 24.

g. Issuance of Patents to Public Lands, United States v. Reese (1879) 5 Dill 405, Fed. Cas. No. 16, 137.

h. Limiting the jurisdiction of courts, The Ester (1911) 190 Fed.216.

i. Submission of claim of United States citizen to arbitration, The Marie (Dominick Dupee, Libellant) (1892) 49 Fed. 286.

j. Protection of migratory birds, United States v. Rockefeller (1919, D.C.) 260 Fed. 346.

k. Extradition, Valentine v. United States (1936) 299 U.S. 5, 81L Ed 5, 57 S Ct. 100.

l. Patents, General Electric Co. v. Robertson 32 F(2) 495.

m. Parcel Post Conventions, United States v. Eighteen Packages of Dental Instruments (1915) 222 Fed. 121.

3. A treaty, like Congressional enactments, is the supreme law of the land and supersedes conflicting state law and previously enacted Federal law.

Article 6, Clause 2 of the Federal Constitution, which provides that "all treaties made under the authority of the United States shall be the supreme law of the land", has the effect of incorporating into the municipal law of the United States, and of each and every state, treaties entered into by the federal government. Where there is a conflict between a treaty and the provisions of a state statute, whether enacted prior or subsequently to the making of the treaty, the treaty will control. (see annotations in 4 ALR 1377 and 134 ALR 882 and cases there cited). The same principle is followed in the cases of international agreements other than treaties.

> "Governmental power over internal affairs is distributed between the national government and the several states. Governmental powers over external affairs is not distributed but is vested exclusively in the national government. * * *
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> "Plainly, the external powers of the United States are to be exercised without regard to state laws or state policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. 'To counteract it by the supremacy of the state laws would bring on the Union the just charge of national perfidy and involve us in war'. 3 Elliott's Debates 515. and see Ware v. Hylton, 3 Dall 199, 236-237.

> And while this rule in respect to treaties is established by the express language of Cl 2, Art. VI of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. * * * In respect to all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. * * * Within the field of its powers, whatever the United States undertakes, it necessarily has warrant to consummate. And when judicial authority is involved in aid of such consummation, state institutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a Federal Constitutional power." United States v. Belmont, supra.

4. A treaty is not abrogated or modified by subsequent Congressional enactments unless such purpose on the part of Congress has been clearly expressed.

> "The Treaty, being later in date than the Act of 1922, superseded, so far as inconsistent with the terms of the Act, the authority which had been conferred by par. 581 upon Officers of the Coast Guard to board, search and seize beyond our territorial waters. Whitney v. Robertson, 124 U.S. 190, 194. For in a strict sense the treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions. * * *
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> "The Treaty was not abrogated by re-enacting par. 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." /underscoring supplied/ Cook v. United States, 288 U.S. 102, 118-120.

5. Although treaties as such must be ratified by two-thirds of the Senate, an executive agreement, modus vivendi, or compact need not be approved.

The President, as the official representative of the people, is the sole organ of communication between the United States and foreign governments; he may execute binding agreements with foreign powers without the necessity of his acts being ratified or confirmed by the Senate. Such agreements will be recognized and enforced by the courts.

On November 16, 1933 the President recognized the Union of Soviet Socialist Republics as the de jure as well as the de facto governments of Russia; and, as an incidence of that recognition took an assignment of certain claims known as the Litvinov Assignment. Mr. Justice Sutherland, speaking for the court in

United States v. Belmont, 301 U.S. 324, recognized the validity of that agreement in these words:

> "The executive had authority to speak as the sole organ of (the) government. The assignment and the agreements in connection therewith did not, as in the case of Treaties, as that term is used in the treaty-making clause of the Constitution, require the advice and consent of the Senate. *** "A treaty signifies 'a compact made between two or more independent nations with a view to the public welfare'. Altman and Company v. United States, 224 U.S. 583, 600. But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations. See 5 Moore Int. Law Digest, 210-211. The distinction was pointed out by this court in the Altman case supra, which arose under par.3 of the Tariff Act of 1897, authorizing the President to conclude commercial agreements with foreign countries in certain specified matters. We held that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a 'treaty' within the meaning of the Circuit Court of Appeals Act, the construction of which might be reviewed upon direct appeal to this court."

6. An executive agreement has the same face and effect as a treaty.

See the discussion of the court in United States v. Belmont, supra and particularly its statement:

> "and while this rule in respect to treaties is established by the express language of Cl 2, Art. VI of the Constitution, the same rule would result in the case of all international compacts and agreements * * *."

See also the discussion under point 9 herein.

7. The provisions of a treaty are either executory, in which case appropriate legislative action is required to effectuate them; or are self-executing and no further legislative action is necessary.

Article VI of the Constitution, by conferring on treaties when made status as "supreme law of the land" was probably adopted to secure compliance by the states with national treaty obligations. The provision, operates, however, to create for purposes of enforcement two categories of treaty stipulations: those which are "self-executing", ie, stipulations so intended and so phrased as to provide a rule which the courts (or administrative officials) can apply in appropriate cases "without the aid of any legislative provision;" and those

which are "now self-executing", ie: either stipulations of an executory character importing a contract to be performed by the legislature (or the executive where competent), or stipulations containing statements of fact or attitude requiring no action at all to be taken. Theoretically a self-executing and an executory provision should be readily distinguishable. In practice it is difficult. John Marshall found it so and the courts since then have often had similar experiences. 34 AIIJ 669.

/Art. VIII of the Treaty of 1819 with Spain held not self-executing in Foster v. Neilsen; after examination of Spanish Text held self-executing in United States v. Percheman, Marshall rendered both opinions/.

> "Whether or not * * * Article VI /of the Constitution/ making treaties the supreme law has any coercive force to compel legislative action to carry into effect treaties which are not self-executing is not directly dealt with in the decisions * * *. Citations on that point are not necessary, however, for it is clear that if this provision making treaties the supreme law of the land does not prevent Congress from repealing by later legislation treaties which are self-executing, there is no coercive effect beyond the moral obligation arising from national good faith and honor, and the obligation to make operative a treaty requiring legislative action to carry it into effect is no greater than the obligation to leave undisturbed a treaty already in force.
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> "A treaty, therefore, under this provision of Article VI, as construed by the Supreme Court, has the value of a law of the land, so far as the Judicial Branch of the Government is concerned, only with the consent of the Legislative Branch of the Government.
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> "It may be noted here that very few treaties are strictly self-executing.
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> "So far as penalties are concerned, treaties do not carry provisions for the punishment of treaty violations. It would be quite inappropriate for governments to stipulate what penalties should be imposed upon their respective nationals within their own jurisdiction for treaty violations. As above noted, the migratory birds treaty required Congressional legislation to give it effect, and the Treaty concerning United States and Canadian Fisheries expressly provided that Congressional legislation should be adopted establishing rules and regulations governing the use of those fisheries.
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> "It must also be noted that a number of limitations are imposed by the Constitution upon the making of treaties which operate to prevent their becoming self-executing without the concurrence of Congress. For example, the treaty-making power cannot override the

powers delegated elsewhere, nor deprive the other branches of the Government of the right to exercise the powers entrusted to them by the Constitution. As an illustration of these limitations, attention is called to two subjects which are confided to Congress exclusively by the Constitution. The views expressed in Congress and by the courts and by authoritative writers on the subject show a consensus of opinion that with respect, at least, to the appropriation of money and the regulation of tariff duties, treaty stipulations cannot be regarded as self-executing, and require legislative action to carry them into effect.

"The report [see AJIL 636] also raised the question, which at that time had not as yet been passed upon by the Supreme Court, whether the treaty-making power could effectively adopt international regulations dealing with economic questions, such, for example, as the universal improvement of labor conditions, or regulations in conflict with the police powers of the state. On this question the report finds that it would be necessary, in dealing with such questions, that the contemplated action should fall within the scope and purpose of the Constitution with respect both to the Nation and to the States, and also that it should be in accord with the underlying conditions inherent in the treaty-making power--namely, that it must be exercised to promote the general welfare of the American people and that the matters dealt with must directly concern the international interest or relations of the Nation. Accordingly--

"'If it appears that these requirements are fulfilled actually as a matter of fact, and not as a mere subterfuge for exercising the power, then in the light of the decisions of the Supreme Court above cited, sustaining the jurisdiction of the treaty-making power over some of the so-called reserved powers, it is difficult to assign any reasonable ground for denying it jurisdiction over the other so-called reserved powers in the cases suggested. It has already been argued that inasmuch as the reserved powers all stand on the same footing in their relation to the treaty-making power, and in view of the terms of the provision making such reservation of powers, the right to exercise jurisdiction over any of them implies the right to exercise jurisdiction over them all. The question of the police powers was left open as a possible exception, but no well-defined distinction can be drawn between the police powers and the other so-called reserved powers in relation to the treaty-making power, and no conclusive reason appears for making an exception of them in this connection.'

"In conclusion, the report found that--

"'In the light of these opinions it cannot well be denied that the treaty-making power is a national rather than a federal power, and this distinction measures the whole difference between its jurisdiction and the jurisdiction of Congress in relation of the so-called reserved powers.'" 29 AJIL 474-476.

"International law is superior in authority to national constitutional law, and the latter may not validly contravene the former; the treaty-making power is possessed by the national state by virtue of international, not national law, where it is a priori plenary as to the subjects with which it may deal or the forms of action for which it may provide; while international law to some degree permits the national state to adopt its own procedure for conclusion of treaties, including approval by representative bodies, it would not permit adoption of procedures seriously impairing the exercise of that power; where conclusion of a treaty is mandatory upon a state under international law, the latter may not by national constitutional law escape that obligation; where it is permissive, the state may refuse to conclude a treaty in an instant case, but may not by national law reduce its own power, under international law, or that of its treaty-making agency, the repository of this international law power, to conclude such a treaty in the future, for this would be to attempt to impose national legal restrictions upon international legal powers; the actual provisions of the Constitution of the United States do not pretend explicitly to remove any subjects or types of action from the purview of the treaty-making power, and none of the provisions of the Constitution are valid, for the reason given in the preceding clause, to restrict by implication the treaty-making agency from concluding an international agreement on any subject, or providing any type of action relating thereto, which it may politically see fit, including, as a maximum, submission of the United States to an international sovereignty, and all lesser degrees of restrictive action. It is certainly not to be inferred that such a conclusion has been reached already by the United States Government; the protests of 'lack of power' made in certain cases by delegates of the United States may be regarded as having been quite sincere. It is also hardly to be expected that such a conclusion will be acceptable to the fanatically nationalistic confraternity of constitutional lawyers or to extreme nationalists generally, but it is submitted that it is both theoretically sound and socially valuable from either an international or a national point of view." 34 AJIL 473-474.
See also "Constitutional Limitations on the Treaty-making Power" 35 AJIL 462.

"Occasionally * * * the nature of a treaty may be such that legislative action is required before it can become effective. * * * Generally, unless a treaty contains an express stipulation for legislative action, or belongs to that exceptional category of treaties which cannot from their nature be given effect as law ex proprio vigore, it would appear that the question is simply one of construction. If the treaty was intended to be self-executing, it has immediately the effect of law. If not, it requires legislation before it can become a rule for the courts." 20 AJIL 444, 448, 449.

"An examination of the decisions of the Supreme Court on this topic will show there is no practical distinction whatever as between a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted with certain powers with reference thereto. The same may be said with regard to a treaty. Both statutes and treaties become presently effective when their purposes are expressed as presently effective * ** ". United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. 155 Fed. 842, 845.

"There is, however, authority for the view that a promissory or executory provision of a treaty may be rendered effective by implied approval or recognition of such provision by Act of Congress and that legislation specifically approving or rendering operative such provisions is not absolutely necessary. While the view has been taken that the mere use of words of futurity in a treaty does not necessarily indicate an executory, as distinguished from a self-executing, contract or provision, the fact that words of futurity are used has been considered in connection with other words or phrases in determining that a particular treaty is not self-executing." 63 CJ 841 "Treaties" par. 22.

8. Exact criteria have not been established by the courts to determine in a given case whether the provisions of a treaty are executory or self-executing.

An excellent discussion of this problem may be found in an article by Chandler P. Anderson on "The extent and limitations of the treaty-making power under the Constitution." 1 AJIL 636-670. He states at page 653:

"There is still some divergence of opinion as to whether or not other matters on which, under the Constitution, Congress is empowered to legislate can be effectively dealt with by treaties without legislative action to carry them into execution, and in the absence of a decision on the question by the Supreme Court it must be regarded as still unsettled.

"It is possible, however, to distinguish between those matters which are confided to Congress exclusively, such as the appropriation of money and the raising of revenue, all bills for which latter purpose must originate in the House, which powers being exclusively in the jurisdiction of Congress are, therefore, presumably excluded from the independent jurisdiction of the treaty-making power, and those matters which are within the enumerated or implied powers of Congress, but are not entrusted exclusively to Congress, and with respect to which the treaty-making power may be regarded as having coordinate jurisdiction with Congress.

"Many treaty stipulations dealing with some of the matters generally entrusted to Congress have been put in force under the Constitution without legislative action, and their validity has never been questioned so that the exercise of such powers by treaty has, to some extent at least, the sanction of custom, although, on the other hand, it has frequently been the practice in similar cases for Congress to enact appropriate legislation for carrying out such treaty stipulations. * * *

"But whether or not the rule will ultimately be extended, it would seem to be already established beyond question that treaty stipulations, however complete they may be in themselves, cannot be self-executing so as to become the supreme law of the land, as defined by the decisions of the Supreme Court, where they deal with those powers which are delegated by the Constitution exclusively to Congress. In such cases the treaty is incomplete without congressional action, and its ratification should be understood to be conditioned upon the sanction of an act of Congress. In this connection, however, it must be remembered that treaty provisions which are merely declaratory of the law of nations, do not require legislative action to make them effective, inasmuch as the law of nations is recognized under the decisions of the Supreme Court as part of the law of the land, except in so far as constitutional or legislative provisions are in conflict therewith. * * * "

9. The courts apparently have considered in determining if the provisions of a treaty were executory or self-executing, whether such provisions:

(a) by their terms indicate that future action, either legislative or administrative, is necessary;

(b) are recognized by the countries signatory thereto as requiring future legislative action;

(c) require appropriations;

(d) involve powers expressly delegated by the Constitution to the Congress;

(e) contain provisions in the nature of future contractual obligations.

Whether a provision of a treaty is self-executing or requires legislation on the part of Congress to effect its execution depends upon the nature of the provision. If it is contractual in nature, i.e. if it imposes an obligation on either of the contracting parties to perform an act in the future, it is not self-executing but must be executed by Congress. If, on the other hand, the provision does not require the performance of an act in the future, but purports to operate by its own force on the subject matter thereof, no further action by Congress is required for its execution.

The earliest expression of this doctrine by the Supreme Court appears to have been made in Foster v. Neilson. (U.S. 1829) 2 Pet. 253. The controversy was over the title to certain land, which one of the parties claimed under a grant of the Spanish Government. A subsequent treaty between the United States and Spain had stipulated "that all the grants of land made before the 24th of January 1818, by his Catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic majesty." (Underscoring supplied). The court held that this stipulation in the treaty did not ex proprio vigore validate the grant from the Spanish government, but that since the language used seemed to contemplate future action on the part of the United States to carry out the stipulated ratification and confirmation,

no ratification had taken place in the absence of a law of Congress. The court said, at page 314:

> "The article under consideration does not declare that all the grants made by his Catholic majesty, before the 24th of January 1818, shall be valid, to the same extent as if the ceded territories had remained under his dominion. It does not say, that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but its language is, that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard existing laws on the subject."

The limitations on the doctrine of Foster v. Neilson are clearly shown in United States v. Percheman, (U.S. 1833) 7 Pet. 51. There the same treaty was under consideration. The court, however, had before it a translation of the Spanish version of the treaty. 1/ This had not been before the court in Foster v. Neilson. The treaty, as written in Spanish and translated, provided that the grants of his Catholic majesty "shall remain ratified and confirmed to the persons in possession of them, to the same extent &c." The court decided that its former interpretation of the treaty had been wrong because the treaty as written in Spanish purported to presently ratify the grants of the Spanish government without future action on the part of the United States. Since the language of the English version of the treaty was susceptible to an interpretation harmonizing it with the Spanish version, it was thought that the two should be construed to mean the same thing. The court said, at page 87, with respect to the treaty as written in English:

> "Although the words 'shall be ratified and confirmed', are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they 'shall be ratified and confirmed' by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper if not unavoidable."

1/ The treaty had been drawn up in both the Spanish and English languages.

The difference between a provision of a treaty contemplating future action on the part of either of the contracting parties and a provision purporting to be presently operative by its own force is set forth in the following much quoted language from Foster v. Neilson, supra (page 314):

> "A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

Illustrations of instances where it has been held under the doctrine of Foster v. Neilson, supra, that a provision of a treaty was not self-executing because it consisted of a covenant to do an act in the future are set forth below.

A convention entered into between the United States, Switzerland and other countries with respect to patents, trademarks, etc. had provided that the subjects or citizens of each state "shall enjoy ... in all the other states . . . the advantages that the respective laws thereof at present accord, or shall afterwards accord, to subjects or citizens." The Attorney General stated the opinion that this provision was merely a covenant to grant certain rights to foreign subjects and citizens in the future, and was therefore not self-executing, but required legislation to render it effective for the modification of an existing law providing that citizens and certain resident aliens might file caveats in the Patent Office. (1889) 19 Op. Atty. Gen. 273. See also Rousseau v. Brown, (1903) 21 App. D.C. 73.

A similar question was presented in Robertson v. General Electric Co., (C.C.A., 4th 1929) 32 F(2d) 495, cert. den. (1929) 280 U.S. 571. It was contended that the Treaty of Berlin, entered into by the United States and Germany in 1921, adopted by reference a provision of the Treaty of Versailles which provided that certain rights of priority for the filing or registration of certain applications for patents, trademarks, etc., "shall be extended by each of the high contracting parties in favour of all nationals

of the other high contracting parties for a period of six months after the coming into force of the present treaty". One question before the court was whether the extension of time provided for by this section of the Treaty of Versailles was self-effectuating or whether it required supporting legislation in order to operate with the force of law. The court held that the stipulation in the treaty was not self-executing, basing its decision partly on the authority of Foster v. Neilson, supra. The court said, at page 500:

> "The language . . . is that 'the rights of priority shall be extended by each of the high contracting parties,' etc. This not only uses language of futurity, 'shall be extended', as to a matter operating as to each nation infra-territorially, and not between nations, but it also provides that the extension shall be made, not by the instrument itself, but 'by each of the high contracting parties'. In other words, to use the language of Chief Justice Marshall, each of the parties 'engages to perform a particular act,' and therefore 'the treaty addresses itself to the political, not judicial, department, and the Legislature must execute the contract before it can become a rule for the court'." (Italics supplied by the court).

In construing the same provision of the Treaty of Versailles the Court of Appeals of the District of Columbia, also held it to be non self-executing. In re Stoffregen (App. D.C. 1925) 6 F(2d) 943, cert. den. (1925) 269 U.S. 569.

It is somewhat difficult to distinguish Foster v. Neilson, supra, and other cases following the doctrine of that case, from certain cases in which it was held that the treaty in question was sufficient in itself to effectuate its purposes without legislation.

In Danise v. Hall, (1875) 91 U.S. 13, a treaty between the United States and the Ottoman Porte had provided in part that "all rights, privileges, or immunities which the Sublime Porte now grants or may hereafter grant to, or suffer to be enjoyed by, the subjects . . . of any foreign power, shall be equally granted to and enjoyed by the citizens . . . of the United States of America." No act of Congress had been passed to carry the treaty into effect. It was contended that the treaty was therefore not self-executing. The court held that it was, although the use of the word "shall" would seem to import a contract under the reasoning of Foster v. Neilson, supra, and Robertson v. General Electric Co., supra. The case is perhaps distinguishable, however, on the ground that the rights, privileges and immunities which the treaty provided "shall be granted" were to be granted by the Sublime Porte, and not by the United States, and that therefore no Act of

Congress could have executed the treaty in this respect.

In Cook v. United States, (1933) 288 U.S. 102 it had been provided by statute that officers of the Coast Guard might in some circumstances board, search and seize vessels within four leagues (twelve miles) of our coast. A subsequent treaty with Great Britain provided for seizure of British vessels in certain cases with a proviso that "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States . . . than can be traversed in one hour by the vessel suspected . . ." A British vessel was seized beyond the one hour limit but within the four league limit. No statute had been passed to implement the treaty, and the preexisting statute had been reenacted, after the making of the treaty, in its original terms. The court held that the seizure was illegal because the treaty was self-executing and no legislation was necessary. This case is probably distinguishable from Foster v. Neilson, supra, on the ground that under the provision of the treaty in question the United States did not bind itself to do any affirmative act as in Foster v. Neilson, nor to grant any privilege as in Robertson v. General Electric Co., supra.

In Asakura v. Seattle, (1924) 265 U.S. 332, it had been provided by a treaty between the United States and Japan that "The citizens or subjects of each of the High Contracting Parties shall have liberty . . . in the territories of the other to carry on trade . . . upon the same terms as native citizens or subjects . . ." An ordinance of the City of Seattle was so phrased as to in effect prohibit Japanese subjects from carrying on the business of pawnbroker, although it permitted citizens of the United States to carry on that business. The court held the ordinance void because in violation of the treaty. The court said that the treaty "operates of itself without aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." The court did not explain why the treaty operated "of itself". Although it cited Foster v. Neilson, supra, it failed to point out the distinction between that case and the one before it.

Whenever the terms of a treaty clearly express the intention that it shall operate by its own force upon the subject matter of the treaty without further act of the parties thereto, it does not, of course, need legislation to execute it. Foster v. Neilson, supra. A clear example of such a treaty is the Spanish language version of the treaty involved in United States v. Percheman, supra, which has already been discussed. Another example is found in American Express Co. v. United States, (1913) 4 Ct. Cust. App. 146. There a treaty with Austria-Hungary provided that "if either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party". The court held that this provision was clearly self-executing, because "if legislation were required before it could be given effect, it would be a contradiction to say that the privilege immediately becomes common to the parties to the treaty".

There is one class of cases where it appears that no legislation is necessary for the execution of a treaty even though the terms of the treaty contemplate that it will be executed by future acts by the parties thereto. The reason for the holdings in these cases is that, although the treaty does not purport to operate of its own force, action by the executive rather than the legislative department of the government is required to execute it.

In Ex Parte Toscano, (S.D. Calif. 1913) 208 F. 938, a construction of a provision of the Hague Convention was required. This provision read:

> "A neutral power which receives on its territory troops belonging to the belligerent shall intern them, as far as possible, at a distance from the theater of war."

Interned soldiers of an army engaged in civil war in Mexico had sought refuge by crossing the border into the United States. They were disarmed and interned by the armed forces of the United States acting under the authority of the President. They sought release by habeas corpus proceedings on the ground that they were unlawfully interned. The petitioners argued that the Hague Treaty was not self-executing and that no legislation had been passed to execute it. The court denied their contention on the ground that the duty of internment was imposed, in the absence of legislation, upon the President.

A similar case was Pettibone v. Cook County, Minnesota, (C.C.A., 8th, 1941) 120 F(2d) 850. A treaty between the United States and Canada provided that Joint Commissioners should be appointed for the purpose of establishing a disputed boundary line between the United States and Canada, and that the boundary line so established "shall be taken and deemed to be the international boundary line." This treaty was obviously not executed by its own terms, since it required the performance of acts by the parties to the treaty through their appointed agents. Foster v. Neilson, supra. The court held, however, that the treaty was executed either when the Commissioners, after establishing the boundary, filed their plat in the Office of the Secretary of State or when they filed their report with him. The treaty was thus executed by executive rather than legislative action.

It has been argued at various times that a treaty must conform to a standard in addition to the one imposed by the doctrine of Foster v. Neilson, supra, in order to be self-executing. This argument is to the effect that where a treaty deals with subjects delegated to the exclusive control of Congress by the Constitution, the consent of both Houses is necessary to its execution. The history of this argument is discussed in 2 Story, Constitution (5th Ed. 1891) sec. 1841. It is there pointed out that in the early years of the Government it was argued by members of the House of Representatives that either the treaty-making power must be limited in its operation, so as not to touch objects committed by the Constitution

to Congress, or the assent and cooperation of the House must be required to give validity to any treaty so far as it might comprehend these objects. It was said that since Congress was invested with the exclusive power to regulate commerce, appropriate money, etc. that treaties dealing with these subjects had to be executed by Congressional action. The House accordingly adopted a resolution declaring that when a treaty stipulates regulations on any subjects submitted to the power of Congress by the Constitution, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress, and that it is the Constitutional right and duty of the House, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon, as in their judgment may be most conducive to the public good. Story pointed out that the President and the Senate disagreed with the view of the House. The merits of the opposing contentions appear to have been an open question in Story's time as he did not cite any case substantiating either view.

The views of the House have been adopted by a modern textwriter who states that:

> ". . . it would seem to be already established beyond question that treaty stipulations, however complete they may be in themselves, cannot be self-executing so as to become the supreme law of the land, as defined by the decisions of the Supreme Court, where they deal with those powers which are delegated by the Constitution exclusively to Congress." (Italics Anderson's). 2/

The view expressed by Anderson has been expressed in certain dicta and opinions, but the authorities for it seem to be meagre. The most frequent expressions of this view have been to the effect that since Congress has the exclusive power to appropriate money from the Treasury, a treaty provision requiring the payment of money on the part of the United States can be executed only by an appropriation act of Congress. Turner v. American Baptist Missionary Union, (1852) Fed. Cas. No. 14,251; In re Sheazle, (1845) Fed. Cas. No. 12,734; (1854) 6 Op. Atty. Gen. 291. It has also been held that since Congress alone has power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" under Article 1, § 8 of the Constitution, a treaty dealing with patent rights is dependent for its execution upon congressional action. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co. (D. Mass. 1906) 148 F. 31, aff'd (1907) 155 F. 842. A contrary view was expressed in Robertson v. General Electric Co., supra, where the court said "the better view is that a treaty affecting patent rights may be so drawn as to be self-executing."

2/ Anderson, The Extent and Limitations of the Treaty-Making Power Under the Constitution, (1907) 1 A.J.I.L. 636, 654-655.

The question of whether a treaty dealing with subjects which have been committed exclusively to Congress by the Constitution can be self-executing, if so phrased that it would be self-executing if dealing with subjects not committed exclusively to Congress, does not appear to have ever been decided by the Supreme Court, and for the most part has been confined to date within the limits of philosophical discussion. It is well known, however, that many treaties do deal with subjects committed by the Constitution to Congress; although these treaties have been before the Supreme Court, the fact that they dealt with subjects properly within the demesne of Congress does not appear to have been considered as having any bearing upon the question of whether they were self-executing. See Whitney v. Robertson, (1888) 124 U.S. 190; Bartram v. Robertson, (1887) 122 U.S. 116; Cook v. United States, supra.

It appears that whatever rules govern the question of whether a treaty is self-executing should be applied in determining whether an executive agreement is self-executing. United States v. Pink, (1942) 315 U.S. 203; Z & F Assets Realization Corporation v. Hull, (App. D.C. 1940) 114 F(2d) 464, aff'd. (1941) 311 U.S. 470. Although the case of Foster v. Neilson, supra, where it was held that the treaty was not self-executing, is not easily distinguished from some later cases where it was held the treaty before the court was self-executing, it is believed that any joint resolution which is to be the basis for an executive agreement between the United States and other nations should be so drafted as not to come into conflict with the rule of the former case. Consequently any provision of such agreement which is so expressed as to impose upon the United States an obligation to perform an act or acts in the future, should rest on a foundation of Congressional authority contained in the joint resolution. Cases may be found which intimate that such a foundation is unnecessary, but the weight of authority as expressed in Foster v. Neilson and later cases following the doctrine of that case would appear to make such a foundation advisable. Whether the joint resolution should lay a foundation for provisions of the executive agreement which seem to deal with subjects committed by the Constitution to Congress is more debatable, in view of the lack of authority for the proposition that a treaty dealing with such subjects requires Congressional approval before it can be executed. It is at least safe to say, however, that any provisions of an executive agreement providing for the payment of money by the United States must have Congressional sanction in the form of an appropriation act.

It does not appear to have been decided whether a treaty or executive agreement which is of the class which can only be executed by a law of Congress, can be so executed by an Act or Joint Resolution passed before the formation of the treaty or executive agreement. When the question of whether a treaty is self-executing has been before the courts the question has been

whether subsequent legislation was necessary to execute it. An opinion written by Attorney General Miller seems to indicate that legislation passed before the treaty becomes effective would suffice to execute it, if it is of the class which needs execution by legislation. (1889) 19 Op. Atty. Gen. 273. The Attorney General there stated:

> "If the treaty-making power, in all treaties whose execution require the exercise of powers committed to Congress, should uniformly provide in the treaties for their proper submission to Congress before they should be effective, consequences might be avoided which may jeopardize the credit of the nation."

10. The property of a foreign sovereign is exempt from taxation.

"Cases which in matters of taxation distinguish between property owned by a state or municipality in its private capacity, and that owned for strictly governmental purposes, are not in point. The distinction which they make has its origin in the peculiar and distinctive features of our form of government, and we are not disposed to make our views of government the yardstick by which to measure the character of a foreign sovereignty. If that sovereignty deems it a proper governmental function to engage in trade for the purpose of maintaining its government, we shall not question its decision that the property so employed is owned in a public and not a private capacity. * * *

"In construing the taxation provisions of our Constitution, we should be careful not to overlook the nature of a tax. It is an enforced contribution of money or other property assessed in accordance with some reasonable rule of approtionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses, 26 R.C.L. p. 13. In other words, a tax operates in invitum, and is in no way dependent upon the will or contract, expressed or implied, of the persons taxed. * * * Indeed, the compulsory listing of property, the penalties provided for a failure to list, and the authority given the assessing officers to list in case of the taxpayer's failure, together with the various provisions for enforcing the collection of the tax, all show a purpost to tax the property of only those persons and corporations who may be required to pay either by suit or a proceeding in rem.

" * * * taxes are imposed on the theory that the taxpayer should pay a portion of the expense incurred in the protection of his property, and as applied to ordinary persons and corporations this principle seems eminently fair and just; but as applied to independent nations it is clearly opposed to the spirit of international amity, which should prompt every nation to guard and protect the personal property of all other nations that happens to be temporarily within its jurisdiction, without levying a tribute for that purpose.

"Another consideration not to be overlooked is that the absolute sovereignty of every nation within its own territory does not always extend to foreign nations, but is subject to certain limitations sanctioned by the law of nations and imposed by its own consent. As said by Mr. Chief Justice Marshall in the Schooner Exchange v. McFaddon et al, 7 Cranch,116,3.L.ed 287;

'A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without notice exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.'

"Hence, if one nation enters the territory of another with its consent, for the purpose of mutual intercourse, it does so with the implied understanding that it does not intend to degrade its dignity by placing itself or its sovereign rights within the jurisdiction of the other, and we know of nothing more calculated to degrade the dignity of an independent nation than for another to attempt to exercise over it the sovereign right of taxation. * * *

" * * * We are constrained to hold that the framers of our Constitution did not intend to inaugurate a policy so opposed to international usage, so incompatible with the dignity of independent nations, and so likely to result in the loss of the good will of those whose friendship we have always prized." French Republic v. Board of Supervisors of Jefferson County, et al. 252 S.W. 124.

A State may not impose a tax upon the national government, or upon any agency of the national government devoted exclusively to carrying out the functions of the United States. See, Van Brocklin v. State of Tennessee, 117 U.S. 151; Clallum County v. United States, 263, U. S. 341.

"The states have no power, by taxation or otherwise to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Van Bracklin v. State of Tennessee, supra.

If the states are without authority to tax the property of the United States, or of foreign sovereigns, within their respective jurisdictions, it should follow that they are likewise precluded from taxing the property of an international agency or corporation whose membership is vested exclusively in the United States and several foreign governments, particularly if the property of such international organization is to be used by it to carry out its functions.