

no mechanisms for the public to monitor the development or implementation of international trade policy. To compound matters, trade decision-makers owe their allegiances to the trade regime and make no attempt to invite or incorporate other views. There are no avenues for public participation to ensure that other perspectives are taken into account. Thus, in the coming era of "government by trade agreements," domestic prerogatives will be foreclosed or made more costly by trade bureaucrats secretly negotiating agreements and adjudicating disputes thousands of miles away.

Patti Goldman, *Symposium: The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 633 (1994).

Assuming such criticism is valid, does the opaqueness of the process of negotiation of trade agreements provide any benefits to the political branches of government? Do these benefits justify fast track treatment? Is legislation enacted pursuant to fast-track authority constitutional? Can it be argued that the procedure circumvents Article II, Section 2's treaty power, and that that provision represents the sole constitutional means of making an international agreement? See *Made in the USA Foundation v. United States*, 56 F. Supp.2d 1226 (N.D. Ala. 1999) (holding that the Treaty Clause did not constitute the exclusive means of enacting international commercial agreements, given Congress's plenary powers to regulate foreign commerce and the President's inherent authority under Article II to manage the nation's affairs), *aff'd*, 242 F.2d 1300 (11th Cir. 2001) (affirming because whether NAFTA was a treaty requiring Senate ratification pursuant to the Treaty Clause was a nonjusticiable political question).

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**ROBERTSON v. GENERAL ELECTRIC CO.**

32 F.2d 495 (4th Cir. 1929)

PARKER, CIRCUIT JUDGE:

[The Paris Convention requires signatory states to recognize so-called "rights of priority," under which a patent applicant in one country is afforded twelve months in which to apply for a patent on the invention in another signatory country without the first patent acting to bar the grant of the patent in the second country. Both the United States and Germany had implemented such rights of priority in their national laws. Stoffregen, a German, filed a German patent application on October 11, 1915. Because of World War I, however, it was impossible for nationals of the combatants to file patent applications in enemy countries. Accordingly, Section 308 of the Treaty of Peace of Versailles provided that rights of priority available under international conventions shall be extended until "six months after the coming into force" of the Versailles Treaty. Before the Versailles Treaty came into force, the U.S. Congress enacted

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the Nolan Act of March 3, 1921, which specifically extended the time for filing patent applications for six months, until September 3, 1921. On November 2, 1921, the treaty of peace between the United States and Germany, known as the Treaty of Berlin, was ratified; and on November 11, 1921, it took effect upon the exchange of ratifications. Without specifically mentioning Section 308, the Treaty of Berlin stated that "the periods of time . . . of the Treaty of Versailles shall run, with respect to any act or election on the part of the United States, from the date of the coming into force of the present treaty." Stoffregen delayed filing an application for a patent with the U.S. Patent Office until May 10, 1922. It was rejected by the Patent Office Examiner on the ground that it had been filed more than twelve months after the filing of the foreign application, which decision was affirmed by the Court of Appeals for the District of Columbia. Appellees then filed a bill in the district court under R.S. 4915 (current 35 U.S.C. § 145) arguing that the Treaty of Berlin extended the effect of Section 308 for six months from the entry into force of the Treaty of Berlin. The district court agreed. The Fourth Circuit here reverses that decision.]

Th[is] bring[s] us to the second ground upon which we think that the prayer of complainants must be denied, viz.: That, even if the Treaty of Berlin is to be construed as incorporating Section 308 of the Versailles Treaty . . . complainants are not entitled to the patent applied for, because the section is not self-executing and no legislation has been enacted to carry it into effect. Assuming that a treaty provision affecting patents may be made self-executing, so that no supporting legislation is necessary under the Constitution to give rise to individual rights thereunder, we are satisfied that section 308 was not intended to be, and is not, such a self-executing provision.

The rule as to whether a treaty is self-executing or not is clearly stated by Chief Justice Marshall in *Foster & Elam v. Neilson*, 2 Pet. 253, 313 as follows:

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 infraterritorial, 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.* (Italics ours.)

The language of section 308 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 infraterritorially, 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 the judicial, department, and the Legislature must execute the contract before it can become a rule for the court."

It was the opinion of Attorney General Miller (19 Op. Attys. Gen. 273) that, as Congress alone was given by the Constitution the 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," treaty provisions relating to patent rights must be deemed dependent upon legislation in aid thereof. And this seems to have been the view also of Judge Lowell in *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.* (C.C.) 148 F. 31, and there is much to be said in its favor. Patent rights differ from many other rights which are the subject of treaties, in that they are created by and dependent upon statutes which only Congress has power to enact. Furthermore, the right under a patent is not one which extends across national boundaries, and is therefore necessarily a matter for regulation by treaty, but is one which must be enjoyed within the territory of the nation. We think, however, that the better view is that a treaty affecting patent rights may be so drawn as to be self-executing. See *United Shoe Machinery Co. v. Duplessis Shoe Mach. Co.* (C.C.A. 1st) 155 F. 842. [cit]. But the reasons which led to the doubt as to whether a treaty could be so drawn as to effect patent rights, without supporting legislation by Congress, are matters which must be considered in the interpretation of treaties affecting patents; and they require that such treaties be held not self-executing, unless their language compels a different interpretation.

Patent rights are valid, of course, only within the country granting the patent. They are created by statute, and complicated administrative machinery is provided for the application of the statutory provisions. Treaties are drafted ordinarily to accomplish certain general results, and in the nature of things cannot regulate details and ought not to interfere with the domestic machinery which the several countries have provided for the regulation of patents. For these reasons, unless a contrary intention is clearly indicated, they should be construed, not as of themselves making changes in the patent laws, but as contemplating that the various parties signatory will enact appropriate legislation and promulgate proper rules to effectuate the ends which they are designed to accomplish.

This rule of construction has been uniformly followed in this country, and treaties affecting patent rights have been held to be not self-effectuating, where the purpose that they should be carried out by supporting legislation was not by any means so clearly indicated as in the section of the treaty under consideration. Thus article II of the [Paris] Convention of March 20, 1883, provided:

The subjects or citizens of each of the contracting States shall enjoy, in all the other states of the Union, so far as concerns patents for inventions, trade or commercial marks, and the commercial name, the advantages that the respective laws thereof at present accord, or

shall afterwards accord to subjects or citizens. In consequence they shall have the same protection as these latter, and the same legal recourse against all infringements of their rights, under reserve of complying with the formalities and conditions imposed upon subjects or citizens by the domestic legislation of each state.

In the opinion of Attorney General Miller, referred to above, this article was held not to be self-executing, but to require the support of legislation before it became a rule for the courts to follow. While the constitutional question to which we have adverted was discussed, the opinion was finally based upon the proposition that the treaty was a contract operating in the future intraterritorially. The Attorney General said:

It is not necessary to the decision of the question submitted to me in the matter under consideration to determine whether all the provisions of treaties, whose execution requires the exercise of powers submitted to Congress, must be so submitted before they become law to the courts and executive departments, for the treaty under consideration is a reciprocal one; each party to it covenants to grant in the future to the subjects and citizens of the other parties certain special rights in consideration of the granting of like special rights to its subjects or citizens. It is a contract operative in the future infraterritorially. It is therefore not self-executing, but requires legislation to render it effective for the modification of existing laws.

In *Rousseau v. Brown*, 21 App.D.C. 73, a citizen of France based his claim upon the provisions of the Convention of March 20, 1883. In denying his claim, the court said:

The convention is in the nature of a contract between the parties thereto, and is not self-executing. It requires the action of Congress to give it full force and effect. *This is the construction that has been placed upon it by most of the parties to it, and they have adopted legislation giving effect to it. . . . But without regard to the action of other states, the uniform construction of that convention by the Patent Office officials, and by the courts of this country, has been that the convention is not self-executing, but requires the aid of an act of Congress. (Italics ours.) . . .*

The Convention of Brussels of December 14, 1900, changed the priority period for patents to twelve months and inserted in the prior convention a section known as article "4bis," as follows:

Patents applied for in the different contracting States by persons admitted to the benefit of the convention under the terms of articles 2 and 3 shall be independent of the patents obtained for the same invention in the other states adherents or nonadherents to the Union.

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There was some controversy in the lower courts as to whether this was a self-executing provision or not, but the Supreme Court, in *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, set these controversies at rest by showing that it was the sense of Congress that the treaty required legislation to become effective, that this was the understanding of other nations also, and that the act of 1903 was passed to carry it into effect. The court said:

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The act of 1903 was then enacted, and if there could be any doubt that it expressed the sense of Congress and those concerned with the treaty that it required legislation to become effective, such doubt would be entirely removed by the legislative action of other states. It appears from the report of the committee on patents of the Senate and of the House of Representatives on the proposed legislation that 13 countries had adopted legislation giving full force and effect to the provisions of the additional act either in the form of a general law or by specific amendment to other laws providing for carrying into force the provisions of the additional act as regards the extension of the 'delay and priority' to twelve months. Other countries were mentioned as being expected to do so. In explaining the object of the bill the member in charge of it in the House of Representatives said that it was to carry into effect the additional act of the convention held at Brussels in December, 1900. . . . If it [the treaty] be not self-executing, as it is certainly the sense of Congress that it was not and seems also to be the sense of some of the other contracting nations, and as the act of 1903 did not make effective article 4bis, the provisions of section 4887 apply to the Cameron patent and caused it to expire with the British patent for the same invention.

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In the light of these decisions, relating to treaties the language of which does not negative the idea of self-execution near so plainly as does that of section 308 of the Treaty of Versailles, it is clear that that section cannot reasonably be construed as self-executing. As no legislation has been passed in aid of it, except the Nolan Act, the time limit of which had expired before complainants filed their application, it follows that there is nothing upon which they can base the extension of priority rights for which they contend.

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