



German Law on the Acceptance of Treaty Reservations Made by Other Nations

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GERMAN LAW ON THE ACCEPTANCE OF TREATY RESERVATIONS MADE BY OTHER NATIONS

The parliament's participation in the making of treaties is based on article 59, paragraph 2, of the German Constitution.¹ The provision translates as follows:

- (2) Treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal statute, of the bodies competent in any specific case for such federal legislation. As regards administrative agreements, the provisions concerning the federal administration shall apply *mutatis mutandis*.²

On its face, this provision only requires parliamentary consent for the ratification of certain treaties; and, until now, this provision has been interpreted so as not to increase parliamentary participation beyond the exact wording.

The issue of parliamentary consent for treaty-altering reservations by other nations has not come before the courts since the creation of the 1949 Constitution nor has it been specifically discussed in the legal literature. Nevertheless, current legal thinking in Germany makes it unlikely that parliamentary consent would be required for the German Government's acceptance of another country's reservation to a treaty, even if this reservation would change Germany's obligation.

The existing judicial reasoning and doctrinal writings stress the prerogatives of the executive branch in conducting foreign affairs.³ According to the prevailing opinion, the legislature's role is limited to either granting or denying consent to the ratification of a treaty that has been placed before the legislative body by the executive branch. Parliament can only reject or accept the treaty in its entirety;⁴ and, once the treaty has been ratified and an implementing law has been enacted, it is up to the executive branch of government to deal with the application of the treaty and to shape the treaty relations with the other involved nations. According to the majority opinion, the executive branch even has the right to cancel a treaty without involving the legislature.

The Federal Constitutional Court has upheld this prevailing opinion on the foreign affairs powers of the executive branch in a line of cases in which it was argued that parliamentary

¹ Grundgesetz für die Republik Deutschland, May 23, 1949, *Bundesgesetzblatt* (BGBl., official law gazette of the Federal Republic of Germany) p. 1.

² Translation from *Basic Law of the Federal Republic of Germany* (Bonn, 1989).

³ Recent discussions of parliamentary participation in the treaty-making process are found in J. Frowein & M. Hahn, "The Participation of Parliament in the Treaty Process in the Federal Republic of Germany," 67 *Chicago-Kent Law Review* 361 (1991); and B. Ehrenzeller, *Legislative Gewalt und aussenpolitik* 190 (Basel, 1993).

⁴ Geschäftsordnung des Bundestages, repromulgated July 2, 1980, BGBl. I, p. 1237, as amended, § 82, para. 2.

involvement would be appropriate if the application of a treaty had unforeseen and significant consequences for the country. In one of the so-called Pershing II cases of 1984,⁵ the Court was asked to review the German Government's consent to the placement of nuclear missiles on German soil within the framework of NATO. The Court held that article 59, paragraph 2, of the Constitution must be interpreted restrictively so as not to enlarge the parliamentary powers in foreign affairs beyond those specifically granted by the Constitution. According to the Court, a more expansive interpretation would interfere with the distribution of powers as envisioned by the Constitution.

The dominant role of the executive branch in conducting foreign affairs is explained with pragmatic considerations, long-standing traditions of international law, and unwritten constitutional law. In light of these doctrines, it seems highly unlikely that parliamentary participation could be demanded for the acceptance of any treaty reservations. It is, moreover, noteworthy that this restriction of parliamentary powers is of limited practical importance. Even if the German Parliament had the right to be consulted on the acceptance of treaty reservations, this would usually not result in the actual exercise of parliamentary power. In the German parliamentary system of government, the Federal Chancellor and the Cabinet are elected by the majority party or coalition of majority parties in Parliament. This makes for a close tie between the executive branch and the parliamentary majority. This tendency is further strengthened by the strict party discipline that is exercised in the German legislature. As a result, the majority in Parliament usually votes in favor of proposals made by the executive branch.⁶

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⁵ Bundesverfassungsgericht decision, Dec. 18, 1984, translated in 1/II *Decisions of the Bundesverfassungsgericht* 511 (Karlsruhe, 1992), p. 19

⁶ A. Heidenheimer, *The Governments of Germany* 198 (New York, 1975).