

106TH CONGRESS }  
*2d Session* }

COMMITTEE PRINT

{ S. PRT.  
106-71 }

**TREATIES AND OTHER INTERNATIONAL  
AGREEMENTS: THE ROLE OF THE  
UNITED STATES SENATE**

---

A S T U D Y

PREPARED FOR THE

COMMITTEE ON FOREIGN RELATIONS  
UNITED STATES SENATE

BY THE

CONGRESSIONAL RESEARCH SERVICE  
LIBRARY OF CONGRESS



JANUARY 2001

**TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE**

106TH CONGRESS }  
*2d Session* }

COMMITTEE PRINT

{ S. PRT.  
106-71 }

**TREATIES AND OTHER INTERNATIONAL  
AGREEMENTS: THE ROLE OF THE  
UNITED STATES SENATE**

---

A S T U D Y

PREPARED FOR THE

**COMMITTEE ON FOREIGN RELATIONS  
UNITED STATES SENATE**

BY THE

**CONGRESSIONAL RESEARCH SERVICE  
LIBRARY OF CONGRESS**



JANUARY 2001

Printed for the use of the Committee on Foreign Relations

---

U.S. GOVERNMENT PRINTING OFFICE

66-922 CC

WASHINGTON : 2001

COMMITTEE ON FOREIGN RELATIONS

JESSE HELMS, North Carolina, *Chairman*

RICHARD G. LUGAR, Indiana

CHUCK HAGEL, Nebraska

GORDON SMITH, Oregon

ROD GRAMS, Minnesota

SAM BROWNBACK, Kansas

CRAIG THOMAS, Wyoming

JOHN ASHCROFT, Missouri

BILL FRIST, Tennessee

LINCOLN D. CHAFEE, Rhode Island

JOSEPH R. BIDEN, JR., Delaware

PAUL S. SARBANES, Maryland

CHRISTOPHER J. DODD, Connecticut

JOHN F. KERRY, Massachusetts

RUSSELL D. FEINGOLD, Wisconsin

PAUL WELLSTONE, Minnesota

BARBARA BOXER, California

ROBERT G. TORRICELLI, New Jersey

STEPHEN BIEGUN, *Staff Director*

EDWIN K. HALL, *Minority Staff Director*

RICHARD J. DOUGLAS, *Chief Counsel*

BRIAN MCKEON, *Minority Counsel*

## LETTER OF SUBMITTAL

---

CONGRESSIONAL RESEARCH SERVICE,  
THE LIBRARY OF CONGRESS,  
*Washington, DC, January 2, 2001.*

Hon. JESSE HELMS,  
*Chairman, Committee on Foreign Relations,  
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: In accordance with your request, we have revised and updated the study "Treaties and Other International Agreements: The Role of the United States Senate," last published in 1993. This new edition covers the subject matter through the 106th Congress.

This study summarizes the history of the treaty-making provisions of the Constitution and international and domestic law on treaties and other international agreements. It traces the process of making treaties from their negotiation to their entry into force, implementation, and termination. It examines differences between treaties and executive agreements as well as procedures for congressional oversight. The report was edited by Richard F. Grimmett, Specialist in National Defense. Individual chapters were prepared by policy specialists and attorneys of the Congressional Research Service identified at the beginning of each chapter.

The Congressional Research Service would like to thank Richard Douglas, Chief Counsel of the Committee, Edwin K. Hall, Minority Staff Director of the Committee, Brian P. McKeon, Minority Counsel of the Committee, and Robert Dove, Parliamentarian of the Senate, for their comments on Senate procedures for consideration of treaties. We would also like to thank Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, Department of State, and other staff members of the Treaty Office for their assistance with various factual questions regarding treaties and executive agreements.

Sincerely,

DANIEL P. MULHOLLAN,  
*Director.*



# CONTENTS

	Page
Letter of submittal .....	iii
Introductory note .....	xi
I. Overview of the treaty process .....	1
A. Background .....	2
The evolution of the Senate role .....	2
Treaties under international law .....	3
Treaties under U.S. law .....	4
Executive agreements under U.S. law .....	4
(1) Congressional-executive agreements .....	5
(2) Agreements pursuant to treaties .....	5
(3) Presidential or sole executive agreements .....	5
Steps in the U.S. process of making treaties and executive agree- ments .....	6
Negotiation and conclusion .....	6
Consideration by the Senate .....	7
Presidential action after Senate action .....	12
Implementation .....	12
Modification, extension, suspension, or termination .....	13
Congressional oversight .....	14
Trends in Senate action on treaties .....	14
B. Issues in treaties submitted for advice and consent .....	15
Request for consent without opportunity for advice .....	15
Multilateral treaties .....	16
Diminishing use of treaties for major political commitments .....	17
Unilateral executive branch action to reinterpret, modify, and termi- nate treaties .....	18
Difficulty in overseeing treaties .....	19
Minority power .....	19
The House role in treaties .....	19
Vienna Convention on the Law of Treaties .....	20
C. Issues in agreements not submitted to the Senate .....	21
Increasing use of executive agreements .....	22
Oversight of executive agreements—the Case-Zablocki Act .....	22
Learning of executive agreements .....	22
Determining authority for executive agreements .....	23
Non-binding international agreements .....	23
D. Deciding between treaties and executive agreements .....	24
Scope of the treaty power; proper subject matter for treaties .....	24
Scope of executive agreements; proper subject matter for executive agreements .....	25
Criteria for treaty form .....	26
II. Historical background and growth of international agreements .....	27
A. Historical background of constitutional provisions .....	27
The Constitutional Convention .....	28
Debate on adoption .....	29
B. Evolution into current practice .....	31
Washington's administrations .....	32
Presidencies from Adams to Polk .....	35
Indian treaties .....	36
Conflicts and cooperation .....	37
Executive agreements and multilateral agreements .....	38
Increasing proportion of executive and statutory agreements .....	40
Growth in multilateral agreements .....	42

	Page
III. International agreements and international law .....	43
A. The Vienna Convention on the Law of Treaties .....	43
International law status .....	43
Senate action on the convention .....	45
B. Treaty definition .....	49
C. Criteria for a binding international agreement .....	50
Intention of the parties to be bound under international law .....	50
Significance .....	51
Specificity .....	52
Form of the agreement .....	52
D. Limitations on binding international agreements and grounds for in- validation .....	53
Invalidation by fraud, corruption, coercion or error .....	53
Invalidation by conflict with a peremptory norm of general inter- national law ( <i>jus cogens</i> ) .....	54
Invalidation by violation of domestic law governing treaties .....	56
E. Non-binding agreements and functional equivalents .....	58
Unilateral commitments and declarations of intent .....	59
Joint communiqués and joint statements .....	60
Informal agreements .....	61
Status of non-binding agreements .....	62
IV. International agreements and U.S. law .....	65
A. Treaties .....	65
Scope of the treaty power .....	65
Treaties as law of the land .....	72
B. Executive agreements .....	76
Congressional-executive agreements .....	78
Agreements pursuant to treaties .....	86
Presidential or sole executive agreements .....	87
V. Negotiation and conclusion of international agreements .....	97
A. Negotiation .....	97
Logan Act .....	98
B. Initiative for an agreement; setting objectives .....	100
C. Advice and consent on appointments .....	103
Unconfirmed presidential agents .....	105
D. Consultations during the negotiations .....	106
Inclusion of Members of Congress on delegations .....	109
E. Conclusion or signing .....	111
F. Renegotiation of a treaty following Senate action .....	112
G. Interim between signing and entry into force; provisional application ..	113
VI. Senate consideration of treaties .....	117
A. Senate receipt and referral .....	118
Senate Rule XXX .....	118
Executive session—proceedings on treaties .....	119
Action on receipt of treaty from the president .....	119
B. Foreign Relations Committee consideration .....	122
C. Conditional approval .....	124
Types of conditions .....	124
Condition regarding treaty interpretation .....	128
Condition regarding supremacy of the Constitution .....	131
D. Resolution of ratification .....	136
E. Senate floor procedure .....	136
Executive session .....	136
Non-controversial treaties .....	137
Controversial treaties .....	138
Consideration of treaties under cloture .....	141
Final vote .....	142
Failure to receive two-thirds majority .....	143
F. Return or withdrawal .....	145
VII. Presidential options on treaties after Senate action .....	147
A. Ratification .....	147
Ratification of the treaty .....	147
Exchange or deposit of instruments of ratification (entry into force) ...	149
B. Resubmission of the treaty or submission of protocol .....	150
C. Inaction or refusal to ratify .....	152
Procedure when other nations attach new conditions .....	153
VIII. Dispute settlement, rules of interpretation, and obligation to implement	157
A. Dispute settlement .....	157



	Page
VIII. Dispute settlement, rules of interpretation, and obligation to implement—Continued	
A. Dispute settlement—Continued	
Conciliation .....	158
Arbitration .....	159
Judicial settlement .....	161
B. Rules of interpretation .....	163
C. Obligation to implement .....	166
IX. Amendment or modification, extension, suspension, and termination of treaties and other international agreements .....	171
A. Introduction .....	171
B. Amendment and modification .....	176
Treaties .....	176
Executive agreements .....	183
C. Extension .....	184
Treaties .....	184
Executive agreements .....	187
D. Suspension .....	187
Treaties .....	187
Executive agreements .....	192
E. Termination or withdrawal .....	192
Treaties .....	192
Terms of treaty; unanimous consent .....	192
Breach .....	193
Impossibility of performance .....	194
<i>Rebus sic stantibus</i> .....	194
<i>Jus cogens</i> .....	195
Severance of diplomatic relations .....	195
Hostilities .....	196
State succession .....	196
F. U.S. law and practice in terminating international agreements .....	198
General .....	198
Treaties .....	201
Executive action pursuant to prior authorization or direction by the Congress .....	202
Executive action pursuant to prior authorization or direction by the Senate .....	204
Executive action without prior specific authorization or direction, but with subsequent approval by the Congress .....	205
Executive action without specific prior authorization or direction, but with subsequent approval by the Senate .....	205
Executive action without specific prior authorization or direction, and without subsequent approval by either the Congress or the Senate .....	206
Executive agreements .....	208
X. Congressional oversight of international agreements .....	209
A. The Case Act .....	209
Origins .....	210
Provisions for publication .....	210
The Bricker amendment and its legacy .....	212
National commitments concerns .....	213
Military base agreements (Spain, Portugal, Bahrain) .....	215
Separation of Powers Subcommittee approach .....	216
Intent and content of the Case Act .....	217
Implementation, 1972–1976 .....	218
Amendments of the Case Act, 1977–1978 .....	222
Committee procedures under the Case Act .....	224
Senate Foreign Relations Committee procedures .....	224
House International Relations Committee procedures .....	225
Impact and assessment of the Case Act .....	225
Number of agreements transmitted .....	226
Late transmittal of Case Act agreements .....	228
Insufficient transmittal of agreements to Congress .....	230
Pre-Case Act executive agreements .....	232
B. Consultations on form of agreement .....	233
C. Congressional review or approval of agreements .....	235
D. Required reports to Congress .....	238
E. Other tools of congressional oversight .....	239

	Page
X. Congressional oversight of international agreements—Continued	
E. Other tools of congressional oversight—Continued	
Implementation legislation .....	240
Recommendations in legislation .....	240
Consultation requirements .....	242
Oversight hearings .....	243
XI. Trends in major categories of treaties .....	245
A. Political and security agreements .....	246
National security and defense commitments .....	247
Treaty on the Final Settlement with Respect to Germany .....	250
Maritime Boundary Agreement with the Soviet Union .....	251
Arms control treaties .....	251
INF Treaty .....	254
Threshold Test Ban Treaty and Protocol .....	256
CFE Treaty .....	257
CFE Flank Agreement .....	257
START I Treaty .....	258
START II .....	260
Open Skies Treaty .....	261
Chemical Weapons Convention .....	261
Comprehensive Test Ban Treaty .....	262
B. Economic treaties .....	265
Friendship, commerce, and navigation treaties .....	265
Investment treaties .....	266
Consular conventions .....	269
Tax conventions .....	270
Treaty shopping .....	271
Exchange of information .....	272
Allocation of income of multinational business enterprises .....	272
Taxation of equipment rentals .....	272
Arbitration of competent authority issues .....	272
Insurance excise tax .....	273
C. Environmental treaties .....	273
No-reservations clauses .....	274
Fishery conventions .....	276
D. Legal cooperation .....	278
Extradition treaties .....	278
Mutual legal assistance treaties .....	282
E. Human rights conventions .....	285
Genocide Convention .....	287
Labor conventions .....	288
Convention Against Torture .....	290
Civil and Political Rights Covenant .....	291
Racial Discrimination Convention .....	292
Other human rights treaties .....	293

## APPENDICES

1. Treaties and other international agreements: an annotated bibliography .....	295
A. Introduction .....	295
B. International agreements and international law .....	295
1. Overview .....	295
a. General .....	295
b. Treaties and agreements involving international organizations .....	298
2. Negotiation and conclusion of treaties and international agreements .....	299
a. Negotiation and the treaty-making process .....	299
(1) General .....	299
(2) Multilateral treaties .....	299
b. Amendments, interpretive declarations, and reservations .....	300
c. Acceptance, depositary, registration and publication .....	301
(1) Acceptance .....	301
(2) Depositary .....	301
(3) Registration and publication .....	302
3. Entry into force .....	302
4. Interpretation .....	303
5. Modification, suspension, and termination of treaties .....	307

	Page
1. Treaties and other international agreements—Continued	
B. International agreements and international law —Continued	
5. Modification, suspension, and termination of treaties —Continued	
a. Overview .....	307
b. Questions of treaty validity .....	310
6. Dispute settlement .....	312
7. Succession of states .....	313
C. International agreements and U.S. law .....	314
1. General .....	314
2. Congressional and Presidential roles in the making of treaties and international agreements .....	319
3. Communication of international agreements to Congress .....	330
4. U.S. termination of treaties .....	332
D. Guides .....	334
1. Guides to resources on treaties .....	334
2. Compilations of treaties, and indexes international in scope .....	335
3. U.S. treaties and the treaty-making process .....	338
a. Sources for treaty information throughout the treaty-making process .....	338
CIS/index .....	338
Congressional Index .....	338
Congressional Record .....	341
Executive Journal of the Senate .....	341
Senate executive reports .....	341
Senate Foreign Relations Committee calendar .....	341
Senate treaty documents .....	341
Department of State Dispatch .....	341
Department of State Bulletin .....	341
Foreign Policy Bulletin .....	342
Department of State Press Releases .....	342
Federal Register .....	342
Monthly Catalog .....	342
Shepard's United States Citations—Statutes Edition .....	342
Statutes at Large .....	342
Weekly Compilation of Presidential Documents .....	343
b. Official treaty series .....	343
TIAS .....	343
UST .....	343
c. Indexes and retrospective compilations .....	343
Current .....	343
1950+ .....	344
1776–1949 .....	344
1776–1949 (Bevans) .....	344
1776–1931 (Malloy) .....	344
1776–1863 (Miller) .....	344
d. Status of treaties .....	345
Treaties in force .....	345
Unperfected treaties .....	345
Additional information .....	345
4. Topical collections .....	346
a. Diplomatic and national security issues .....	346
b. Economic and commercial issues .....	347
c. International environmental issues and management of common areas .....	348
2. Case-Zablocki Act on Transmittal of International Agreements and Related Reporting Requirements .....	349
3. Coordination and reporting of international agreements, State Department regulations .....	351
4. Department of State Circular 175 Procedures on Treaties .....	357
710 Purpose and disclaimer .....	357
711 Purpose (state only) .....	357
712 Disclaimer (state only) .....	357
720 Negotiation and signature .....	357
721 Exercise of the international agreement power .....	358
722 Action required in negotiation and/or signature of treaties and agreements .....	359
723 Responsibility of office or officer conducting negotiations .....	361
724 Transmission of international agreements other than treaties to Congress: compliance with the Case-Zablocki Act .....	364

	Page
4. Department of State Circular 175 Procedures on Treaties—Continued	
725 Publication of treaties and other international agreements of the United States .....	364
730 Guidelines for concluding international agreements .....	364
731 Conformity of texts .....	366
732 Exchange or exhibition of full powers .....	366
733 Signature and sealing .....	366
734 Exchange of ratifications .....	367
740 Multilateral treaties and agreements .....	367
741 Official and working languages .....	368
742 Engrossing .....	369
743 Full powers .....	370
744 Signature and sealing .....	370
745 Disposition of final documents of conference .....	370
746 Procedure following signature .....	371
750 Responsibilities of the Assistant Legal Adviser for Treaty Affairs .....	371
5. The Vienna Convention on the Law of Treaties, Senate Ex. L, 92d Congress 1st Session, with list of signatures, ratifications and accessions deposited as of December 11, 2000 .....	375
Letter of transmittal .....	377
Letter of submittal .....	378
Vienna Convention on the Law of Treaties .....	384
List of signatures, ratifications deposited and accessions deposited as of December 11, 2000 .....	407
6. Glossary of treaty terminology .....	411
7. Simultaneous consideration of treaties and amending protocols .....	415
1. Treaty with Mexico Relating to Utilization of the Waters of Certain Rivers (Ex. A, 78-2, and Ex. H, 78-2) .....	415
2. Convention Between France and the United States as to Double Taxation and Fiscal Assistance and Supplementary Protocol (S. Ex. A, 80-1 and S. Ex. G, 80-2) .....	415
3. Tax Convention with Canada and Two Protocols (Ex. T, 96-2; Treaty Doc. 98-7; and Treaty Doc. 98-22) .....	416
4. Treaties with the U.S.S.R. on the Limitation of Underground Nuclear Weapon Tests and on Underground Nuclear Explosions for Peaceful Purposes and Protocols (Ex. N, 94-2; and Treaty Doc. 101-19) .....	416
8. Treaties approved by the Senate .....	417
2000 .....	417
1999 .....	420
1998 .....	422
1997 .....	425
1996 .....	426
1995 .....	429
1994 .....	430
1993 .....	430
9. Treaties rejected by the Senate .....	433
1999 .....	433
10. Letter of response from Acting Director Thomas Graham, Jr. to Senator Pell accepting the narrow interpretation of the ABM Treaty .....	
TABLES	
II-1. Treaties and executive agreements concluded by the United States, 1789-1989 .....	39
II-2. Treaties and executive agreements concluded by the United States, 1930-1999 .....	39
X-1. Transmittal of executive agreements to Congress, 1978-1999 .....	226
X-2. Agencies submitting agreements late, 1979-1999 .....	229
X-3. Statutory requirements for transmittal of agreements to Congress .....	236
X-4. Required reports related to international agreements .....	239
X-5. Legislation implementing treaties .....	241
XI-1. Human rights treaties pending on the Senate Foreign Relations Committee calendar .....	286
A1-1. Publications providing information on U.S. treaties throughout the treaty-making process .....	
CHARTS	
1. Steps in the making of a treaty .....	8
2. Steps in the making of an executive agreement .....	10

## INTRODUCTORY NOTE

---

This study revises a report bearing the same title published in 1993. It is intended to provide a reference volume for use by the U.S. Senate in its work of advising and consenting to treaties. It summarizes international and U.S. law on treaties and other international agreements. It traces the process of making treaties through the various stages from their initiation and negotiation to ratification, entry into force, implementation and oversight, modification or termination—describing the respective senatorial and Presidential roles at each stage. The study also provides background information on issues concerning the Senate role in treaties and other international agreements through specialized discussions in individual chapters. The appendix contains, among other things, a glossary of frequently used terms, important documents related to treaties: the Vienna Convention on the Law of Treaties (unratified by the United States); State Department Circular 175 describing treaty procedures in the executive branch; the State Department regulation, “Coordination and Reporting of International Agreements,” and material related to the Case-Zablocki Act on the reporting of international agreements to Congress. Also included are a list of treaties approved by the Senate from January 1993 through October 2000, examples of treaty documents, and an annotated bibliography.

## I. OVERVIEW OF THE TREATY PROCESS<sup>1</sup>

---

Treaties are a serious legal undertaking both in international and domestic law. Internationally, once in force, treaties are binding on the parties and become part of international law. Domestically, treaties to which the United States is a party are equivalent in status to Federal legislation, forming part of what the Constitution calls "the supreme Law of the Land."

However, the word treaty does not have the same meaning in the United States and in international law. Under international law, a "treaty" is any legally binding agreement between nations. In the United States, the word treaty is reserved for an agreement that is made "by and with the Advice and Consent of the Senate" (Article II, Section 2, Clause 2 of the Constitution). International agreements not submitted to the Senate are known as "executive agreements" in the United States, but they are considered treaties and therefore binding under international law.

For various reasons, Presidents have increasingly concluded executive agreements. Many agreements are previously authorized or specifically approved by legislation, and such "congressional-executive" or statutory agreements have been treated almost interchangeably with treaties in several important court cases. Others, often referred to as "sole executive agreements," are made pursuant to inherent powers claimed by the President under Article II of the Constitution. Neither the Senate nor the Congress as a whole is involved in concluding sole executive agreements, and their status in domestic law is not fully resolved.

Questions on the use of treaties, congressional-executive agreements, and sole executive agreements underlie many issues. Therefore, any study of the Senate role in treaties must also deal with executive agreements. Moreover, the President, the Senate, and the House of Representatives have different institutional interests at stake, a fact which periodically creates controversy. Nonetheless, the President, Senate, and House share a common interest in making international agreements that are in the national interest in the most effective and efficient manner possible.

The requirement for the Senate's advice and consent gives the Senate a check over all international agreements submitted to it as treaties. The Senate may refuse to give its approval to a treaty or do so only with specified conditions, reservations, or understandings. In addition, the knowledge that a treaty must be approved by a two-thirds majority in the Senate may influence the content of the document before it is submitted. Even so, the Senate has found

---

<sup>1</sup> Prepared by Richard F. Grimmett, Specialist in National Defense.

it must be vigilant if it wishes to maintain a meaningful role in treaties that are submitted.

The main threat of erosion of the Senate treaty power comes not from the international agreements that are submitted as treaties, however, but from the many international agreements that are not submitted for its consent. In addition to concluding hundreds of executive agreements, Presidents have made important commitments that they considered politically binding but not legally binding. Maintaining the Senate role in treaties requires overseeing all international agreements to assure that agreements that should be treaties are submitted to the Senate.

## A. BACKGROUND

### THE EVOLUTION OF THE SENATE ROLE<sup>2</sup>

The Constitution states that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.” The Convention that drafted the Constitution did not spell out more precisely what role it intended for the Senate in the treatymaking process. Most evidence suggests that it intended the sharing of the treaty power to begin early, with the Senate helping to formulate instructions to negotiators and acting as a council of advisers to the President during the negotiations, as well as approving each treaty entered into by the United States. The function of the Senate was both to protect the rights of the states and to serve as a check against the President’s taking excessive or undesirable actions through treaties. The Presidential function in turn was to provide unity and efficiency in treatymaking and to represent the national interest as a whole.

The treaty clause of the Constitution does not contain the word ratification, which refers to the formal act by which a nation affirms its willingness to be bound by a specific treaty. From the beginning, the formal act of ratification has been performed by the President acting “by and with the advice and consent of the Senate.” The President ratifies the treaty, but, only after receiving the advice and consent of the Senate.

When the Constitution was drafted, the ratification of a treaty was generally considered obligatory by the nations entering into it if the negotiators stayed within their instructions. Therefore Senate participation during the negotiations stage seemed essential if the Senate was to play a meaningful constitutional role. At the time, such direct participation by the Senate also seemed feasible, since the number of treaties was not expected to be large and the original Senate contained only 26 Members.

Within several years, however, problems were encountered in treatymaking and Presidents abandoned the practice of regularly getting the Senate’s advice and consent on detailed questions prior to negotiations. Instead, Presidents began to submit the completed treaty after its conclusion. Since the Senate had to be able to advise changes or deny consent altogether if its role was to be mean-

<sup>2</sup>See Chapters II and VI for references and additional discussion.

ingful, the doctrine of obligatory ratification was for all practical purposes abandoned.

Although Senators sometimes play a part in the initiation or development of a treaty, the Senate role now is primarily to pass judgment on whether completed treaties should be ratified by the United States. The Senate's advice and consent is asked on the question of Presidential ratification. When the Senate considers a treaty it may approve it as written, approve it with conditions, reject and return it, or prevent its entry into force by withholding approval. In practice the Senate historically has given its advice and consent unconditionally to the vast majority of treaties submitted to it.

In numerous cases, the Senate has approved treaties subject to conditions. The President has usually accepted the Senate conditions and completed the ratification process. In some cases, treaties have been approved with reservations that were unacceptable either to the President or the other party, and the treaties never entered into force.<sup>3</sup>

Only on rare occasions has the Senate formally rejected a treaty. The most famous example is the Versailles Treaty, which was defeated on March 19, 1920, although 49 Senators voted in favor and 35 against. This was a majority but not the required two-thirds majority so the treaty failed. Since then, the Senate has definitively rejected only three treaties.<sup>4</sup> In addition, the Senate sometimes formally rejects treaties but keeps them technically alive by adopting or entering a motion to reconsider. This has happened, for instance, with the Optional Protocol Concerning the Compulsory Settlement of Disputes in 1960, the Montreal Aviation Protocols Nos. 3 and 4 in 1983, and the Comprehensive Test Ban Treaty in 1999.

More often the Senate has simply not voted on treaties that did not have enough support for approval, and the treaties remained pending in the Foreign Relations Committee for long periods. Eventually, unapproved treaties have been replaced by other treaties, amended by protocols and then approved, or withdrawn by or returned to the President. Thus the Senate has used its veto sparingly, but still demonstrated the necessity of its advice and consent and its power to block a treaty from entering into force.

#### TREATIES UNDER INTERNATIONAL LAW<sup>5</sup>

Under international law an international agreement is generally considered to be a treaty and binding on the parties if it meets four criteria:

- (1) The parties intend the agreement to be legally binding and the agreement is subject to international law;
- (2) The agreement deals with significant matters;
- (3) The agreement clearly and specifically describes the legal obligations of the parties; and

<sup>3</sup>These include treaties on income taxation with Thailand, signed March 1965, and Brazil, signed March 13, 1967.

<sup>4</sup>Treaty on General Relations with Turkey, January 18, 1927; St. Lawrence Waterway Treaty with Canada, July 18, 1932 (the St. Lawrence Seaway was subsequently approved by legislation); and adherence to the Permanent Court of International Justice, January 29, 1935.

<sup>5</sup>See Chapter III for references and additional discussion.



(4) The form indicates an intention to conclude a treaty, although the substance of the agreement rather than the form is the governing factor.

International law makes no distinction between treaties and executive agreements. Executive agreements, especially if significant enough to be reported to Congress under the Case-Zablocki Act, are to all intents and purposes binding treaties under international law.<sup>6</sup>

On the other hand, many international undertakings and foreign policy statements, such as unilateral statements of intent, joint communiques, and final acts of conferences, are not intended to be legally binding and are not considered treaties.

#### TREATIES UNDER U.S. LAW<sup>7</sup>

Under the Constitution, a treaty, like a Federal statute, is part of the "supreme Law of the Land." Self-executing treaties, those that do not require implementing legislation, automatically become effective as domestic law immediately upon entry into force. Other treaties do not become effective as domestic law until implementing legislation is enacted, and then technically it is the legislation, not the treaty unless incorporated into the legislation, that is the law of the land.

Sometimes it is not clear on the face of a treaty whether it is self-executing or requires implementing legislation. Some treaties expressly call for implementing legislation or deal with subjects clearly requiring congressional action, such as the appropriation of funds or enactment of domestic penal provisions. The question of whether or not a treaty requires implementing legislation or is self-executing is a matter of interpretation largely by the executive branch or, less frequently, by the courts. On occasion, the Senate includes an understanding in the resolution of ratification that certain provisions are not self-executing or that the President is to exchange or deposit the instrument of ratification only after implementation legislation has been enacted.

When a treaty is deemed self-executing, it overrides any conflicting provision of the law of an individual signatory state. If a treaty is in irreconcilable conflict with a Federal law, the one executed later in time prevails, although courts generally try to harmonize domestic and international obligations whenever possible.

#### EXECUTIVE AGREEMENTS UNDER U.S. LAW<sup>8</sup>

The status in domestic law of executive agreements, that is, international agreements made by the executive branch but not submitted to the Senate for its advice and consent, is less clear. Three types of executive agreements and their domestic legal status are discussed below.

<sup>6</sup>The Case-Zablocki Act (Public Law 92-403, as amended), is also examined in Chapter X. See Appendix 2 for text of the law.

<sup>7</sup>See Chapter IV for references and additional discussion. See also Chapter X.

<sup>8</sup>See Chapter IV for references and additional discussion. See also Chapter X.

*(1) Congressional-executive agreements*

Most executive agreements are either explicitly or implicitly authorized in advance by Congress or submitted to Congress for approval. Some areas in which Congress has authorized the conclusion of international agreements are postal conventions, foreign trade, foreign military assistance, foreign economic assistance, atomic energy cooperation, and international fishery rights. Sometimes Congress has authorized conclusion of agreements but required the executive branch to submit the agreements to Congress for approval by legislation or for a specified waiting period before taking effect. Congress has also sometimes approved by joint resolution international agreements involving matters that are frequently handled by treaty, including such subjects as participation in international organizations, arms control measures, and acquisition of territory. The constitutionality of this type of agreement seems well established and Congress has authorized or approved them frequently.

*(2) Agreements pursuant to treaties*

Some executive agreements are expressly authorized by treaty or an authorization for them may be reasonably inferred from the provisions of a prior treaty. Examples include arrangements and understandings under the North Atlantic Treaty and other security treaties. The President's authority to conclude agreements pursuant to treaties seems well established, although controversy occasionally arises over whether particular agreements are within the purview of an existing treaty.

*(3) Presidential or sole executive agreements*

Some executive agreements are concluded solely on the basis of the President's independent constitutional authority and do not have an underlying explicit or implied authorization by treaty or statute. Authorities from the Constitution that Presidents claim as a basis for such agreements include:

- The President's general executive authority in Article II, Section 1, of the Constitution;
- His power as Commander in Chief of the Army and Navy in Article II, Section 2, Clause 1;
- The treaty clause itself for agreements, which might be part of the process of negotiating a treaty in Article II, Section 2, Clause 2;
- His authority to receive Ambassadors and other public Ministers in Article II, Section 3; and
- His duty to "take care that the laws be faithfully executed" in Article II, Section 3.

Courts have indicated that executive agreements based solely on the President's independent constitutional authority can supersede conflicting provisions of state law, but opinions differ regarding the extent to which they can supersede a prior act of Congress. What judicial authority exists seems to indicate that they cannot.

STEPS IN THE U.S. PROCESS OF MAKING TREATIES AND EXECUTIVE  
AGREEMENTS

Phases in the life of a treaty include negotiation and conclusion, consideration by the Senate, Presidential ratification, implementation, modification, and termination. Following is a discussion of the major steps and the roles of the President and the Senate in each phase.

Executive agreements are negotiated and concluded in the same way as treaties, but they do not go through the procedure for advice and consent of the Senate. Some executive agreements are submitted to the Congress for approval and most are to be transmitted to Congress after their conclusion. (See charts 1 and 2.)

*Negotiation and conclusion*<sup>9</sup>

The first phase of treaty-making, negotiation and conclusion, is widely considered an exclusive prerogative of the President except for making appointments which require the advice and consent of the Senate. The President chooses and instructs the negotiators and decides whether to sign an agreement after its terms have been negotiated. Nevertheless, the Senate or Congress sometimes proposes negotiations and influences them through advice and consultation. In addition, the executive branch is supposed to advise appropriate congressional leaders and committees of the intention to negotiate significant new agreements and consult them as to the form of the agreement.

Steps in the negotiating phase follow.

(1) *Initiation.*—The executive branch formally initiates the negotiations. The original concept or proposal for a treaty on a particular subject, however, may come from Congress.

(2) *Appointment of negotiators.*—The President selects the negotiators of international agreements, but appointments may be subject to the advice and consent of the Senate. Negotiations are often conducted by ambassadors or foreign service officers in a relevant post who have already been confirmed by the Senate.

(3) *Issuance of full powers and instructions.*—The President issues full power documents to the negotiators, authorizing them officially to represent the United States. Similarly, he issues instructions as to the objectives to be sought and positions to be taken. On occasion the Senate participates in setting the objectives during the confirmation process, or Congress contributes to defining the objectives through hearings or resolutions.

(4) *Negotiation.*—Negotiation is the process by which representatives of the President and other governments concerned agree on the substance, terms, wording, and form of an international agreement. Members of Congress sometimes provide advice through consultations arranged either by Congress or the executive branch, and through their statements and writings. Members of Congress or their staff have served as members or advisers of delegations and as observers at international negotiations.

(5) *Conclusion.*—The conclusion or signing marks the end of the negotiating process and indicates that the negotiators have reached agreement. In the case of a treaty the term “conclusion” is a mis-

<sup>9</sup> See Chapter V for references and additional discussion.

nomer in that the agreement does not enter into force until the exchange or deposit of ratifications. In the case of executive agreements, however, the signing and entry into force are frequently simultaneous.

*Consideration by the Senate*<sup>10</sup>

A second phase begins when the President transmits a concluded treaty to the Senate and the responsibility moves to the Senate. Following are the main steps during the Senate phase.

(1) *Presidential submission.*—The Secretary of State formally submits treaties to the President for transmittal to the Senate. A considerable time may elapse between signature and submission to the Senate, and on rare occasions a treaty signed on behalf of the United States may never be submitted to the Senate at all and thus never enter into force for the United States. When transmitted to the Senate, treaties are accompanied by a Presidential message consisting of the text of the treaty, a letter of transmittal requesting the advice and consent of the Senate, and the earlier letter of submittal of the Secretary of State which usually contains a detailed description and analysis of the treaty.

(2) *Senate receipt and referral.*—The Parliamentarian transmits the treaty to the Executive Clerk, who assigns it a document number. The Majority Leader then, as in executive session, asks the unanimous consent of the Senate that the injunction of secrecy be removed, that the treaty be considered as having been read the first time, and that it be referred to the Foreign Relations Committee and ordered to be printed. The Presiding Officer then refers the treaty, regardless of its subject matter, to the Foreign Relations Committee in accordance with Rule XXV of the Senate Rules. (Rule XXV makes an exception only for reciprocal trade agreements.) At this point the treaty text is printed and made available to the public.

(3) *Senate Foreign Relations Committee action.*—The treaty is placed on the committee calendar and remains there until the committee reports it to the full Senate. While it is committee practice to allow a treaty to remain pending long enough to receive study and comments from the public, the committee usually considers a treaty within a year or two, holding a hearing and preparing a written report.

The committee recommends Senate advice and consent by reporting a treaty with a proposed resolution of ratification. While most treaties have historically been reported without conditions, the committee may recommend that the Senate approve a treaty subject to conditions incorporated in the resolution of ratification.

(4) *Conditional approval.*—The conditions traditionally have been grouped into categories described in the following way.

—Amendments to a treaty change the text of the treaty and require the consent of the other party or parties. (Note that in Senate debate the term may refer to an amendment of the resolution of ratification, not the treaty itself, and therefore be comprised of some other type of condition.)

<sup>10</sup> See Chapter VI for references and additional discussion. Chapter VI also contains the text of Senate Rule XXX.

Chart 1. Steps in the Making of a Treaty

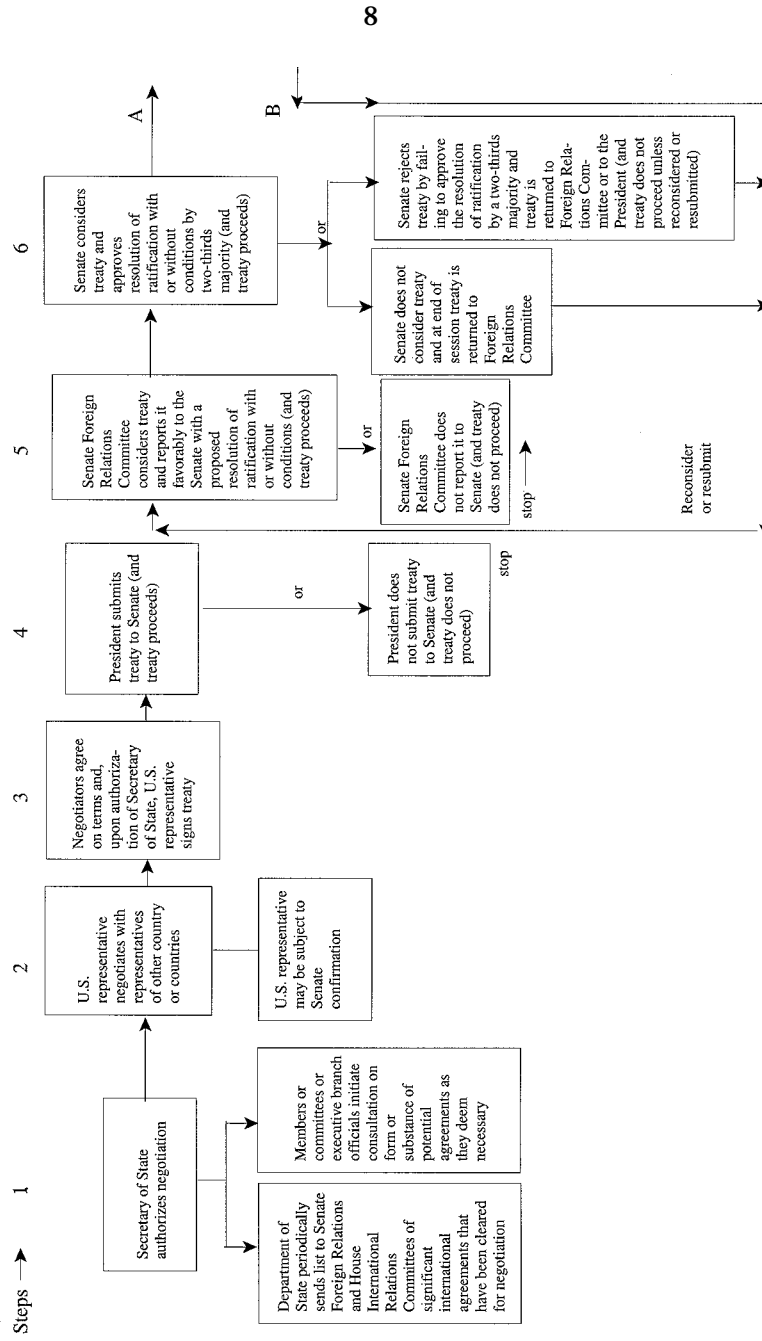


Chart 1. Steps in the Making of a Treaty (continued)

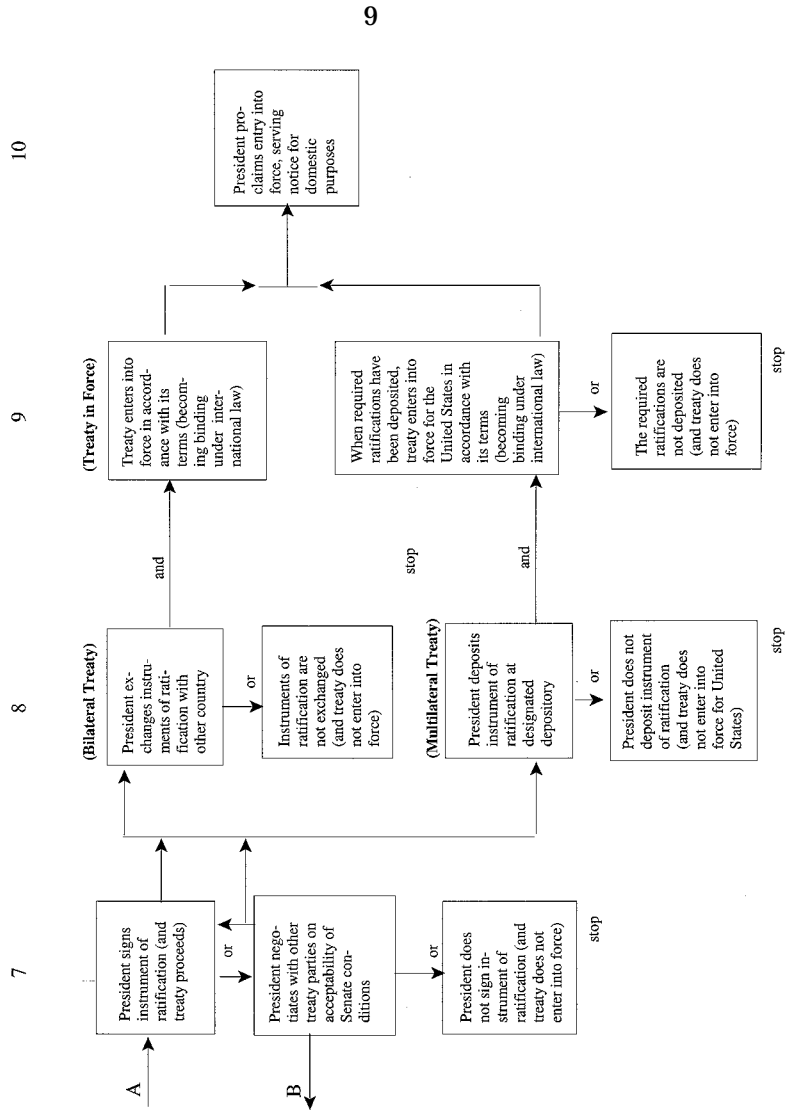
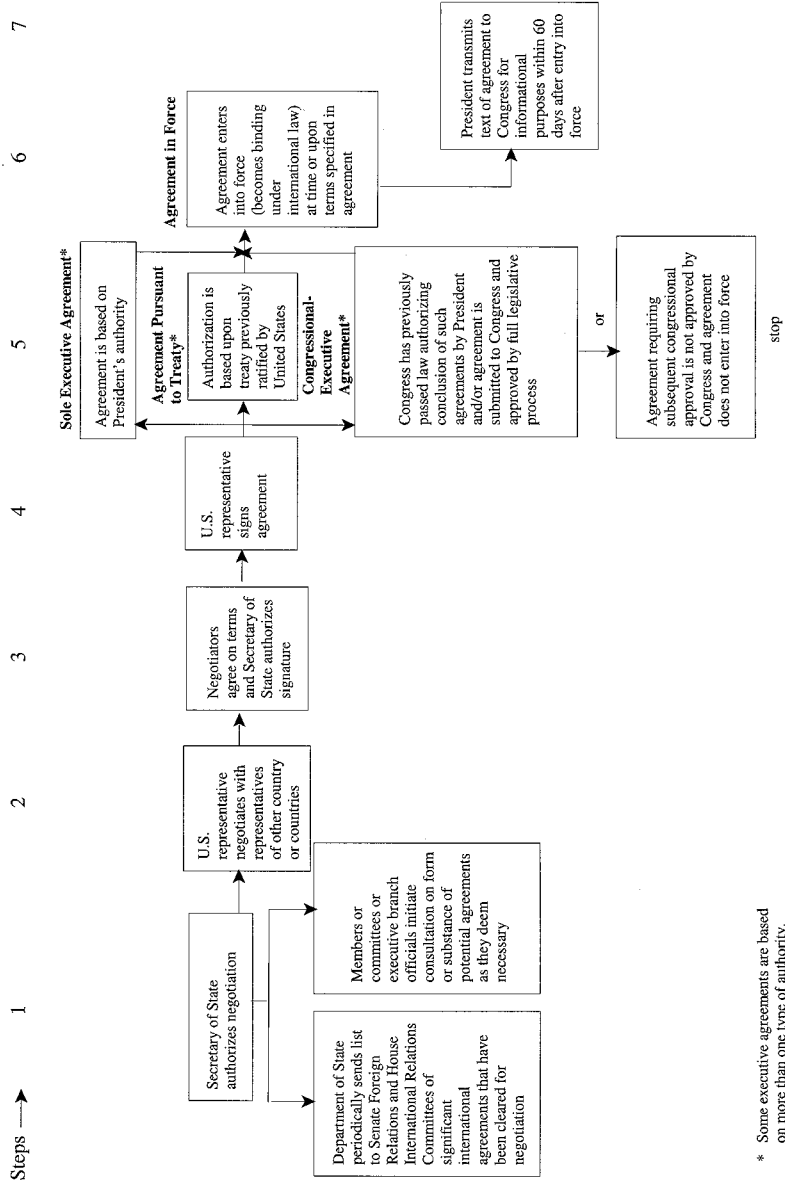


Chart 2. Steps in the Making of an Executive Agreement



- Reservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party.
- Understandings are interpretive statements that clarify or elaborate provisions but do not alter them.
- Declarations are statements expressing the Senate's position or opinion on matters relating to issues raised by the treaty rather than to specific provisions.
- Provisos relate to issues of U.S. law or procedure and are not intended to be included in the instruments of ratification to be deposited or exchanged with other countries.

Whatever name a condition is given by the Senate, if a condition alters an international obligation under the treaty, the President is expected to transmit it to the other party. In recent years, the Senate on occasion has explicitly designated that some conditions were to be transmitted to the other party or parties and, in some cases, formally agreed to by them. It has also designated that some conditions need not be formally communicated to the other party, that some conditions were binding on the President, and that some conditions expressed the intent of the Senate.

(5) *Action by the full Senate.*—After a treaty is reported by the Foreign Relations Committee, it is placed on the Senate's Executive Calendar and the Majority Leader arranges for the Senate to consider it. In 1986 the Senate amended Rule XXX of the Senate Rules, which governs its consideration of treaties, to simplify the procedure in this step. Still, under the full procedures of the revised Rule XXX, in the first stage of consideration the treaty would be read a second time and any proposed amendments to the treaty itself would be considered and voted upon by a simple majority. Usually the Majority Leader obtains unanimous consent to abbreviate the procedures, and the Senate proceeds directly to the consideration of the resolution of ratification as recommended by the Foreign Relations Committee.

The Senate then considers amendments to the resolution of ratification, which would incorporate any amendments to the treaty itself that the Senate had agreed to in the first stage, as well as conditions recommended by the Foreign Relations Committee. Senators may then offer reservations, understandings, and other conditions to be placed in the resolution of ratification. Votes on these conditions, as well as other motions, are determined by a simple majority. Finally, the Senate votes on the resolution of ratification, as it has been amended. The final vote on the resolution of ratification requires, for approval, a two-thirds majority of the Senators present. Although the number of Senators who must be present is not specified, the Senate's practice with respect to major treaties is to conduct the final treaty vote at a time when most Senators are available. After approval of a controversial treaty, a Senator may offer a motion to reconsider which is usually laid on the table (defeated). In the case of a treaty that has failed to receive a two-thirds majority, if the motion to reconsider is not taken up, the treaty is returned to the Foreign Relations Committee. Prior to the final vote on the resolution of ratification, a Senator may offer a substitute amendment, proposing that the Senate withhold its ad-



vice and consent, or offer a motion to recommit the resolution to the Foreign Relations Committee.

(6) *Return to committee.*—Treaties reported by the committee but neither approved nor formally returned to the President by the Senate are automatically returned to the committee calendar at the end of a Congress; the committee must report them out again in order for the Senate to consider them.

(7) *Return to President or withdrawal.*—The President may request the return of a treaty, or the Foreign Relations Committee may report and the Senate adopt a simple resolution directing the Secretary of the Senate to return a treaty to the President. Otherwise, treaties that do not receive the advice and consent of the Senate remain pending on the committee calendar indefinitely.

#### *Presidential action after Senate action*<sup>11</sup>

After the Senate gives its advice and consent to a treaty, the Senate sends it to the President. He resumes control and decides whether to take further action to complete the treaty.

(1) *Ratification.*—The President ratifies a treaty by signing an instrument of ratification, thus declaring the consent of the United States to be bound. If the Senate has consented with reservations or conditions that the President deems unacceptable, he may at a later date resubmit the original treaty to the Senate for further consideration, or he may renegotiate it with the other parties prior to resubmission. Or the President may decide not to ratify the treaty because of the conditions or for any other reason.

(2) *Exchange or deposit of instruments of ratification and entry into force.*—If he ratifies the treaty, the President then directs the Secretary of State to take any action necessary for the treaty to enter into force. A bilateral treaty usually enters into force when the parties exchange instruments of ratification. A multilateral treaty enters into force when the number of parties specified in the treaty deposit the instruments of ratification at a specified location. Once a treaty enters into force, it is binding in international law on the parties who have ratified it.

(3) *Proclamation.*—When the instruments of ratification have been exchanged or the necessary number deposited, the President issues a proclamation that the treaty has entered into force. Proclamation serves as legal notice for domestic purposes and publicizes the text.

#### *Implementation*<sup>12</sup>

The executive branch has the primary responsibility for carrying out treaties and ascertaining that other parties fulfill their obligations after treaties and other international agreements enter into force, but the Senate or the entire Congress share in the following phases.

(1) *Implementing legislation.*<sup>13</sup>—When implementing legislation or appropriations are needed to carry out the terms of a treaty, it

<sup>11</sup> See Chapter VII for references and additional discussion.

<sup>12</sup> See Chapter VIII for references and additional discussion.

<sup>13</sup> In addition to Chapter VIII, see Chapter X.

must go through the full legislative process including passage by both Houses and presentment to the President.

(2) *Interpretation.*<sup>14</sup>—The executive branch interprets the requirements of an agreement as it carries out its provisions. U.S. courts may also interpret a treaty's effect as domestic law in appropriate cases. The Senate has made clear that the United States is to interpret the treaty in accordance with the common understanding of the treaty shared by the President and the Senate at the time the Senate gave its advice and consent. This common understanding is based on the text of the treaty, the provisions of the resolution of ratification, and the authoritative representations provided by the executive branch to the Senate during its consideration. The Senate has further specified that the United States is not to agree to or adopt an interpretation different from the common understanding except pursuant to Senate advice and consent or enactment of a statute.

(3) *Settlement of international disputes.*—When disputes arise between parties on the interpretation of a treaty or on the facts relating to compliance with the obligations of a treaty, the executive branch usually conducts negotiations aimed at resolving differences in interpretation. Treaties sometimes provide for formal procedures or mechanisms for dispute settlement. Members of Congress have sometimes played an important role by overseeing implementation of a treaty, bringing about public discussion of compliance issues, and urging procedures to resolve international disputes.

*Modification, extension, suspension, or termination*<sup>15</sup>

Modifying and extending an international agreement amount to the making of a new agreement that should be done by the same method as the original agreement. For treaties, this means with the advice and consent of the Senate. Practice on termination, however, has not been consistent.

(1) *Modification.*—At the international level, treaties are amended by agreement of the parties or in accordance with their terms. In the United States, amendments to treaties are ordinarily submitted to the Senate for its advice and consent, unless the treaty provides for modification in some other way. Less formal modifications have been made by executive agreements or decisions.

(2) *Extension.*—An agreement to extend an existing international agreement is considered a new agreement, and ordinarily would be accomplished in the same fashion as the original, with an extension of a treaty submitted to the Senate.

(3) *Suspension.*—The President conveys notice of suspension of a treaty and makes the determination that would justify suspension, such as a fundamental change in circumstances or material breach of a treaty by another party.

(4) *Termination.*—At the international level, treaties often contain provisions regarding duration and the method of termination, or nations may terminate treaties by mutual consent. Grounds for termination include violation of the agreement, but violation does not automatically terminate a treaty.

<sup>14</sup>In addition to Chapter VIII, see Chapter VI, and discussion of INF Treaty in Chapter XI.  
<sup>15</sup>See Chapter IX for references and additional discussion.

Domestically, the Constitution does not prescribe the process for the United States to terminate a treaty, and the process continues to be controversial. Treaties have been terminated in a variety of ways, including by the President following a joint resolution of Congress, by the President following action by the Senate, by the President and with subsequent congressional or Senate approval, and by the President alone.

*Congressional oversight*<sup>16</sup>

Congress has responsibility for overseeing the negotiation and conclusion of international agreements by the executive branch and the manner in which the executive branch interprets and carries out the agreements. It shares with the executive branch the responsibility for assessing the general effectiveness of international agreements at the international level and determining the course of action when agreements are not effective.

(1) *Hearings and reports.*—Congress reviews actions under treaties and other international agreements as part of its responsibilities for overseeing executive branch activities. Senate and House rules direct committees to review the application of those laws within their jurisdiction, so the oversight function is distributed widely among the various committees of Congress. Methods for oversight include hearings, investigations, consultations, and requiring and reviewing reports.

(2) *Review of executive agreements.*—Under the Case-Zablocki Act, all executive agreements are to be transmitted to Congress within 60 days of their entry into force, including those that are classified for security reasons. The receipt is noted in the Congressional Record, and unclassified agreements are listed in committee publications. Members of Congress may read the agreements in the Senate Foreign Relations and House Foreign Affairs Committee offices.

TRENDS IN SENATE ACTION ON TREATIES<sup>17</sup>

In recent years the Senate has endeavored both to improve its efficiency in handling treaties and to assure a meaningful role. Among steps to streamline procedures, in 1986 it amended Senate Rule XXX to eliminate the requirement for consideration by the Senate as in Committee of the Whole. It has frequently approved groups of treaties with a single roll call vote, or approved treaties by a division vote. The Senate Legis computer system has made it easier for Senators to obtain current information on action on treaties before the Senate.

Among steps to assure a meaningful role, the Senate has appointed observer groups to negotiations on important treaties, especially in the arms control and environmental areas. In 1987 and 1988 the Senate reviewed the constitutional principles of treaty interpretation and affirmed that the United States should not agree to or adopt an interpretation different from the common understanding shared by the President and the Senate at the time the Senate gave its advice and consent to ratification, except pursuant

<sup>16</sup> See Chapter X for references and additional discussion.

<sup>17</sup> See Chapter VI and Chapter XI for references and additional discussion.

to Senate advice and consent or enactment of a statute. The Senate also provided a system to review the negotiating record of the Intermediate Range Nuclear Forces (INF) Treaty. However, the Foreign Relations Committee said that Senate review of negotiating records should not become an institutionalized procedure, but that reference to the record on a case-by-case basis might sometimes be useful.

Treaties and Senate action on them have begun to reflect new policy concerns since the end of the Cold War. Increased recognition has been given to the importance of economic treaties, including consular, investment, and tax agreements. The use of friendship, commerce, and navigation (FCN) treaties decreased after 1948 when the United States entered the General Agreement on Tariffs and Trade (GATT). Since investment matters were outside the scope of GATT at that time, in 1981 the United States began to negotiate a series of bilateral investment treaties (BITs). Subsequently, the Senate has given its advice and consent to BITs with several countries.

Treaties providing for cooperation in bringing suspected criminals to trial have become increasingly important with the growth of transnational criminal activity, including narcotics trafficking, terrorism, money laundering, and export control violations. The two chief types are extradition treaties and a new series called mutual legal assistance treaties (MLATs). The Senate Foreign Relations Committee has supported recent supplementary extradition treaties and new MLATs, although sometimes with conditions.

Treaties for conservation of certain species of wildlife and regulation of fisheries have been supplemented with broad treaties for environmental cooperation. Although supportive of environmental cooperation treaties, the Senate Foreign Relations Committee has expressed concern about articles prohibiting reservations and has cautioned that consent to three multilateral environmental treaties containing such articles should not be construed as a precedent.

#### B. ISSUES IN TREATIES SUBMITTED FOR ADVICE AND CONSENT

Although it can prevent a treaty from being ratified or attach conditions for ratification, the Senate frequently finds it difficult to advise on treaties effectively. Several obstacles to a meaningful Senate role have developed.

##### REQUEST FOR CONSENT WITHOUT OPPORTUNITY FOR ADVICE

A major problem derives from the executive branch practice of not submitting a treaty to the Senate until it is completed. Seeing the terms of the treaty only after it has been signed, the Senate frequently has little choice in practice except to consent to a treaty exactly as it has been negotiated, or to block it entirely. The President may present a treaty as vital to good relations with a nation, relations that would be set back immeasurably if the treaty were defeated. Or he may present it as a package that has been so delicately negotiated that the slightest change in understanding by the Senate would unbalance the package and kill the treaty. Or he may present it so late in the congressional session, or so near some type

of international deadline, that Senate consideration in depth is pictured as impeding the beginning of a new beneficial regime.

Administrations almost always discourage significant changes that might require renegotiation of a treaty, and the Senate usually defeats attempted reservations that would actually alter treaty obligations. Rather than adding reservations or attempting to amend the treaty itself, the Senate often addresses its concerns through understandings that do not alter the obligations under the treaty and therefore do not require renegotiation.

The Senate has the choice of rejecting a treaty by a public vote, or by quietly not bringing the treaty to a vote. In recent years it has almost always chosen not to conduct a vote that might embarrass the U.S. negotiators, make the United States appear divided, and impair relations with other countries. In either event, Senate defeat of a treaty entails a loss of the time, energy, and in some cases U.S. international prestige invested in the negotiations.

An option for avoiding defeats is legislative-executive consultation prior to or during negotiations. The President can initiate consultation through meetings or by inviting congressional observers to negotiations. The Senate can initiate consultation through hearings and other meetings or through resolutions or legislative directives. In the past, some Senators have been concerned that participating in the formulation of a treaty could pose a conflict of interest since Senators are subsequently asked to pass judgment on the completed treaty. With the increase in multilateral treaties and other developments, this concern appears to have diminished.

#### MULTILATERAL TREATIES

The Senate's problem of not receiving a treaty until it is completed is particularly acute in multilateral treaties. These treaties are often negotiated by many nations in large international conferences, sometimes over a period of years. States make concessions in one area to obtain concessions from other states in other areas. The result is often an interwoven package that the Senate is called upon to take or leave in its entirety, without amendments or reservations, because renegotiation may not be feasible.

Some multilateral treaties have contained an article prohibiting reservations. The Senate Foreign Relations Committee has taken the position that the executive branch negotiators should not agree to this prohibition. The Senate has given its advice and consent to a few treaties containing the prohibition, but the committee has stated that approval of these treaties should not be construed as a precedent for such clauses in future treaties. It has further stated that the President's agreement to such a clause could not constrain the Senate's right and obligation to attach reservations to its advice and consent.<sup>18</sup>

A related problem arises from reservations made by other nations to a multilateral treaty. Although the reservations may modify international obligations, the Department of State has not been sending the reservations to the Senate for its advice and consent. It has been assumed that the Senate, aware of this practice, tacitly

<sup>18</sup>See section on Environmental Treaties in Chapter XI.

consents to the U.S. acceptance of the reservations.<sup>19</sup> Without information on the reservations, however, the Senate cannot estimate the size or significance of the problem.

The trend toward more multilateral agreements seems inevitable. The United States entered virtually no multilateral agreements until the late 1800s, but after 1900 multilateral treaties steadily increased and their subject coverage expanded. From 1980 through 1991 the United States entered 259 multilateral agreements of which 79 were treaties. For the future, with the number of sovereign nations still growing, multilateral agreements on a subject offer an efficient alternative to bilateral agreements with 100 or 200 countries.

The great increase in multilateral diplomacy and multilateral agreements is introducing another new phenomenon. The United States now has bilateral international agreements with approximately 50 international organizations. It might appear that the Senate would encounter the same difficulty in proposing modifications it does in the case of multilateral agreements. Renegotiation of bilateral treaties with multilateral organizations should be more feasible, however, because the United States is one of only two negotiating partners. Moreover, the United States is in most instances also a major player in the international organization, the other negotiating partner.

#### DIMINISHING USE OF TREATIES FOR MAJOR POLITICAL COMMITMENTS<sup>20</sup>

At the end of World War II, treaties played an important part in shaping post-war U.S. foreign policy. Formal peace treaties were concluded with all belligerents except Germany. The Charters of the United Nations and the Organization of American States established a framework for international cooperation. The North Atlantic Treaty and other regional security treaties built a network of mutual security that endured throughout the Cold War.

After 1955 the building of commitments through treaties appeared to halt, and many in Congress expressed concern with commitments made through executive action. In 1969 the Senate adopted the National Commitments Resolution expressing the sense that a national commitment "results only from affirmative action taken by the executive and legislative branches of the U.S. Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment." Yet for the rest of the Cold War, military and security commitments were not made as treaties but as executive agreements, non-binding political agreements, or unilateral executive branch statements and actions.

Arms control treaties became the only type of agreement in the political-military field that have been concluded primarily in treaty form. In this area legislation specified that agreements be concluded as treaties or authorized by legislation, and the Senate insisted that most agreements be submitted as treaties. As a result,

<sup>19</sup> See section on Amendment in Chapter IX.

<sup>20</sup> See Chapter XI for references and additional discussion.

arms control treaties have been the main vehicle in recent years for special Senate influence on foreign policy.

The end of the Cold War offers a new era in foreign policy comparable to that which existed at the end of World War II. As the agreements to provide the framework for the new era are concluded, the significance of the Senate's treaty power is again being tested. Some agreements to shape the new foreign policy already have been undertaken by executive agreement, non-binding political agreement, or unilateral executive branch statements or actions. In other cases, the Senate has insisted that agreements be concluded as treaties. Such insistence appears to have become necessary to ensure that significant political agreements are submitted as treaties.

UNILATERAL EXECUTIVE BRANCH ACTION TO REINTERPRET, MODIFY,  
AND TERMINATE TREATIES

The Constitution is silent on procedures for modifying or terminating treaties, and agreement has not been reached between the branches on a single proper mode.<sup>21</sup> The general rule is that international agreements are to be amended in the same way that they were made, thus for treaties requiring the advice and consent of the Senate. With the increase in numbers and complexity of treaties, more frequent changes and adjustments have become necessary. The Senate has again been challenged to be vigilant for unilateral executive branch action that might change a basic obligation agreed to in its advice and consent to a treaty.

What portion of treaty modifications have been submitted to the Senate is unknown. Although certain changes have been routinely submitted to the Senate, such as amendments to tax treaties, others have been made solely by executive agreement or action. The most controversial unilateral action of the executive branch in recent years involved reinterpretation of the Anti-Ballistic Missile (ABM) Treaty of 1972. In 1985, the Reagan Administration sought to reinterpret the ABM Treaty to permit development of mobile space-based anti-ballistic systems for the Strategic Defense Initiative. The Senate became concerned about both the future of the ABM Treaty and the failure to obtain its advice and consent for a major change in treaty obligations. It attached a condition to the INF Treaty restating the principle that the President may not adopt a treaty interpretation different from the common understanding shared by the Senate at the time it gave its advice and consent, without the advice and consent of the Senate or the enactment of a statute. In action on subsequent arms control treaties, the Senate affirmed the applicability of these principles to all treaties. In 1993 the Clinton Administration made clear it had returned to the "narrow" or "traditional" interpretation of the ABM Treaty.<sup>22</sup>

Twice in recent years the method of terminating a treaty has raised serious controversy within the United States. In 1978, President Carter terminated the defense treaty with the Republic of China without the concurrence of either the Senate or Congress

<sup>21</sup> See Chapter IX for references and additional discussion.

<sup>22</sup> See Chapters VI, VIII, and IX for references and additional discussion.

when he established diplomatic relations with the People's Republic of China. In 1977, the new Panama Canal Treaty terminated the 1903, 1936, and 1955 treaties with Panama. Although a new treaty was approved by the Senate, some contended that the termination of the earlier treaties required an act of Congress, thus including approval by the House of Representatives as well as the Senate.

#### DIFFICULTY IN OVERSEEING TREATIES<sup>23</sup>

Once it has given its advice and consent to a treaty, the Senate often lacks the information necessary to oversee further action under the treaty. It does not receive a copy of the resolution of ratification signed by the President, or the proclamation, to enable comparison with the resolution of ratification adopted by the Senate. It does not receive copies of reservations or conditions established by other parties, to enable a determination of whether the advice and consent of the Senate should have been required. It is not always informed when a treaty has entered into force or been modified in some way. Completion by the Department of State of a computerized information system on treaties, with Senate access, might enable the Senate to oversee some aspects of the implementation of treaties more effectively.

Compliance with treaties has also become an issue on some occasions, especially in the arms control field. Oversight of compliance has been done with traditional congressional tools such as hearings, investigations, and required reports.

#### MINORITY POWER

Questions are sometimes raised because of the power of a minority to block a treaty. Since a two-thirds majority of the Senators present is required to advise and consent to a treaty, a minority of one-third plus one of the Senate may reject a treaty. In some cases Senators in the minority seem to have more influence on a treaty or the substance of future policy than other Senators because those in the minority can win concessions. The President may be certain of the support of a simple majority; he must make special concessions to win the extra votes necessary for a two-thirds majority. Nevertheless, a two-thirds majority was clearly the intention of the Framers of the Constitution, and any formal change would require a constitutional amendment.

#### THE HOUSE ROLE IN TREATIES

Because treaties become part of the law of the land, concern is sometimes expressed that the House of Representatives does not share in the treaty power. The Framers confined the treaty-making power to the President and the Senate in the belief that the latter's smaller size would enable it to be a confidential partner in the negotiations. The need for maintaining secrecy during negotiations and acting with speed were also cited as justifications for not including the House. In addition, by making the treaty power a national power and requiring the advice and consent of the Senate,

<sup>23</sup> See Chapter X for references and additional discussion.



the Framers gave expression to their desire to form a strong central government while affording the states ample safeguards.

The Supreme Court, in *INS v. Chadha*, cited the Senate's power to advise and consent to treaties negotiated by the President "as one of only four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto."<sup>24</sup> In 1945 the House adopted a resolution to amend the Constitution to require the advice and consent of both Houses for treaties, but the Senate did not act on the measure.<sup>25</sup>

The House from the beginning has played a role in treaties that require implementing legislation. On occasion, as in 1796 with the Jay Treaty, problems have arisen when Presidents have completed ratification of treaties and then called upon Congress to pass implementing legislation to prevent the United States from defaulting on its international obligations. Treaties approved by the Senate have sometimes remained unfulfilled for long periods because implementing legislation was not passed.

The increasing use of congressional-executive agreements has also equalized to some extent the role of the House vis-a-vis the Senate in the making of international agreements. Executive agreements authorized or approved by legislation give a majority in the House and Senate the power analogous to the Senate's advice and consent by a two-thirds majority.

#### VIENNA CONVENTION ON THE LAW OF TREATIES

A pending issue for the Senate is what action to take on the Vienna Convention on the Law of Treaties, a codification of the international law of treaties which is increasingly cited as a source of international law, even though the United States has not yet ratified it. The United States played a leading role in negotiating the Vienna Convention at a conference of more than 100 nations and signed it with almost 50 other countries on May 23, 1969. As in the case of many treaties, however, the executive branch conducted the negotiations without congressional observers or consultations, although the subject matter was of clear concern to the Senate.

The convention was signed by the United States on May 23, 1969, and submitted to the Senate on November 7, 1971. The Senate Foreign Relations Committee ordered reported a resolution of advice and consent to ratification, subject to an understanding and an interpretation, on September 7, 1972, but the Department of State and the Senate Foreign Relations Committee could not agree on acceptable conditions and the convention remains pending on the Foreign Relations Committee calendar.<sup>26</sup>

The main dilemma is that simple ratification would leave unresolved important constitutional issues relating to executive agreements. The Vienna Convention codifies an international law definition of treaties that makes no distinction between different forms of international agreements. Article 46 permits a state to invalidate a treaty if a violation of domestic law in concluding the treaty

<sup>24</sup> 462 U.S. 919 (1983).

<sup>25</sup> H.J. Res. 60, Congressional Record (1945), pp. 4326-4368.

<sup>26</sup> See section on the Vienna Convention on the Law of Treaties in Chapter III. The text of the Vienna Convention is contained in Appendix 5.

was "manifest and concerned a rule of its internal law of fundamental importance." In 1972, however, the Department of State objected to the interpretation proposed by the Senate Foreign Relations Committee that it was "a rule of internal law of the United States of fundamental importance" that no treaty as defined by the convention would be valid unless it had received the advice and consent of the Senate or its terms had been approved by law.

The second problem is that, although the United States has traditionally supported the progressive codification of international law, in a few instances the Vienna Convention formally codifies rules of international law that may not have been fully accepted as customary law by the United States. In particular, the Vienna Convention provides that an international agreement is void if it conflicts with a fundamental norm of general international law "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted \*\*\*." The United States in principle does not object to this concept known as *jus cogens*, but the convention does not state by whom or how such norms are established.

Furthermore, the Vienna Convention provides that if a treaty dispute relating to *jus cogens* is not resolved within 12 months, any party may invoke the jurisdiction of the International Court of Justice unless the parties agree to submit it to arbitration. While the United States has entered a number of treaties providing for submission of disputes to the International Court of Justice, unqualified Senate approval of the Vienna Convention would appear to broaden significantly U.S. acceptance of the court's jurisdiction, a matter which has long been controversial. The United States withdrew its declaration accepting the court's compulsory jurisdiction on October 7, 1985. Moreover, in approving some treaties with provisions for submission of disputes to the International Court of Justice, the Senate has added conditions. In giving its advice and consent to the Genocide Convention, the Senate added a reservation that before any dispute to which the United States was a party could be submitted to the jurisdiction of the International Court of Justice, the specific consent of the United States was required in each case.

### C. ISSUES IN AGREEMENTS NOT SUBMITTED TO THE SENATE

Any problems the Senate has in influencing treaties pale in comparison with problems in influencing many other international agreements entered into by the United States. For sole executive agreements, many executive agreements entered into under the authority of a treaty, and non-legally binding or political agreements, the Senate (and Congress as a whole) often have little timely knowledge and no opportunity to change them or prevent them from taking effect. An exception is the category of congressional-executive agreements that are authorized by Congress in legislation with procedures for congressional review and approval. The problem is one of both quantity and quality. The number of agreements not submitted to the Senate as treaties has risen sharply while the number of treaties has remained steady. At the same time, the subject matter coverage of executive agreements has expanded and their significance increased.

INCREASING USE OF EXECUTIVE AGREEMENTS<sup>27</sup>

As the United States became more involved in world affairs, international agreements multiplied. Most of the growth was in executive agreements. The executive branch found it was much easier to conclude an executive agreement than a treaty because it was not submitted to the Senate. (Compare charts 1 and 2 above.) The Senate, too, accepted executive agreements as an alternate method of making many international agreements, since submitting all agreements to the Senate as treaties would either overwhelm the Senate with work or force approval to become perfunctory.

Of most concern to the Senate were executive agreements concluded solely on the President's own authority, without any influence from Congress. In other executive agreements, the Senate played a role anyway. In the case of executive agreements concluded under the authority of a treaty, the Senate consented to the original treaty. In the case of congressional-executive agreements, both Houses passed the legislation that authorized, required scrutiny of, or approved the agreements.

OVERSIGHT OF EXECUTIVE AGREEMENTS—THE CASE-ZABLOCKI ACT<sup>28</sup>

To help in oversight of executive agreements, in 1972 the Case-Zablocki Act was enacted. This Act (1 U.S.C. 112b), usually referred to as the Case Act, requires the Secretary of State to transmit to Congress all executive agreements, including oral agreements which are to be reduced to written form, within 60 days after their entry into force. If the President deems that the immediate disclosure of an agreement would be prejudicial to national security, the agreement is to be transmitted to the Senate Foreign Relations and House International Relations Committees with a security classification.

The Case Act has proved helpful in informing Congress of executive agreements and has provided machinery for additional oversight. If fully complied with by the executive branch and utilized by Members of Congress, a system exists for Congress to learn of executive agreements and to determine the adequacy of their authorization.

## LEARNING OF EXECUTIVE AGREEMENTS

The first problem dealt with by the Case Act was determining when executive agreements have been concluded. In the past, Presidents have entered into agreements secretly, as evidenced by the Yalta Agreement of 1945 and the Cuban missile crisis of 1962. The Case Act requires the State Department to send Congress copies of executive agreements. In most cases the agreements are submitted within the required 60 days after their entry into force, but some are submitted late. While the fact that the agreements have already entered into force means that Congress cannot prevent them from taking effect, timely knowledge does permit Congress an

<sup>27</sup> See Chapter II for references and additional discussion.

<sup>28</sup> See Chapter X for references and additional discussion. The text of the Case-Zablocki Act is contained in Appendix 2.

opportunity to consider the policy represented by the agreement and to use legislative means to modify the policy if it wishes.

The Case Act has also helped the Department of State, as well as Congress, learn of and have some supervision over agreements made by agencies of the Government other than the State Department. The Case Act requires any department or agency that enters an international agreement to transmit the agreement to the Department of State within 20 days. In addition, it prohibits any international agreement from being signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State. Such consultation may cover a class of agreements rather than each individual agreement.

U.S. agencies frequently make contracts and arrangements with agencies in other countries. The Secretary of State determines for the executive branch whether an arrangement constitutes an international agreement required to be transmitted to Congress under the Case Act. Members and committees of Congress do not want to be deluged with trivia, yet they want to be sure to receive important agreements. One decision taken to this end by the Secretary of State with congressional concurrence was to exclude agreements made by the Agency for International Development to provide funds of less than \$25 million for a foreign project, unless the agreement was otherwise significant.

#### DETERMINING AUTHORITY FOR EXECUTIVE AGREEMENTS

A basic concern of the Senate has been whether an executive agreement is properly within the authority of a treaty or statute. In 1973, in implementing the Case Act, the Department of State agreed to send with each executive agreement transmitted to Congress a background statement on the agreement that would include a precise citation of legal authority. Checking these citations could help the Senate distinguish between those agreements that are within the authority of a treaty or statute and those it would consider sole executive agreements. In recent years, however, a majority of agreements have been transmitted without such background statements.

#### NON-BINDING INTERNATIONAL AGREEMENTS<sup>29</sup>

Some international agreements are not intended to be legally binding, and these non-binding agreements may escape regular congressional oversight procedures. Sometimes called political agreements, these agreements are not considered treaties under international law. They are not enforceable in courts, and rules concerning compliance, modification, and withdrawal from treaties do not apply. Nevertheless, these agreements may be considered morally binding by the parties, and the President may be making a type of national commitment when he enters one. Moreover such agreements are occasionally later converted into legally binding agreements.

Non-binding agreements are not new. Presidents have often made mutual declarations and agreed on final acts and communi-

<sup>29</sup> See Chapters III and X for references and additional discussion.

ques after international meetings. Recently some non-binding agreements appear to have become quite formal, however, assuming all the characteristics of a treaty except for a statement that they are politically, not legally, binding. Agreements under the Conference on Security and Cooperation in Europe (CSCE) are an example.

Since non-binding agreements are not submitted to the Senate as treaties and are not transmitted to Congress as executive agreements under the Case-Zablocki Act, Congress may need to learn of the agreements and oversee them through other methods. In the case of the CSCE agreements, Congress has carried out vigorous oversight through the Commission on Security and Cooperation in Europe.

#### D. DECIDING BETWEEN TREATIES AND EXECUTIVE AGREEMENTS

The crux of the problem is determining when international agreements should be concluded as treaties and when they should be executive agreements. For what subjects is it essential to use the treaty process? For what subjects are executive agreements appropriate?

#### SCOPE OF THE TREATY POWER; PROPER SUBJECT MATTER FOR TREATIES<sup>30</sup>

The treaty power is recognized by the courts as extending to any matter properly the subject of international negotiations. In practice the subject matter dealt with by international negotiations has steadily expanded, particularly in the last half century, with new forms of international cooperation in political, military, economic, and social fields.

From time to time concern has been expressed that treaties could have adverse implications for, or the effect of changing, domestic law. For example, the negotiation of human rights treaties under the auspices of the United Nations raised concern in the 1950s that some clauses, if ratified by the United States, might be in conflict with constitutional provisions safeguarding human rights, or that matters clearly in the domestic jurisdiction of the United States could be changed into matters of international concern. Other concerns were that some national powers might be transferred to an international organization, or that powers traditionally reserved to the states could be invaded by transferring them to the Federal Government or international bodies.

Despite its breadth, the treaty power has certain limitations in addition to the procedural safeguard of the requirement for the Senate's advice and consent. Chief among these is that treaties, like laws, are subject to the requirements of the Constitution. Controversial constitutional issues involving treaties include:

(1) *Rights reserved to the states*.—While it seems settled that the unspecified reserved powers of the 10th amendment are not a bar to exercise of the treaty power, specific powers conferred on states arguably might provide restrictions.

<sup>30</sup> See Chapters III and IV for references and additional discussion.

(2) *Subjects in which the Constitution gave participation to the House of Representatives.*—Powers delegated to Congress are not a limitation on subject matter which can be embraced by a treaty, but for many treaties, domestic effectiveness may depend on implementing legislation.

(3) *Authorizations of U.S. participation in proceedings before certain types of international judicial tribunals.*—The Constitution's vesting of the judicial power in one Supreme Court and such inferior courts as Congress might establish provides a safeguard against infringement by treaty on the domestic judicial power.

(4) *Matters of domestic jurisdiction, not of international concern.*—While there is no clear test of what matters are of international concern, the existence of such limitations appears to be generally accepted.

(5) *Separation of powers and rights under the Bill of Rights.*—As a general matter, an agreement cannot alter the constitutional distribution of powers or impair constitutionally protected rights.

SCOPE OF EXECUTIVE AGREEMENTS; PROPER SUBJECT MATTER FOR  
EXECUTIVE AGREEMENTS<sup>31</sup>

The extent to which executive agreements can be utilized instead of treaties is perhaps the fundamental question in studying the Senate role in treaties, and is by no means wholly resolved.

Congressional-executive or statutory agreements, authorized or approved by legislation, would appear to have the broadest constitutional basis. They have been used for such important subjects as joining international organizations, and the Senate in legislation has endorsed their possible use for arms control agreements and the making of national commitments.

Many legal scholars consider statutory agreements interchangeable with treaties as a method of making international agreements. Some might even argue that because they require approval of both Houses of Congress, statutory agreements might be more appropriate for those questions which affect domestic law than treaties, which are considered only by the Senate. When implementing legislation is required, they are an efficient device because the approval of the agreement and the necessary legislation may be accomplished in a single step.

Others might argue that to use congressional-executive agreements instead of treaties, while preserving the congressional role, could lead to erosion of the treaty power. Not only would it circumvent the method set out in the Constitution that deliberately made entering treaties more difficult than passing legislation, but it would indirectly reduce the influence of states whose interests were seen to be protected by requiring a two-thirds majority of the Senators voting. Some may object to the use of statutory agreements instead of treaties, when initiated by the executive branch, on the grounds that it allows the executive branch to pick and choose between the two methods of making international agreements according to the better prospects for approval; they may not object if Congress specifically authorizes such an agreement.

<sup>31</sup> See Chapter IV for references and additional discussion.

The other two types of international agreements have narrower limits but pose other problems. Executive agreements pursuant to treaties are supposed to be within the purview of the treaty, that is, carry out the purposes of the treaty. Sole executive agreements are supposed to be within the President's independent executive powers under Article II of the Constitution. However, the extent of the "purview of the treaty" and the President's independent powers raise judgmental matters subject to varying interpretations.

CRITERIA FOR TREATY FORM<sup>32</sup>

A perennial concern of Senators has been to insure that the most important international commitments are made as treaties rather than executive agreements. There have been recurrent complaints that some agreements of major significance, such as agreements to establish military bases, were not submitted to the Senate as treaties.

Procedures for consultation between the executive branch and Congress on the form of prospective international agreements, primarily whether they should be treaties submitted to the Senate, were developed in 1978 after the Senate passed the International Agreements Consultation Resolution suggesting that such consultation should occur. These procedures include State Department consultation with appropriate congressional committees in advance of negotiations. In addition, the Department is periodically to send the Senate Foreign Relations and House International Relations Committees a list of significant international agreements that it has authorized for negotiation. Congress can use the information provided as the basis for discussions with the Department of State, or possibly take more action, on the form an agreement should ultimately take.

The State Department has developed the following criteria for determining whether an agreement should be a treaty:

- (1) The degree of commitment or risk for the entire Nation;
  - (2) Whether the agreement is intended to affect state laws;
  - (3) Whether the agreement requires enabling legislation;
  - (4) Past U.S. practice;
  - (5) The preference of Congress;
  - (6) The degree of formality desired;
  - (7) The proposed duration and the need for prompt conclusion;
- and
- (8) General international practice on similar agreements.

When there is a question as to whether an agreement should be concluded as a treaty or executive agreement, State Department procedures call for consultation with congressional leaders and committees as may be appropriate. Fuller use of these and other consultation procedures appear to offer the most opportunity for assuring appropriate decisions, from the Senate's perspective, on whether particular international agreements should be concluded as executive agreements, congressional-executive agreements, or treaties.

<sup>32</sup> See Chapter X.

## II. HISTORICAL BACKGROUND AND GROWTH OF INTERNATIONAL AGREEMENTS<sup>1</sup>

---

The Framers of the Constitution expected the Senate to serve as a council of advice to the President on treaty matters, participating during the negotiation stage through the end of the treaty-making process. The experience of President George Washington in 1789, in meeting with Senators to discuss the terms of a treaty to be negotiated with the Southern Indians, proved discouraging to both branches. Although no President again met with Senators in the Senate Chamber to discuss a proposed treaty, other methods were used to include Senators in the treaty-drafting process. The Senate's role evolved into a more formal pattern of passing judgment on completed treaties, approving or not approving them, or approving them with conditions that the President must accept if he ratifies them.

Senate action on treaties has changed dramatically, particularly since World War II. While the number of treaties concluded each year has remained fairly constant, the number of international agreements other than treaties has skyrocketed. Moreover, a growing proportion of treaties are now multilateral rather than bilateral, and the subject matter of treaties and other international agreements continues to diversify. All of these changes challenged the Senate in maintaining its constitutional role.

### A. HISTORICAL BACKGROUND OF CONSTITUTIONAL PROVISIONS

Four provisions of the Constitution expressly relate to treaties and form the basis of U.S. law on treaties. By making treaties the supreme law of the land and dividing the treaty-making power between the President and the Senate, the Constitution makes treaties uniquely important and difficult for the United States.

Article I, Section 10, expressly prohibits states from entering into "any Treaty, Alliance, or Confederation," nor may any state, without the consent of Congress, enter into any agreement or compact or agreement with another state or with a foreign nation.

Article II, Section 2, Clause 2, states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

Article III, Section 2, Clause 1, provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; \* \* \*"

Article VI, Section 2, includes treaties among the supreme law of the land: "This Constitution, and the Laws of the United States

---

<sup>1</sup> Prepared by Louis Fisher, Senior Specialist in Separation of Powers.



which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

The background and records of the Constitutional Convention of 1787 and early writings and practice help reveal the intentions, concerns, and assumptions of the Drafters of the Constitution.

#### THE CONSTITUTIONAL CONVENTION

The Articles of Confederation, completed in 1777 but not ratified until 1781, formed the basis of the relationship among the 13 colonies until superseded by the Constitution in 1789. The Continental Congress was the only central organ of the Confederation. The Articles vested in “the united states in congress assembled” the power to enter into treaties and alliances, “provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever \* \* \*.” Congress, a single body composed of delegates from each state, required the assent of nine states for a treaty. The main problem concerning treaties under the Articles was in securing agreement to make treaty provisions binding on all the states.

At the Philadelphia Convention in 1787, a number of proposals were put forth to replace the Articles of Confederation. It was generally agreed that the single branch of the Continental Congress would be replaced by three branches: legislative, executive, and judicial. Well into August, the delegates agreed to give the Senate the exclusive power to make treaties and appoint ambassadors.<sup>2</sup> Opposition developed, however. On August 15, John Mercer of Maryland objected to lodging the treaty-making power in the Senate, contending that it belonged to the executive department, adding that treaties “would not be final so as to alter the laws of the land, till ratified by legislative authority.”<sup>3</sup> On August 23, James Madison pointed out that the Senate represented the states alone and that for “this as well as other obvious reasons it was proper that the President should be an agent in Treaties.”<sup>4</sup>

By September 4 delegates had agreed that the President “by and with the advice and consent of the Senate, shall have power to make treaties,” and that no treaty shall be made without the consent of two-thirds of the Senators present.<sup>5</sup> This portion of the report was brought up for discussion on September 7. James Wilson of Pennsylvania moved to add the words “and House of Representatives” after the word Senate because, he said, since treaties “are to have the operation of laws, they ought to have the sanction of laws also.” As to the objection that secrecy was needed for treaty-making, he said that factor was outweighed by the necessity for the sanc-

<sup>2</sup> The Records of the Federal Convention of 1787, at 143, 144–45, 155, 392 (Max Farrand ed. 1937) (hereafter cited as Farrand).

<sup>3</sup> *Ibid.*, p. 297.

<sup>4</sup> *Ibid.*, p. 393.

<sup>5</sup> *Ibid.*, pp. 495, 498–499.

tion of both chambers. Roger Sherman of Connecticut argued that the requirement of secrecy for treaties “forbade a reference of them to the whole Legislature.” Wilson’s motion was defeated.<sup>6</sup>

Considerable attention was given to the size of the Senate majority that should be required. Wilson objected to requiring a two-thirds majority on the grounds that it “puts it in the power of a minority to control the will of a majority.” He was supported by Rufus King of Massachusetts, who pointed out that there was already a check by joining the President in the treatymaking process.<sup>7</sup> Several amendments were defeated: (1) to allow two-thirds of the Senate to make treaties of peace without the President’s concurrence; (2) to strike out altogether the clause requiring approval by two-thirds of the Senate; (3) to require the consent of two-thirds of all the members of the Senate; (4) to require a majority of the whole number of the Senate; (5) to establish that a quorum of the Senate consist of two-thirds of all the members; and (6) to provide that “no Treaty shd. be made with[ou]t previous notice to the members, & a reasonable time for their attending.”<sup>8</sup>

A committee was then appointed to revise the style and arrangement of the articles that had been adopted, and the text reported back was finally approved by the convention as Section 2 of Article II in its current form. Thus, the power to make treaties, at first given to the Senate by the Committee of Detail, was transferred to the President by and with the advice and consent of the Senate.

#### DEBATE ON ADOPTION

Further indications of the intended meaning of the constitutional provisions are found in “The Federalist,” a group of papers written by Alexander Hamilton, John Jay, and James Madison to explain and win support for the Constitution, and in debates in the State Constitutional Conventions called to decide on its adoption. These sources sustain the conclusion that the original intention was that the Senate and the President share the treatymaking power, with the sharing to begin early and continue throughout the treatymaking process.

Federalist No. 75 by Hamilton ascribes a “peculiar propriety” to the union of the President and the Senate in the treatymaking process:

Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly neither the one nor

<sup>6</sup>Ibid., p. 538.

<sup>7</sup>Ibid., p. 540.

<sup>8</sup>Ibid., pp. 540–541, 547–550.

the other. \* \* \* Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.<sup>9</sup>

Federalist No. 64 by Jay foresees that on some occasions the President would undertake preparatory work on treaties alone but nevertheless would call upon the Senate in important matters:

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate despatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

\* \* \* Those matters which in negotiations usually require the most secrecy and the most despatch, are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these, the President will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them. \* \* \*

Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men vested with legislative authority. \* \* \*

Others, though content that treaties should be made in the mode proposed, are averse to their being the supreme law of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a Nation who would

<sup>9</sup>The Federalist (Benjamin Fletcher Wright ed.), Cambridge, Mass., Harvard University Press (1961), pp. 476-477.

make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it.<sup>10</sup>

Pierce Butler, one of the delegates of the Federal Convention and a member of the committee that drafted the treaty clause, explained to the members of the South Carolina ratifying convention the reasons that lay behind the constitutional language:

It was at first proposed to vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President, but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction. The House of Representatives was then named; but an insurmountable objection was made to this proposition—which was, that negotiations always required the greatest secrecy, which could not be expected in a large body.<sup>11</sup>

Charles Cotesworth Pinckney, who had originally proposed in the convention that the treatymaking power be given to the Senate alone, explained to the South Carolina Legislature that the Senate would approve or disapprove the terms of treaties proposed by the President.

At last it was agreed to give the President a power of proposing treaties, as he was the ostensible head of the Union, and to vest the Senate (where each state had an equal voice) with the power of agreeing or disagreeing to the terms proposed. \*\*\* On the whole, a large majority of the Convention thought this power would be more safely lodged where they had finally vested it, than any where else. It was a power that must necessarily be lodged somewhere: political caution and republican jealousy rendered it improper for us to vest in the President alone; the nature of negotiation, and the frequent recess of the House of Representatives, rendered that body an improper depository of this prerogative. The President and Senate joined were, therefore, after much deliberation, deemed the most eligible corps in whom we could with safety vest the diplomatic authority of the Union.<sup>12</sup>

## B. EVOLUTION INTO CURRENT PRACTICE

Early practice in treatymaking lends further insight into the intentions of the Framers of the Constitution, as well as into factors bringing about current practice. The first President of the United States had also presided at the Constitutional Convention, and most of the Members of the Senate during his administrations either had been members of the Continental or Confederation Con-

<sup>10</sup> *Ibid.*, pp. 422–424.

<sup>11</sup> *The Debates in the Several State Conventions on the Adoption of the Federal Convention* (Jonathan Elliot ed.), v. 4, p. 263.

<sup>12</sup> *Ibid.*, p. 265.

gresses or attended the Constitutional Convention or the state conventions called to adopt the Constitution.<sup>13</sup>

#### WASHINGTON'S ADMINISTRATIONS

On August 6, 1789, the Senate appointed a committee to confer with the President on the manner in which communications between them concerning treaties and nominations should be handled. In a message to the committee on August 8, 1789, President Washington stated that in all matters respecting treaties "oral communications seem indispensably necessary; because in these a variety of matters are contained, all of which not only require consideration, but some of them may undergo much discussion; to do which by written communications would be tedious without being satisfactory."<sup>14</sup> In a second message on August 10, he distinguished between appointments—in which "the agency of the Senate is purely executive"—and treaties, where "the agency is perhaps as much of a legislative nature and the business may possibly be referred to their deliberations in their legislative chamber." In this same message, he explained that the Senate was to be consulted in advance of making a treaty. Treaties would be presented to the Senate in an interim form ("propositions"), not as a completed product:

On some occasions it may be most convenient that the President should attend the deliberations and decisions on his propositions; on others that he should not; or that he should not attend the whole of the time. In other cases, again, as in Treaties of a complicated nature, it may happen, that he will send his propositions in writing and consult the Senate in person after time shall have been allowed for consideration.<sup>15</sup>

President Washington recommended that the Senate should accommodate its rules to the uncertainty of the particular mode and place, provide for either oral or written propositions, and for giving consent and advice in either the presence or absence of the President, leaving the President free to establish the mode and place.

Accordingly, on August 21, 1789, the Senate adopted a rule on the procedure to be followed when the President met with the Senate. The rule covered both appointments and treaties:

*Resolved*, That when nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration; that when the President of the United States shall meet the Senate in the Senate Chamber, the President of the Senate shall have a chair on the floor, be considered as at the head of the Senate, and his chair shall be assigned to the President of the United States; that when the Senate shall be convened by the President of the United States to any other place, the President of

<sup>13</sup>Of the sixty-six men who served in the Senate during Washington's administrations, thirty-one had been members of the Constitutional Congress or of the Congress of the Confederation, twelve had helped draft the Constitution in the convention at Philadelphia, and ten had been members of state conventions which had ratified the Federal instrument." Hayden, Ralston. *The Senate and Treaties, 1789-1817*. New York, Macmillan, 1920, p. 3.

<sup>14</sup>*The Writings of George Washington* (John C. Fitzpatrick ed.), v. 30, p. 373.

<sup>15</sup>*Ibid.*, p. 378.

the Senate and Senators shall attend at the place appointed. The Secretary of the Senate shall also attend to take the minutes of the Senate.

That all questions shall be put by the President of the Senate, either in the presence or absence of the President of the United States; and the Senators shall signify their assent or dissent by answering *viva voce*, aye or no.<sup>16</sup>

The same day President Washington gave notice of his intention to meet with the Senate to consider the terms of a treaty to be negotiated with the Southern Indians. The next day, Saturday, President Washington came into the Senate Chamber, accompanied by Secretary of War Henry Knox, and presented a paper giving an explanation of the proposed treaty. He then asked the Senate for its advice and consent on seven questions to guide the commissioners who were negotiating the treaty. At his request, the Senate postponed voting on the first question. On the second question, regarding instructions to the commissioners to pursue other measures respecting the Chickasaws and Choctaws, the Senate voted in the negative.<sup>17</sup> On Monday, August 24, the President again returned to the Senate Chamber and votes were taken on the rest of the questions.<sup>18</sup>

These meetings between the Senate and the President are famous as the first and last times that a President personally appeared before the Senate to seek its advice and consent. The meetings apparently were not satisfactory to either side. While the Executive Journal of the Senate does not record the debate, William Maclay, a Senator from Pennsylvania, recorded in his journal the difficulty of hearing the discussion and the seeming haste for decisions. Because of the noise created by carriages driving past, Maclay "could tell it was something about Indians, but was not master of one sentence of it." When it was proposed that the questions be referred to a committee, Washington "started up in a violent fret" and stated that "This defeats every purpose of my coming here." Maclay also wrote:

I had, at an early stage of the business, whispered to Mr. Morris that, I thought, the best way to conduct the business was to have all the papers committed. My reasons were that I saw no chance of a fair investigation of subjects while the President of the United States sat there, with his Secretary of War to support his opinions, and overawe the timid and neutral part of the Senate.<sup>19</sup>

The dissatisfaction on the President's side is often illustrated with the following quotation from the memoirs of John Quincy Adams:

Mr. Crawford told twice over the story of President Washington's having at an early period of his Administration gone to the Senate with a project of a treaty to be negotiated, and been present at their deliberations upon it. They debated it and proposed alterations, so that when Washington left the Senate-

<sup>16</sup> 1 Annals of Cong. 65 (August 21, 1789) (emphasis in original).

<sup>17</sup> Ibid., p. 69.

<sup>18</sup> Ibid., pp. 69-71.

<sup>19</sup> Maclay, William. Sketches of Debate in the First Senate of the United States (George W. Harris ed.), Harrisburg, Lane S. Hart (1880), p. 124.

chamber he said he would be damned if he ever went there again. And ever since that time treaties have been negotiated by the Executive *before* submitting them to the consideration of the Senate.<sup>20</sup>

It is error to conclude from this unhappy incident that Washington and future Presidents thereafter excluded the Senate from the treaty negotiation process. Washington continued to seek the advice of Senators, but he did so through written communications rather than personal appearances. For example, on February 9, 1790, he wrote to the Senate about a boundary line between U.S. and British territories. He thought "it advisable to postpone any negotiations on the subject until I shall be informed of the result of your deliberations and receive your advice as to the propositions most proper to be offered on the part of the United States."<sup>21</sup> On May 8, 1792, he asked the Senate these questions:

If the President of the United States should conclude a convention or treaty with the Government of Algiers for the ransom of the thirteen Americans in captivity there for a sum not exceeding \$40,000, all expenses included, will the Senate approve the same? Or is there any, and what, greater or lesser sum which they would fix on as the limit beyond which they would not approve the ransom?

If the President of the United States should conclude a treaty with the Government of Algiers for the establishment of peace with them, at an expense not exceeding \$25,000, paid at the signature, and a like sum to be paid annually afterwards during the continuance of the treaty, would the Senate approve the same? Or are there any greater or lesser sums which they would fix on as the limits beyond which they would not approve of such treaty?<sup>22</sup>

On some occasions, however, President Washington did not consult the Senate in advance of negotiations. Four treaties with Indian tribes negotiated during Washington's administrations without prior consultation with the Senate were approved. In regard to one of these, the Treaty of Greenville with the Indians northwest of the Ohio, Washington consulted his Cabinet on whether consultations with the Senate should be undertaken prior to negotiation and the Cabinet unanimously expressed the opinion it would be better not to. Thomas Jefferson wrote that all thought that if the Senate were consulted and told of plans, it would become known to the British minister and "we would lose all chance of saving anything more than our ultimatum."<sup>23</sup>

In the case of the Jay Treaty with Great Britain of November 19, 1794, a few Senators helped initiate the treaty and were prominent in its negotiation, but the President did not obtain the advice and consent of the entire Senate on the instructions to the negotiation.

<sup>20</sup> *Memoirs of John Quincy Adams* (Charles Francis Adams ed.), Philadelphia, J.B. Lippincott (1875), v. VI, p. 427 (emphasis in original).

<sup>21</sup> *A Compilation of the Messages and Papers of the Presidents* (James D. Richardson ed.), New York, Bureau of National Literature (1897-1925), v. 1, p. 64 (hereafter cited as Richardson).

<sup>22</sup> *Ibid.*, p. 115.

<sup>23</sup> Hayden, Ralston. *The Senate and Treaties, 1789-1817*. New York, Macmillan Co., 1920, pp. 37-38.

Just before approving the appointment of John Jay as special envoy to Britain, the Senate rejected a motion asking the President to supply it with complete information on the business to be charged to Jay. However, it was recognized that the treaty would have to be negotiated subject to obtaining the consent of the Senate to ratification. When the final treaty was put before the Senate, the Senate made its consent conditional upon alteration of the treaty. After the revisions requested by the Senate were made and accepted by Britain, the President ratified the revised treaty without further submission to the Senate.

The Senate on one occasion was called upon to assist in the interpretation of a treaty. In 1791, France contended that certain acts of Congress imposing requirements on ships without excepting those of France were in contravention of the Treaty of 1778. After considering various alternatives presented by the Secretary of State, the Senate expressed the opinion that the American interpretation of the treaty was correct and advised that this answer be given to France in the most friendly manner. This course was adopted.<sup>24</sup>

The conclusions of one student of the subject on the evolution of the treaty-making procedures during Washington's administrations have been stated as follows:

One very important decision reached by the logic of events during these eight years, however, was that the Senate could not really be a "council of advice" to the President in treaty-making. Yet evidently both Washington and the Senate originally expected that it would be such a council. The personal element in their relations was emphasized by the presence of the Secretary of State or the Secretary of War, or, in the one instance, of the President himself, at their deliberations.

As the Senate ceased to be consulted as a real "council of advice," its activities in that part of treaty-making known as the negotiation became less important. At first in making treaties both with the Indian tribes and with foreign nations the President usually secured the advice and consent of the Senate to the details of the proposed treaty before opening the negotiation. In the end it became his custom merely to inform the Senate of the proposed negotiation upon securing its consent to the nomination of the agent, and to submit the latter's instructions only with the completed treaty. \* \* \* The effect of the change in procedure was to leave the President free to negotiate the sort of treaty which the necessities of the situation demanded and allowed, while the Senate retained a like freedom to accept, to amend, or to reject the result of his efforts.<sup>25</sup>

#### PRESIDENCIES FROM ADAMS TO POLK

During subsequent administrations, the respective roles of the Senate and the President were further refined. Through its action on the Treaty of 1797 with Tunis, the Senate established its right to make its approval of a treaty conditional upon changes in the text or terms that might require renegotiation. In the European

<sup>24</sup> Hayden, op. cit., p. 101.

<sup>25</sup> Hayden, op. cit., pp. 105-106.



monarchies prior to that time, it had been considered obligatory for the monarchies to ratify a treaty if his emissary had stayed within his instructions, and no practice existed of reservations to parts of treaties. After considering the treaty with Tunis, the Senate adopted a resolution advising and consenting to its ratification on condition that a certain article be suspended and recommending renegotiation of the article. Renegotiation was undertaken and the Senate subsequently gave its advice and consent to the ratification of the article in question and two other articles that were renegotiated.<sup>26</sup> The King-Hawksbury Convention of May 12, 1803, became the first treaty not to enter into force because the other party, Great Britain, would not accept an amendment advised by the Senate. Lord Harrowby, the head of the British Foreign Office at that time, criticized the practice of ratifying treaties with exceptions to parts of them, a practice which he called "new, unauthorized and not to be sanctioned."<sup>27</sup> Gradually, however, other countries became used to the American procedure.

President Andrew Jackson appreciated the value of seeking the advice of Senators on how best to pursue treaty negotiations. On May 6, 1830, he submitted to the Senate "propositions" for a treaty with the Choctaw Indians. He indicated the amendments he thought necessary, but elicited the Senate's views: "Not being tenacious though, on the subject, I will most cheerfully adopt any modifications which, on a frank interchange of opinions my Constitutional advisors may suggest and which I shall be satisfied are reconcilable with my official duties."<sup>28</sup> He explained that the Indians recommended that their propositions be submitted to the Senate, and that the Senate's opinion "will have a salutary effect in a future negotiation, if one should be deemed proper."<sup>29</sup> Instead of acting unilaterally, Jackson thought it would be more satisfactory to the American people and to the Indians to have "the united counsel of the treatymaking power."<sup>30</sup>

President James K. Polk also invited the Senate's advice on negotiating a treaty. He regarded the Senate as "a branch of the treatymaking power, and by consulting them in advance of his own action upon important measures of foreign policy which may ultimately come before them for their consideration the President secures harmony of action between that body and himself."<sup>31</sup>

#### INDIAN TREATIES

Conclusion of treaties with Indian tribes ended in 1871. For almost a century, Indian tribes were treated as independent nations and subjected to the treatymaking power of the President and the Senate. However, the Constitution also empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Partly because of corruption and mismanagement in the Office of Indian Affairs, the House of Representatives began to object to its exclusion from Indian affairs.

<sup>26</sup> *Ibid.*, pp. 108-111.

<sup>27</sup> *Ibid.*, p. 150.

<sup>28</sup> *Journal of the Executive Proceedings of the Senate*, vol. 4, p. 98.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, p. 99.

<sup>31</sup> *Richardson*, vol. 5, p. 2299.

In 1869, the Senate added funds to an appropriations bill to fulfill Indian treaties it had approved, but the House refused to grant the funds.<sup>32</sup> In 1871, the House completed its reassertion by enacting this language: "Provided, That hereafter no Indian Nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."<sup>33</sup> That language was later incorporated into permanent law as 25 U.S.C. § 71 (1994).

#### CONFLICTS AND COOPERATION

Presidents have varied in their attitude toward Senate participation in the treaty process. Some have included Senators; others have kept the negotiation of treaties an executive monopoly. President Woodrow Wilson believed that the President should not consult with the Senate and treat it as an equal partner. He applied this theory to the Versailles Treaty, which the Senate twice rejected.<sup>34</sup> On the other hand, Presidents such as William McKinley, Warren Harding, and Herbert Hoover included Senators and Representatives as members of U.S. delegations that negotiated treaties. The details of the U.N. Charter were hammered out at a conference in San Francisco in 1945. Half of the eight members of the U.S. delegation came from Congress: Senators Tom Connally (D-Tex.) and Arthur H. Vandenberg (R-Mich.) and Representatives Sol Bloom (D-N.Y.) and Charles A. Eaton (R-N.J.).

During negotiations of the North Atlantic Treaty, Senators Thomas Connally and Arthur Vandenberg were with Secretary of State Dean Acheson "all the time," and Senator Walter George actually wrote one of the treaty provisions.<sup>35</sup> The Carter Administration consulted with at least 70 Senators during the final phase of the negotiations of the Panama Canal Treaty.<sup>36</sup> During 1977 and 1978, 26 Senators served in Geneva as official advisers to the SALT II negotiating team.<sup>37</sup>

The notion that the President is the exclusive negotiator of treaties and international agreements has been undercut by recent trade legislation, which gives Congress a direct role in the negotiation process. It has become the practice of Congress to offer the President a "fast-track" legislative procedure for implementing trade agreements with other nations. Fast-track means that the President's implementing bill is automatically introduced in Congress, committees must act within a specified number of days, Congress must complete floor action within a limited time, and amend-

<sup>32</sup> Cohen, Felix. *Felix Cohen's Handbook on Federal Indian Law* (1971), p. 66.

<sup>33</sup> Act of March 3, 1871, ch. 120, sec. 1, 16 Stat. 566. For further involvement of the House and the Senate in the treaty process, see Louis Fisher, "Congressional Participation in the Treaty Process," *University of Pennsylvania Law Review*, vol. 137, pp. 1511-1522 (1989).

<sup>34</sup> For academic refutations of Wilson's thesis, see Forrest R. Black, "The United States Senate and the Treaty Power," *Rocky Mountain Law Review*, vol. 4, pp. 1-19 (1931); Richard E. Webb, "Treaty-Making and the President's Obligation to Seek the Advice and Consent of the Senate with Special Reference to the Vietnam Peace Negotiations," *Ohio State Law Journal*, vol. 31, pp. 490-519 (1970).

<sup>35</sup> "Executive Privilege: The Withholding of Information by the Executive," hearings before the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971), pp. 262-264.

<sup>36</sup> I.M. Destler, "Treaty Troubles: Versailles in Reverse," *Foreign Policy*, vol. 35, p. 50 (1978-1979).

<sup>37</sup> I.M. Destler, "Executive-Congressional Conflict in Foreign Policy: Explaining It, Coping With It, in *Congress Reconsidered* (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1981), p. 310.

ments to the bill are prohibited either in committee or on the floor. Through this procedure, leaders of foreign governments (often with parliamentary systems that vest strong powers in the Executive) are assured that the trade pact will be given expedited consideration by Congress.

In obtaining these procedural benefits, the President recognizes that Members of Congress must be closely involved in the negotiations that produce the implementing bill. In 1991, after President George Bush asked Congress to extend the fast track for a trade pact with Mexico, U.S. Trade Representative Carla A. Hills told the Senate Finance Committee that the fast track “is a genuine partnership between the two branches.” Because Congress retained the power to defeat the implementing bill, Hills emphasized that Congress “has a full role throughout the entire process in formulating the negotiating objectives in close consultation as the negotiations proceed.”<sup>38</sup> President Bush gave Congress his “personal commitment to close bipartisan cooperation in the negotiations and beyond.”<sup>39</sup>

#### EXECUTIVE AGREEMENTS AND MULTILATERAL AGREEMENTS

Early practice ushered in the use of “executive agreements”: international agreements that are not submitted to the Senate as treaties.<sup>40</sup> Legislation in 1792 authorized the Postmaster General to make arrangements with foreign postmasters for the receipt and delivery of letters and packets.<sup>41</sup> Executive officials also entered into reciprocal trade agreements on the basis of statutory authority. Although such agreements lacked what the Supreme Court in 1912 called the “dignity” of a treaty, since they do not require Senate approval, they are nonetheless valid international compacts.<sup>42</sup>

After the Second World War, the United States entered into a dramatically increasing number of international agreements, and most of these were concluded as executive agreements. Table II-1 depicts the tremendous growth in the number of U.S. treaties and other international agreements in 50-year periods from 1789 through 1989 and Table II-2 depicts the annual growth since 1930. These statistics on treaties and agreements “concluded” means agreements that completed the negotiation stage and have been signed but may not yet have entered into force. In this data “concluded” does not mean agreements and treaties that have all entered into force.

As apparent from the charts, after 1945 the number of international agreements concluded annually escalated rapidly. One factor was the continuing increase in the number of newly independ-

<sup>38</sup>“Extension of Fast Track Legislative Procedures,” hearings before the Senate Committee on Finance, 102d Cong., 1st Sess. (1991), p. 9.

<sup>39</sup>Public Papers of the Presidents, 1991, I, p. 450.

<sup>40</sup>For discussion of domestic legal aspects of executive agreements, see Chapter IV.

<sup>41</sup>1 Stat. 239 (1792).

<sup>42</sup>*Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1912). In *United States v. Pink*, 315 U.S. 203, 230 (1942), Justice Douglas regarded executive agreements as having a “similar dignity” with treaties.

**Table II-1.—Treaties and Executive Agreements Concluded by the United States, 1789–1989<sup>1</sup>**

Period	Treaties	Executive Agreements
1789–1839 .....	60	27
1839–1889 .....	215	238
1889–1939 .....	524	917
1939–1989 .....	702	11,698
<b>Total .....</b>	<b>1,501</b>	<b>12,880</b>

<sup>1</sup> Data on the period since 1945 has been furnished by the Department of State, Office of the Assistant Legal Adviser for Treaty Affairs. Data prior to 1945 is from the Congressional Record, May 2, 1945, p. 4118. In Borchard, Edwin M. *Treaties and Executive Agreements*. *American Political Science Review*, v. 40, no. 4, August 1947, p. 735.

**Table II-2.—Treaties and Executive Agreements Concluded by the United States, 1930–1999**

Year	Treaties	Executive Agreements	Year	Treaties	Executive Agreements	Year	Treaties	Executive Agreements
1930	25	11	1950	11	157	1970	20	183
1931	13	14	1951	21	213	1971	17	214
1932	1	16	1952	22	291	1972	20	287
1933	9	11	1953	14	163	1973	17	241
1934	14	16	1954	17	206	1974	13	229
1935	25	10	1955	7	297	1975	13	264
1936	8	16	1956	15	233	1976	13	402
1937	15	10	1957	9	222	1977	17	424
1938	12	24	1958	10	197	1978	15	417
1939	10	26	1959	12	250	1979	28	378
1940	12	20	1960	5	266	1980	26	321
1941	15	39	1961	9	260	1981	12	322
1942	6	52	1962	10	319	1982	17	343
1943	4	71	1963	17	234	1983	23	282
1944	1	74	1964	3	222	1984	15	336
1945	6	54	1965	14	204	1985	8	336
1946	19	139	1966	14	237	1986	17	400
1947	15	144	1967	18	223	1987	12	434
1948	16	178	1968	18	197	1988	21	387
1949	22	148	1969	6	162	1989	15	363
			1990	20	398			
			1991	11	286			
			1992	21	303			
			1993	17	257			
			1994	24	338			
			1995	17	300			
			1996	48	260			
			1997	40	257			
			1998	25	259			
			1999	26	199			

ent nations with which the United States interacts. Treaties in the early days of the Nation were limited to Indian tribes and a comparatively few foreign powers, including France, Great Britain, Algiers, Spain, and Russia. By January 1, 1999, the United States had bilateral treaties or other international agreements with more than 200 countries.<sup>43</sup>

Another factor was the growing international cooperation of the United States, and the continuing emergence of new fields of international cooperation, such as atomic energy, space research, and satellites. Agreements with a single country often cover a whole range of subjects ranging from aviation, commerce, and defense to environmental cooperation, patents, and taxation. The United States had more than 200 international agreements with the United Kingdom in force in 1999, for example, listed under almost 60 different subjects.<sup>44</sup>

Cumulatively, in 1989 the United States was a party to 890 treaties and 5,117 executive agreements.<sup>45</sup> The total number of treaties and other international agreements in force increases with time because, once entered into, agreements remain in force until they expire by their own terms or are denounced, replaced, or superceded. While some international agreements are by their terms temporary or limited to a specific time period, others are intended to be more or less permanent. To illustrate, still listed among treaties in force with the United Kingdom are the Paris Peace Treaty of 1783, the Jay Treaty of 1794, and the Treaty of Peace and Amity signed at Ghent in 1814.

#### INCREASING PROPORTION OF EXECUTIVE AND STATUTORY AGREEMENTS

Accompanying the increase in international agreements was the increase of international agreements other than treaties, that is, agreements not submitted to the Senate. As the preceding table shows, in the first 50 years of U.S. history, twice as many treaties were concluded as executive agreements. In the 50-year period from 1839 to 1889 a few more executive agreements than treaties were concluded. In the 50-year period from 1889 to 1939 almost twice as many executive agreements as treaties were concluded. In the period since 1939 executive agreements have comprised more than 90 percent of the international agreements concluded.

The growth in executive agreements may be accounted for by a number of factors.<sup>46</sup> A primary factor is the sheer increase in volume of the amount of business and contacts between the United States and other countries. Many observers believe it would be impractical to submit every international agreement the United States enters to the Senate as a treaty. An executive agreement is

<sup>43</sup>U.S. Department of State. *Treaties in Force*. A list of treaties and other international agreements of the United States in force on January 1, 1999, pp. iii-v.

<sup>44</sup>*Treaties in Force*, 1999, pp. 301-312.

<sup>45</sup>Information from the U.S. Department of State, Office of the Assistant Legal Adviser for Treaty Affairs, September 29, 2000. Comprehensive and detailed data for the years after 1989 is no longer being tabulated by the State Department.

<sup>46</sup>Some of the increase since 1973 may be attributed to the counting of agency level agreements that may not have been counted prior to the passage of the Case-Zablocki Act in 1973, just as the decrease in 1991 may be accounted for partly by the cessation of the reporting under the Case-Zablocki Act of agricultural commodity agreements. See Chapter X.

usually much simpler to conclude or amend than a treaty. The Senate, with an already heavy workload, would quickly find itself overburdened if all international agreements, no matter how minor in importance, were submitted to it for advice and consent.

Most executive agreements are concluded under the authority of a statute or prior treaty.<sup>47</sup> In a wide variety of laws Congress has authorized the executive branch to conclude international agreements in fields including foreign aid, agriculture, and mutual security. Similarly, the Senate has approved numerous treaties that implicitly or explicitly authorized further agreement among the parties. As an example, the executive branch has concluded numerous defense and base agreements on the basis of the North Atlantic Treaty and other security treaties. One study found that 88.3 percent of international agreements reached between 1946 and 1972 were based at least partly on statutory authority; 6.2 percent on treaties, and 5.5 percent solely on executive authority.<sup>48</sup>

An increasing number of international agreements require the specific approval of Congress before entry into force rather than being submitted as treaties to the Senate. On occasion, this has been done at the initiative of the executive branch with the knowledge that an international agreement was unlikely to receive the approval of two-thirds of the Senate, or to assure that funds for implementation would be approved by the House of Representatives. One historian knowledgeable about executive agreements wrote, "On certain occasions, when the treatymaking method has failed or seemed likely to fail, he [the President] has accomplished his purpose by substituting the more facile type of instrument."<sup>49</sup>

More often, legislation has required that executive agreements in some categories be submitted to Congress for specific approval or for tacit approval (through no negative action in a specified time period) before they enter into force. In trade legislation, Congress has authorized the President to negotiate certain agreements but has required that Congress approve the agreements, as well as requiring the executive branch to notify and consult with Congress during the negotiations. Nuclear, fisheries, and social security agreements are among those required by law to lie before Congress for specified time periods before they can enter into force. During this period, Congress can pass legislation disapproving the agreements, often with expedited procedures.

The increasing use of international agreements other than treaties challenged the Senate to oversee that the executive agreement process was not used when agreements should properly be submitted to the Senate as treaties. Similarly, the increasing rise of agreements requiring approval by Congress, while assuring a congressional role, challenged the Senate to distinguish which types of agreements required submission to the Senate under the traditional treaty procedure.<sup>50</sup>

<sup>47</sup> See also Chapter IV, section on Executive Agreements.

<sup>48</sup> U.S. Congress, Senate Committee on Foreign Relations, *International Agreements: An Analysis of Executive Regulations and Practices*. Prepared by the Congressional Research Service, Library of Congress, 1974-1975, by R. Roger Majak. Committee Print, 1977, p. 22. See further discussion in Chapters IV and X.

<sup>49</sup> McClure, Wallace Mitchell. *International Executive Agreements*. New York, Columbia University Press, 1941, p. 4.

<sup>50</sup> See Chapter X.

## GROWTH IN MULTILATERAL AGREEMENTS

The third main change in the field of international agreements is the growth of multilateral agreements, agreements among three or more parties as opposed to bilateral treaties between two parties. Multilateral agreements for the United States were rare prior to the 20th century. After the end of the Second World War, their numbers grew as nations found a multilateral treaty could render unnecessary dozens of bilateral treaties and establish an agreed international standard. From 1980 through 1999, the United States concluded or acceded to 450 multilateral agreements.<sup>51</sup>

Multilateral agreements vary widely in number of parties, subject matter, and significance. Some have only three parties, but others have more than 150. As of October 2000, for example, the United Nations had 189 members.<sup>52</sup> Multilateral agreements cover more than 200 different subject areas ranging from Africa to World War II and agriculture to women's political rights.<sup>53</sup> Many multilateral agreements establish international organizations, which in turn conclude bilateral agreements with the United States. The United States has concluded bilateral agreements with approximately 50 international organizations.<sup>54</sup> Some of these concern routine matters such as reimbursement of taxes of employees of these organizations, but others concern subjects of broader significance, such as the application of international atomic energy safeguards in the United States.

Although multilateral executive agreements being concluded outnumber multilateral treaties, multilateral agreements form a far larger proportion of treaties than of executive agreements. Of 415 treaties that the United States concluded from 1980 through 1999, 155 (37 percent) were multilateral; of 6,381 executive agreements, 294 (4.6 percent) were multilateral.<sup>55</sup>

Like executive agreements, the growing number of multilateral agreements brought new challenges to the role of the Senate in the treaty-making process. A major challenge was the pressure to approve a multilateral treaty without reservation because of the large number of nations that had been involved and the difficulty of renegotiation. Some multilateral treaties have contained an article prohibiting conditions. The Senate Foreign Relations Committee has said that its approval of these treaties should not be construed as a precedent for such clauses in future treaties. In the committee's view, "The President's agreement to such a prohibition can not constrain the Senate's constitutional right and obligation to give its advice and consent to a treaty subject to any reservation it might determine is required by the national interest."<sup>56</sup>

<sup>51</sup> Information from Office of the Assistant Legal Adviser for Treaty Affairs, September 29, 2000.

<sup>52</sup> The 189th member was Tuvalu.

<sup>53</sup> See *Treaties in Force, 1999*, pp. v–vii, 331–478.

<sup>54</sup> Compiled from *Treaties in Force, 1999*, pp. iii–v.

<sup>55</sup> Information from Office of the Assistant Legal Adviser for Treaty Affairs, September 29, 2000.

<sup>56</sup> United Nations Framework Convention on Climate Change. S. Exec. Rept. 102–55 to accompany Treaty Doc. 102–38, October 1, 1992, p. 15. See also Protocol on Environmental Protection to the Antarctic Treaty. S. Exec. Rept. 102–54 to accompany Treaty Doc. 102–22, September 22, 1992, p. 7.

### III. INTERNATIONAL AGREEMENTS AND INTERNATIONAL LAW<sup>1</sup>

Treaties are governed by international law and are a primary source of international law. They play a central role in the orderly conduct of relations among states. In order for treaties to perform this role, internationally recognized rules governing treaties have developed. Traditionally, treaty rules were established by custom and practice, and as a result they were not precisely defined.

Under international law, the term “treaty” is applied to all binding international agreements between states or between states and international organizations. The term “international agreement,” however, includes both binding and non-binding agreements. The term “executive agreement” is a creature of U.S. domestic law, not international law; “executive agreements” that are binding international agreements are considered to be “treaties” in international law terminology.

This chapter examines the definition of a treaty under international law and utilizes the 1969 Vienna Convention on the Law of Treaties and the Restatement (Third) of the Foreign Relations Law of the United States, as primary sources for such law. Because the United States has not ratified the convention, its international law status for non-parties is discussed. The chapter also reviews the criteria, under international law, which make an agreement binding; the principles which can render a binding agreement invalid; and the status of “non-binding” agreements and statements under international law.

#### A. THE VIENNA CONVENTION ON THE LAW OF TREATIES

##### INTERNATIONAL LAW STATUS

The Vienna Convention is in force internationally and has been ratified by or acceded to by 91 countries.<sup>2</sup> The United States has signed but has not ratified the Vienna Convention and thus is not legally bound by its provisions.<sup>3</sup> Nevertheless, the convention retains its status as a primary source of international law concerning treaties, even for non-parties. The convention is partly a codification of customary international law, but also partly a development of international law and a reconciliation of different theories and

<sup>1</sup> Prepared by Margaret Mikyung Lee, Legislative Attorney.

<sup>2</sup> The Vienna Convention on the Law of Treaties, concluded at Vienna on May 23, 1969, entered into force for the countries that had ratified it on January 27, 1980, upon its ratification or accession by 35 foreign countries. As of January 19, 2001, it had 46 signatories and 91 parties. For the text of the Vienna Convention on the Law of Treaties and a list of parties thereto, see Appendix 5.

<sup>3</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, S. Exec. Doc. L, 92-1 (1971) (hereafter cited as Vienna Convention).



practices; provisions in the latter category are binding only on the parties.<sup>4</sup> Furthermore, the convention was not intended to be a complete codification of treaty law, and issues not covered by the convention continue to be covered by principles of customary international law.<sup>5</sup> The Department of State describes the convention as a widely regarded “major achievement in the development and codification of international law.”<sup>6</sup>

In his letter transmitting the Vienna Convention to the President, Secretary of State William P. Rogers referred to it as “\* \* \* a generally agreed body of rules to govern all aspects of treaty making and treaty observance.” He called the convention “\* \* \* an expertly designed formulation of contemporary treaty law \* \* \* [that] \* \* \* should contribute importantly to the stability of treaty relationships. \* \* \* Although not in force, [for the United States] *the Convention is already recognized as the authoritative guide to current treaty law and practice.*” (emphasis added.)<sup>7</sup>

President Richard Nixon attributed similar status to the convention when, upon sending it to the Senate, he stated that:

The growing importance of treaties in the orderly conduct of international relations has made increasingly evident the need for clear, well-defined, and readily ascertainable rules of international law applicable to treaties. I believe that the codification of treaty law formulated by representatives of the international community and embodied in the Vienna Convention meets this need.<sup>8</sup>

The State Department’s position on the status of the Vienna Convention largely accords with the positions of most members of the

<sup>4</sup>I.A. Shearer, *Starke’s International Law* 397 (11th ed. 1994); M.N. Shaw, *International Law* 561 (3d ed. 1991).

<sup>5</sup>*Ibid.*

<sup>6</sup>Statement regarding the Vienna Convention (unpublished) of Carl F. Salans, Acting Legal Adviser, Department of State, before the Senate Committee on Foreign Relations, August 3, 1972.

<sup>7</sup>S. Exec. Doc. L, at 1.

<sup>8</sup>S. Exec. Doc. L, Letter of Transmittal. Despite the authoritative status of the convention under international law, in a few instances it appears to differ from customary international law and U.S. practice. For example, the convention definition of a treaty does not include oral agreements (Article 2) although according to the convention, its definition shall not affect the legal force of such agreements (Article 3(a)). Also, the convention permits a treaty to prohibit reservations (Article 19), which is contrary to the strong position taken by the Senate Foreign Relations Committee against the inclusion of provisions in agreements that would inhibit the power of the Senate to attach reservations. However, it has recommended advice and consent to some treaties containing such provisions, while affirming opposition to such provisions and declaring that approval of a treaty containing such a provision is not to be considered a precedent for acceptance of such provisions. See S. Exec. Rept. 105-25, at 18-19 (1998) (the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty); S. Exec. Rept. 102-55, at 15 (1992) (the United Nations Framework Convention on Climate Changes); S. Exec. Rept. 102-54 (1992) (the Protocol on Environmental Protection to the Antarctic Treaty); S. Exec. Rept. 85-3, at 17 (1957) (Statute of International Atomic Energy Agency). Regarding differences between customary and conventional treaty law, see American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) (hereafter cited as Rest. 3d). The Restatement accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States even though the United States has not adhered to the convention. In a few instances, the convention moves beyond or deviates from accepted customary international law, and the Restatement therefore departs from the convention pending U.S. adherence to it. In a few other instances, the difference between the convention and customary law is a matter of emphasis and degree and can be accommodated within the text of the convention. Since the United States may become a party to the convention, the Restatement uses the text of the convention as a guide, with deviations indicated as appropriate in Comment and Reporters’ notes. Rest. 3d, Vol. I, Part III, Introductory Note, at 145.

international community.<sup>9</sup> This status stems in part from the concept that international treaties constitute one of the most significant sources of international law. For example, the Statute of the International Court of Justice directs the Court, when deciding disputes, to apply international law gleaned from a variety of sources beginning with international conventions.<sup>10</sup>

Multilateral agreements, of which the Vienna Convention is a prime example, are not only an evidentiary source of recognized customary international law. They may also contribute to the progressive development of international law by expressing rules which may not yet be fully recognized by the international community. The International Court of Justice has on occasion noted that provisions contained in such agreements may be binding on a state as customary law even if a state is not a party to the agreement.<sup>11</sup> A determination of whether a given provision of such an agreement expresses customary law may entail a consideration of (1) whether the provision was intended to codify settled law at the time of drafting, (2) whether an evolving rule of settled law expressed by the provision had become settled customary law by the time the agreement was concluded or entered into force, and finally, (3) whether a rule, which was experimental or evolving when the agreement expressing it in a provision was concluded or entered into force, has become customary international law with the passage of time since the agreement's conclusion or entry into force.<sup>12</sup> So the Vienna Convention contains rules governing treaty relationships that are recognized as general principles of international law by the executive and judicial branches of the United States, as well as by the international community, even though the United States has not ratified it.<sup>13</sup> Senate advice and consent to future treaties will, as a result, be influenced by the Vienna Convention, even if the United States does not become a party to it.

#### SENATE ACTION ON THE CONVENTION

The Vienna Convention on the Law of Treaties was sent to the Senate on November 22, 1971, and remains in committee. The Senate Committee on Foreign Relations ordered reported a Resolution of Advice and Consent to the Ratification of the Convention on Sep-

<sup>9</sup>The convention is the final product of a U.N. Conference on the Law of Treaties. The International Law Commission, which initially drafted the convention, was established to implement Article 13 of the U.N. Charter, which called for the General Assembly to initiate studies and make recommendations for purposes that include the "progressive development of international law and its codification." Article 1 of the International Law Commission's statute charged it with this task. See G.A. Res. 174 (II), U.N. GAOR, 2d Sess., November 21, 1947. Members of the U.S. Senate were apparently not participants in, and not consulted on, the Commission's drafting or adoption of its final draft text of the Vienna Convention. However, as the Commission's membership consists of individual members and not government delegations, no requirement for either formal or informal Senate involvement existed at this stage of the convention's formulation.

<sup>10</sup>Article 38 of the Statute of the International Court of Justice, June 26, 1945. Other sources of international law cited by this Article include international custom and general principles of law recognized by civilized nations. Domestic judicial decisions and the teachings of judicial scholars are named as subsidiary means for the determination of rules of international law.

<sup>11</sup>See *North Sea Continental Shelf cases (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 ICJ 3, 28-29, 37-46, 53 (Feb. 20).

<sup>12</sup>*Ibid.*

<sup>13</sup>See, for example, *Weinberger v. Rossi*, 456 U.S. 25, 29 note 5 (1982) (citing the draft Rest. 3d, Introductory Note 3, p. 74 (Tent. Draft No. 1, Apr. 1, 1980)). For additional discussion, see Maria Frankowska, *The Vienna Convention on the Law of treaties before United States Courts*, 28 Va. J. Int'l L. 281-391 (1988).

tember 7, 1972, subject to an understanding and interpretation. The Department of State opposed the wording of the understanding, and the convention was reconsidered in executive session by the committee, but not reported out.<sup>14</sup>

The wording proposed by the committee read:

subject to the interpretation and understanding, \*\*\* that, in accordance with Article 46 of the Convention [relating to a state's right to invalidate a treaty if its consent was obtained by a manifest violation of an internal law of fundamental importance], since Article 2, Section 2, of the United States Constitution states that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," *it is a rule of internal law of the United States of fundamental importance that no treaty (as defined by paragraph 1(a) of Article 2 of the Convention) is valid with respect to the United States, and the consent of the United States may not be given regarding any such treaty, unless the Senate of the United States has given its advice and consent to such treaty, or the terms of such treaty have been approved by law, as the case may be.*<sup>15</sup>

Acceptance of this wording would have achieved two objectives desired by the Senate committee. First, it would have made clear that the Vienna Convention does not establish an international law rule which could hold the United States bound to a treaty which a President had signed, but which the Senate had not accepted.<sup>16</sup> Furthermore, it would have made clear that an international instrument is voidable if concluded by a President in the form of an executive agreement that should have been treated either as a treaty under Article II, Section 2, to which the Senate should have consented, or presumably a congressional-executive agreement to which both Houses of Congress should have agreed. The wording of the proposed Senate interpretation would seem to make agreements concluded by a President, on his own independent constitutional authority, subject to Senate advice and consent. The wording, therefore, could be seen as severely limiting a President's independent authority to make binding and firm international commitments.

The wording of the Senate's interpretation was not acceptable to the executive branch because the term "treaty" under the Vienna Convention includes agreements which are not "treaties" under Article II, Section 2, of the Constitution.<sup>17</sup> In response to the Senate's proposed interpretation and understanding, the Department of State suggested that the Senate's intent could be expressed along the following lines: "with the understanding and interpretation that ratification of the Convention by the United States does not give any international agreement of the United States any internal

<sup>14</sup>See U.S. Department of State, *Digest of United States Practice in International Law*, 1974, 195-198 (1975) (hereafter cited as *Digest*, 1974).

<sup>15</sup>*Ibid.*, at 195 (comments and emphasis added).

<sup>16</sup>The convention does not definitively resolve this issue. See later discussion in this chapter entitled: "Invalidation by Violation of Domestic Law Governing Treaties."

<sup>17</sup>This is the part of the U.S. Constitution which requires Senate advice and consent to treaties.

standing under the Constitution of the United States that it would not have in the absence of the Convention.”<sup>18</sup>

The Department of State, in comments on a subsequently proposed Senate interpretation suggested by the Chief of Staff of the Foreign Relations Committee, highlighted the issue as follows:

\*\*\* there is a very considerable difference between the use of the term “treaty” in the Vienna Convention and the generally accepted use of that term in the internal law of the United States.

\*\*\* the term “treaty” under the internal law of the United States is restricted to the term as used in Article II, Section 2, of the Constitution.

\*\*\* the term treaty as used in our internal law does *not* include international agreements made pursuant to a treaty, international agreements authorized by Congress, or international agreements made pursuant to the President’s constitutional authority [emphasis added].<sup>19</sup>

In 1984, Robert Dalton, Assistant Legal Adviser for Treaty Affairs, explained the department’s objection to the interpretation and understanding proposed by the committee in 1973 in the following way:

\*\*\* The Department was concerned that other countries might conclude that, by making the interpretation and understanding, the United States was intending to abandon the practice of making executive agreements \*\*\*, or was attempting to avoid application of the principle of *pacta sunt servanda* to those agreements by reserving the possibility of invoking article 46 of the Vienna Convention if it found the provisions of any such agreement to be unduly onerous.<sup>20</sup>

He stressed that the Vienna Convention had already influenced U.S. treaty practice in a number of ways, and that not being a party sometimes made it difficult to invoke the convention’s rules in treaty relations with states that were parties.

In the same forum, two former chief counsels of the Foreign Relations Committee supported becoming party to the convention, although both appeared to favor some kind of understanding to deal with the executive agreement issue. Frederick Tipson stressed the importance for the United States to follow through on negotiations after they had been concluded and treaties signed. But he also cited the need to clarify a number of important domestic constitutional procedures. In his view “the United States could not afford to leave in limbo a series of important issues which remained outstanding between the Congress and the executive branch in the

<sup>18</sup>See Digest, 1974, *supra* note 14, at 197.

<sup>19</sup>Letter dated January 31, 1974, Digest, 1974, *supra* note 14, at 196. The text of the alternative interpretation and understanding, proposed on November 8, 1973, by Carl Marcy, the Chief of Staff of the Foreign Relations Committee at the time, would make any resolution of ratification “*subject to the interpretation and understanding, which understanding and interpretation are made a part and condition of the resolution of ratification, that within the meaning of Article 46 of the Convention, Article 2, Section 2, of the United States Constitution, stating that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur, is a rule of the internal law of the United States of fundamental importance*” [emphasis added].

<sup>20</sup>Robert E. Dalton, The Vienna Convention on the Law of Treaties: Consequences for the United States, in Proceedings of the American Society of International Law at its 78th Annual Meeting 277 (1984).

area of international agreements. Some effort should be made to remedy the situation by attempting to arrive at a consensus on several of these issues.”<sup>21</sup> Michael Glennon said the benefits of ratification outweighed the costs, and favored a “stand-still provision” that nothing in the convention should be construed as conferring any authority upon the President under U.S. law that he would not have had in its absence, along the lines of the earlier State Department proposal.<sup>22</sup>

In 1986 the Foreign Relations Committee again held a hearing on the Vienna Convention on the Law of Treaties as well as several other treaties. Mary V. Mochary, Deputy Legal Adviser of the Department of State, spoke of the advantages of becoming a party to the treaty. She stressed the wide support for the convention in the academic and legal community, and the advantages of having a precise statement of customary law. She added, “Moreover, the Convention includes procedural mechanisms for settlement of disputes that do not reflect customary law and cannot be invoked by the United States until it becomes a party to the convention.”<sup>23</sup>

On the issue of executive agreements, Arthur Rovine, a former Assistant Legal Adviser on Treaty Affairs for the Department of State and representing the American Bar Association, expressed the view that the Vienna Convention had fallen “victim in the post-Vietnam and post-Watergate period to an attempt to limit the President’s constitutional and statutory power to enter into international executive agreements.” But in his view these were old issues having no bearing on the convention, and had been resolved by the Case-Zablocki Act of 1972 on the reporting of all international executive agreements to Congress and related procedures on consultation on the form of an agreement.<sup>24</sup>

At the hearing, Assistant Legal Adviser for Treaty Affairs Robert Dalton specified that the administration favored Senate advice and consent to the convention without reservation or understanding. In answer to supplementary written questions from the Foreign Relations Committee, the State Department reiterated its objections to the interpretation and understanding that had been proposed in 1972 by Senator Case. It argued that the proposed understanding would hamper the ability of the President to resolve international differences or undertake international cooperation by concluding agreements quickly, and that it would put the United States at a disadvantage in international negotiations by depriving it of the ability to make agreements with immediate binding effect to obtain and formalize concessions from other governments.<sup>25</sup>

The committee also submitted the question of whether the administration believed the U.S. constitutional requirement for advice and consent to be “a rule of internal law of fundamental importance.” The department replied the administration believed it was “a rule of internal law of fundamental importance,” enshrined in

<sup>21</sup> *Ibid.*, at 283–284.

<sup>22</sup> *Ibid.*, at 292.

<sup>23</sup> Private Law Treaties: Hearing on S. Exec. Doc. L, 92–1, S. Treaty Docs. 97–12, 98–9, 98–27, 98–29, 99–11, and S. 1828 Before the Senate Comm. on Foreign Relations, 99th Cong. (1986) (stenographic transcript of Hearing, June 11, 1986) (hereafter cited as Vienna Convention, 1986 hearings).

<sup>24</sup> Vienna Convention, 1986 hearings. For discussion of the Case-Zablocki Act, see Chapter X.

<sup>25</sup> Vienna Convention, 1986 hearings. Answers to questions submitted by J. Edward Fox, Assistant Secretary, Legislative and Intergovernmental Affairs, July 24, 1986.

the Constitution. But, the department said, other relevant rules enshrined in the Constitution were also rules of fundamental importance, including the President's power as Commander-in-Chief, the executive power clause, and clauses relating to the reception of ambassadors and taking care that laws be faithfully executed. The department continued:

If the resolution of advice and consent is to refer to one rule of internal law of fundamental importance relating to the conclusion of treaties as that term is used in the Vienna Convention on the Law of Treaties, it should also refer to the other relevant rules of internal law. To draft such an understanding and interpretation would require the preparation of a gloss on the Constitution on which history shows it would be exceedingly difficult for the executive branch and the Congress as a whole promptly to agree. To fail to include all the relevant rules would confuse foreign countries and make it more difficult for the President to exercise the full range of powers relating to foreign affairs accorded to him under the Constitution.<sup>26</sup>

Thus the Vienna Convention has become caught up in a long-term controversy on the roles of the legislative and executive branches in the making of international agreements.

#### B. TREATY DEFINITION

The Vienna Convention establishes a comprehensive definition of a treaty in international law without prejudice to differing uses of the term "treaty" in the domestic laws of various states.<sup>27</sup>

Under the definition of a treaty provided by the Vienna Convention,

treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>28</sup>

The Vienna Convention applies the term "treaty" to formal agreements designated as treaties and also to other agreements in simplified form, such as exchanges of notes. While the convention does not encompass unwritten agreements or agreements concluded with or by international organizations, it does not affect the validity of such agreements under international law.<sup>29</sup>

<sup>26</sup> Ibid.

<sup>27</sup> Vienna Convention, Art. 2, § 2.

<sup>28</sup> Vienna Convention, Art. 2, § 1(a). Note also that the U.N. Charter employs the term "treaty" but does not define it. The charter, in Article 102, provides "Every treaty and every international agreement entered into by any Member of the United Nations \*\*\* shall \*\*\* be registered with the Secretariat and published by it." Note further that the U.N. Secretariat "follows the principle that it acts in accordance with the position of the Member States submitting an instrument for registration that so far as that party is concerned the instrument is a treaty or an international agreement within the meaning of Art. 2. Registration of an instrument submitted by a Member State, therefore, does not imply a judgment by the Secretariat on the nature of the instrument, the status of a party, or any similar question." See Leland Goodrich, Edvard Hambro, and Anne Patricia Simons, *Charter of the United Nations* 612 (3d ed. 1969).

<sup>29</sup> Vienna Convention, Art. 3.

## C. CRITERIA FOR A BINDING INTERNATIONAL AGREEMENT

A paramount principle of international law is *pacta sunt servanda*—that treaties must be kept. Treaties, therefore, are binding under international law. However, in the conduct of international relations, nations conclude business contracts or enter into understandings that fall short of being binding agreements with the status of international treaties.<sup>30</sup> It is, therefore, vital to understand the elements that are necessary for an agreement to be considered a treaty under international law. Important criteria in determining this include: (1) the intention of the parties to be bound under international law, (2) the significance of the agreement, (3) the specificity of the agreement, and (4) the form of the agreement.

## INTENTION OF THE PARTIES TO BE BOUND UNDER INTERNATIONAL LAW

So far as the U.S. State Department is concerned, treaties cannot be concluded unless the parties involved intend their acts to be legally binding.<sup>31</sup> Documents that are intended to invoke purely political or moral obligations are not, therefore, treaties under international law. The Final Act of the Conference on Security and Cooperation in Europe (CSCE) or “Helsinki Accords” adopted August 2, 1975, and most of the subsequent agreements concluded by the CSCE fall into this category.<sup>32</sup> For example, the Vienna Document of March 4, 1992, states in paragraph 156: “The measures adopted in this document are politically binding and will come into force on 1 May 1992.”<sup>33</sup>

Furthermore, a binding international agreement must be subject to international law and not the law of another legal system. For example, if an agreement specifies that it is to be governed by the law of a particular nation, the mention of governing domestic law would probably be construed as negating an intent to be bound by international law. To illustrate this point, the State Department notes that a (hypothetical) foreign military sales contract, specifying that it is governed by the law of the District of Columbia, is

<sup>30</sup>The Department of State has compiled guidelines for internal purposes for determining the elements of a legally binding international agreement. The gist of these guidelines is: (1) The parties to an agreement must intend to be bound under international law. (2) The agreement must be of international significance and not deal with trivial matters. (3) The obligations undertaken must be clearly specified and be objectively enforceable. (4) The agreement must have two or more parties. (5) The agreement will preferably use a customary form. If not, content and context must reveal a legally binding intent. See Memorandum of March 12, 1976, from Monroe Leigh, Legal Adviser, Department of State, to all key Department personnel, reprinted in U.S. Department of State, *Digest of United States Practice in International Law*, 1976, 263–267 (1977) (hereafter cited as Department of State Memo of March 12, 1976). The memo stated that for “purposes of implementing legal requirements with respect to publication of international agreements and transmittal of international agreements to Congress, the Legal Adviser applies the \* \* \* [above] criteria in deciding what constitutes an international agreement.” These guidelines were subsequently incorporated in regulations designed to assist agencies in determining if agreements constitute international agreements within the meaning of the Case-Zablocki Act. See 22 CFR part 181. The text of the regulations are contained in Appendix 3 of this volume.

<sup>31</sup>Department of State Memo of March 12, 1976, *supra* note 30.

<sup>32</sup>Conference on Cooperation and Security in Europe: Final Act, Helsinki, August 1, 1975, 14 I.L.M. 1292 (1975); 73 Dep’t St. Bull. 323 (1975) (hereafter cited as Helsinki Accords).

<sup>33</sup>Vienna Document 1992 of the Negotiations on Confidence and Security-Building Measures Convened in Accordance with the Relevant Provisions of the Concluding Document of the Vienna Meeting of the Conference on Security and Cooperation in Europe, 3 Dep’t St. Dispatch Supp. (July 1992).

not a binding international agreement.<sup>34</sup> Although many international agreements are silent as to which law governs them, the intent of the makers normally is that international law apply.<sup>35</sup>

This element—that the parties must intend an agreement to be legally binding under international law—is incorporated into the definition of an international agreement in the Restatement (Third) of the Foreign Relations Law of the United States. The Restatement, while lacking the force of formally enacted law, has been cited as evidence of the law in the decisions of U.S. courts.<sup>36</sup> The Restatement defines an international agreement in the following manner:

“International agreement” means an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law;  
\* \* \* .<sup>37</sup>

#### SIGNIFICANCE

To have the status of a treaty under international law, an agreement should concern itself with significant matters. It cannot deal with trivial matters alone, even if they are couched in legal language and form.<sup>38</sup> The significance of an agreement is frequently characterized as a matter of degree. For example, “a promise to sell one map to a foreign nation is not an international agreement; a promise to sell one million maps probably is \* \* \* .”<sup>39</sup> The exact point, however, between 1 and 1 million maps at which the transaction becomes an international agreement is difficult to determine. Since there are no detailed guidelines to assist in deciding the level of significance needed, the answer is largely a matter of judgment within the context of a particular transaction.<sup>40</sup>

<sup>34</sup> Department of State Memo of March 12, 1976, *supra* note 30 at 265.

<sup>35</sup> *Ibid.*

<sup>36</sup> See, for example, *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981). Rest. 3d, § 301(1) (1987). The Restatement (Third) was adopted and promulgated by the American Law Institute (a private organization) on May 14, 1986. The “Restatement represents the opinion of the American Law Institute as to the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law.” *Ibid.*, at 3.

<sup>37</sup> Rest. 3d, § 301(1).

<sup>38</sup> Department of State Memo of March 12, 1976, *supra* note 30.

<sup>39</sup> *Ibid.*

<sup>40</sup> See Arthur Rovine, Separation of Powers and International Agreements, 52 Ind. L. J. 402–403 (1950). Note also that the Department of State provides some guidance in a letter of September 6, 1973, from Acting Secretary of State Kenneth Rush to Secretary of Defense James R. Schlesinger. This letter requires transmittal to the State Department [for possible transmittal to the Congress] of “\* \* \* any agreements of political significance, any that involve a substantial grant of funds, any involving loans by the United States or credits payable to the United States, any that constitute a commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations, and any that involve continuing or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment.” For the full text of the letter, see Congressional Oversight of Executive Agreements: Hearing Before the Subcommittee on Separation of Powers, Senate Committee on the Judiciary, 94th Cong. 101 (1975). As noted above, the meaning of the term “treaty” under the U.S. Constitution and domestic laws is narrower than its meaning under international law. A number of “executive agreements” under domestic laws would qualify as treaties under international law, but not all agreements concluded by the executive branch have the significance sufficient to be considered treaties under international law. The guidelines in the Department of State letter are meant to enable executive branch agencies to determine which executive agreements qualify as treaties under international law and therefore must be reported to Congress.



## SPECIFICITY

A treaty should clearly and specifically describe the obligations legally assumed by the parties.<sup>41</sup> This requires that the terms setting out the obligations assumed by parties be worded specifically, so that an observer can determine fairly objectively whether a party is legally bound. Thus, international diplomatic undertakings which do not specifically describe precise legal obligations, are not legally binding. An example would be a promise "to help develop a more viable economic system." In contrast, a promise to deliver 1,000 tractors of a specified type, for a specified amount of money, to be delivered at a specified place, on a specific date, sets forth the definable obligations necessary to make such a promise legally binding.

This does not mean, however, that every provision of a treaty must meet this criterion of specificity in order for the treaty to be legally binding. In fact, treaties often contain individual clauses which describe in non-specific terms obligations assumed by the parties.

## FORM OF THE AGREEMENT

Form is not central to the validity of a binding international agreement, but it may reflect the intention of the parties to conclude an agreement, or something less than an agreement.<sup>42</sup> Thus, in all probability a formal document entitled "agreement"—one with final clauses, signature blocks, entry into force dates, and dispute settlement provisions—would reflect a general intent to conclude an international agreement.

It is emphasized that the substance, and not the form, of the agreement determines whether it is a treaty. Occasionally, however, the failure to follow a customary form to conclude an agreement may constitute evidence of an intent not to be legally bound. In such cases, it is important to determine whether the general content of the agreement and the context of its making reveal an intent to be legally bound; if so, the lack of a customary or proper form will not be decisive. Moreover, if an agreement is the product of formal international negotiations by diplomats, this may be construed as supporting evidence of an intent to be legally bound.<sup>43</sup>

Inasmuch as the substance, not the form, governs the validity of an international agreement, it is possible to have binding agreements that are not in writing, although in practice this rarely occurs. Hence, "whether a statement is made orally or in writing makes no essential difference \* \* \*."<sup>44</sup> The Vienna Convention does

<sup>41</sup> Department of State Memo of March 12, 1976, *supra* note 30, at 266.

<sup>42</sup> *Ibid.* Also, the International Court of Justice has consistently stated that form "\*\*\* is not a domain in which international law imposes any special or strict requirements." *Nuclear Tests case (Austl. v. Fr.)*, 1974 I.C.J. 253, 267-268 (Dec. 20).

<sup>43</sup> Department of State Memo of March 12, 1976, *supra* note 30 at 266.

<sup>44</sup> *Nuclear Tests* cases at 267. Although the Vienna Convention applies only to instruments in written form (Art. 2(1)(a)), it does not affect the validity of unwritten agreements (Art. 3). Under customary international law, oral agreements are just as binding as written ones. See *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (ser. A/B) No. 53, at 71. Furthermore, the text of the Case-Zablocki Act, Pub. L. No. 92-403, 86 Stat. 619 (1972), reprinted as amended at 1 U.S.C. 112b(a), specifically requires transmittal to Congress, of "the text of any oral international agreement."

not apply to binding oral agreements, but as a matter of practice, international agreements are usually in written form.<sup>45</sup>

A wide variety of descriptive terms may be used to describe international agreements, but these terms do not in themselves determine whether an agreement has the status of a treaty. They may, nevertheless, be considered a factor among others in determining whether the parties intend to create an internationally legally binding agreement. Relevant terms include treaty, convention, protocol, declaration, agreement, act, covenant, statute, concordat, exchange of notes, memorandum of agreement, memorandum of understanding, *modus vivendi* or charter.<sup>46</sup> Often there is no apparent reason for the use of one title as opposed to another, and the choice is frequently the result of non-legal considerations.

#### D. LIMITATIONS ON BINDING INTERNATIONAL AGREEMENTS AND GROUNDS FOR INVALIDATION

International law does not limit the subject matter of international agreements. However, many theorists of international law argue that certain principles of international law cannot be violated by a treaty without rendering a treaty void. Thus, it would be widely agreed that a pact of aggression between two states against a third state could not have the force of international law as it would violate norms in the U.N. Charter prohibiting the use of force except in self defense.<sup>47</sup> Other circumstances enable a signatory to invalidate a treaty if it chooses to do so. For example, an error made by a state concluding a treaty, which formed an essential basis of its consent to be bound, would permit that state to invoke the error to invalidate the treaty.

If principles are violated which make a treaty void, the treaty cannot be in effect—or ever have been in effect—and there can be no question of seeking redress for violating it. However, some grounds for invalidity are voidable, that is, the aggrieved state has the option of maintaining the treaty in force or declaring it invalid.

#### INVALIDATION BY FRAUD, CORRUPTION, COERCION OR ERROR

Consent is necessary for a state to be bound by a treaty<sup>48</sup> and it may be expressed in many ways.<sup>49</sup> Since consent implies a voluntary decision, it can be negated by coercion, fraud, and corruption of agents who are giving authorized consent for their state. Consent of a state to be bound by a treaty may also be negated by error.<sup>50</sup>

Current international rules relating to coercion, fraud and corruption as a basis for invalidating consent to a treaty have been summarized in the Restatement (Third) as follows:

- (1) A state may invoke only the following grounds to invalidate its consent to be bound by an agreement:

<sup>45</sup> Rest. 3d, § 301, Comment b; and Vienna Convention, Art. 2(1)(a) and Art. 3.

<sup>46</sup> Rest. 3d, § 301, Comment a.

<sup>47</sup> U.N. Charter, Art. 2, § 4, and Art. 51. See Georg Schwarzenberger and E.D. Brown, *A Manual of International Law* 24 (6th ed. 1976).

<sup>48</sup> Vienna Convention, Art. 13, and Rest. 3d, § 12(1).

<sup>49</sup> Vienna Convention, Art. 11–18, and Rest. 3d, § 312(1).

<sup>50</sup> Vienna Convention, Art. 48, and Rest. 3d, § 331(1)(a).

- (a) an error as to a fact or situation which was assumed by that state to exist at the time of the agreement and which formed the basis of its consent to be bound.<sup>51</sup>
  - (b) the fraudulent conduct of another negotiating state that induced its consent; or
  - (c) the corruption of the state's representative by another negotiating state.
- (2) An international agreement is void
- (a) if a state's consent to the agreement was procured by the coercion of the state's representative, or by the threat or use of force against the state in violation of the principles of international law embodied in the Charter of the United Nations; \* \* \*.<sup>52</sup>

INVALIDATION BY CONFLICT WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW (JUS COGENS)

Traditionally, many theorists of general international law have argued that there exists a *jus cogens* or superior law which holds a special status internationally and which cannot be violated by a treaty.<sup>53</sup> Although legal theorists differ as to which international rules currently have the status of *jus cogens*, they tend to agree that attainment of this status is largely the result of an evolutionary process. Notwithstanding uncertainty as to what rules are, and what rules may become, *jus cogens*, the Vienna Convention accords recognition to the concept of such rules.

The principle of *jus cogens*<sup>54</sup> holds that an international agreement is void if at its inception it conflicts with a peremptory norm of general international law.<sup>55</sup> The Vienna Convention in Article 53 defines a "peremptory norm of general international law" as:

\* \* \* a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

These norms are rules commonly accepted as holding a superior status and which therefore cannot be affected by a treaty. Thus, a norm cannot be *jus cogens* unless the international community accepts both the norm and its peremptory character. Under the convention, the emergence of a new peremptory norm voids any treaty provision violating the new norm.<sup>56</sup>

<sup>51</sup> Rest. 3d, § 331. The wording of this section essentially follows that of the Vienna Convention which lists "error" as a ground that may be invoked to invalidate consent to be bound (Art. 48). Such error must relate "to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound." However, under the Vienna Convention, a state may not invoke error if it contributed to the error by its own conduct or if circumstances were such as to put the state on notice of a possible error (Art. 48(2)). Also, error in the wording of an agreement, such as a typographical error, is not a ground for invalidating it; special procedures are established for the correction of such errors. Vienna Convention, Articles 48(3) and 79. See Rest. 3d, § 331, Comment b.

<sup>52</sup> Rest. 3d, § 331. This section combines and follows the rule stated in the Vienna Convention in Arts. 49-53.

<sup>53</sup> See Georg Schwarzenberger and E.D. Brown, A Manual of International Law 24 (6th ed. 1976).

<sup>54</sup> Compelling law which is binding on parties regardless of their will and will not yield to other laws.

<sup>55</sup> Vienna Convention, Art. 53, Rest. 3d, Sec. 331(2)(b) and Comment e.

<sup>56</sup> However, the emergence of a new rule of *jus cogens* will not have retroactive effect on the validity of a treaty. Accordingly, the invalidity will only attach from the time the new rule is established. See Vienna Convention, Art. 64; International Law Commission Report, 61 Am. J. Int'l L. 412 (1967).

It is accepted that certain obligations of member states under the U.N. Charter constitute *jus cogens*.<sup>57</sup> Thus, the example provided earlier, of an aggression pact between two states against a third which provides that their two armies will jointly invade the third state, subjugate it, and jointly rule it, is generally accepted as violating a *jus cogens* rule against the use of aggressive force.<sup>58</sup> There is, however, substantial uncertainty as to what other norms are peremptory and therefore constitute *jus cogens*. Some interpretations of peremptory norms might include "rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps attacks on diplomats."<sup>59</sup>

When a treaty at its inception is void because it conflicts with a peremptory norm (Article 53), the parties are expected to comply with the norm (Article 71). If a treaty becomes void because a new overriding norm has emerged (Article 62), the parties are released from any further obligation to perform.<sup>60</sup>

Because uncertainty may exist as to whether a particular norm constitutes a rule of *jus cogens*, the issue of who decides such claims when nations invoke Article 53 in an attempt to invalidate agreements becomes of paramount importance. Thus, the U.S. Government, in its comments on an earlier Draft Article 37 of the International Law Commission, similar to Article 53, relating to the emergence of new norms, noted that such an article "could not be accepted unless agreement is reached as to who is to define a new peremptory norm and to determine how it is to be established."<sup>61</sup> The text of the article was amended by the conference in such a way as to give the United States, in the view of State Department officials, a veto over creation of a new peremptory norm. The final text defined such a norm as one "accepted and recognized by the international community of States as a whole."

In addition, under another article, any party to a dispute arising under the *jus cogens* article may invoke the jurisdiction of the International Court of Justice unless the parties agree to submit to arbitration.<sup>62</sup> This International Court dispute settlement provision, it is argued, protects the United States against arbitrary *jus cogens* claims which other states might attempt to use as a basis for invalidating treaties with the United States. The Senate on occasion has expressed concern about treaty provisions requiring submission of disputes to arbitration or the International Court, but on numerous occasions has given unqualified approval to such treaties.<sup>63</sup>

<sup>57</sup> Rest. 3d, § 331, Reporters' Note 5. Art. 103 of the U.N. Charter provides that if there is a conflict between member obligations under the Charter and their obligations under another international agreement, the Charter shall prevail.

<sup>58</sup> See Rest. 3d, § 102, Comment k and Reporters' Note 6.

<sup>59</sup> See Rest. 3d, § 702(a)-(f), Comment n and Reporters' Note 6.

<sup>60</sup> Vienna Convention, Art. 71, Comment a.

<sup>61</sup> See Sir Humphrey Waldock, Special Rapporteur, Fifth Report on the Law of Treaties, U.N. Doc. A/CN.4/183 and Add.1-4, reprinted in [1966] 2 Y.B. Int'l L. Comm'n 1, 21, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

<sup>62</sup> Vienna Convention, Art. 66. See also comments of Secretary of State William P. Rogers, S. Exec. Doc. L, supra note 3, at 7.

<sup>63</sup> For further discussion of dispute settlement procedures, see Chapter VIII below. The accession of the Tunisian Government to the Vienna Convention on the Law of Treaties requires the consent of all parties in *jus cogens* disputes prior to Tunisian submission of such disputes to the International Court of Justice for a decision. See Multilateral Treaties Deposited with the U.N. Secretary General. Status of 31 December 1981, U.N. Doc. ST/LEG/SER.E/a, at 622. This

## INVALIDATION BY VIOLATION OF DOMESTIC LAW GOVERNING TREATIES

In the world community, constitutional limitations affecting the exercise of the treaty-making power differ from nation to nation.<sup>64</sup> International law generally provides that a state may not invalidate a treaty because of claims that its consent to be bound has been expressed in violation of domestic law governing its competence to conclude a treaty. Article 46(1) of the Vienna Convention, permits a state to invalidate a treaty if a violation of domestic law was “*manifest and concerned a rule of its internal law of fundamental importance*” [emphasis added]. Article 46(2) further provides that a violation is manifest “if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

These provisions have been of interest to the U.S. Senate primarily because of the question whether they could prevent the United States from being internationally bound by an instrument which the President signed as an executive agreement, but which arguably should have been sent for Senate advice and consent.<sup>65</sup> In the words of one constitutional authority:

A(n) \*\*\* issue is whether under international law the United States could ever claim it was not bound by an agreement because it was made without Senate consent. Whether a state can escape obligation on the ground that those who incurred it in her behalf acted *ultra vires* under the national constitution is not wholly agreed. \*\*\* Art. 46(1) of the Vienna Convention on the Law of Treaties \*\*\* provides that a state cannot invoke failure to comply with its internal law as a defense “unless that violation was manifest and concerned a rule of its internal law of fundamental importance.” Senate consent has been cited as an example of a fundamental requirement. \*\*\* But the power of the President to make many agreements without the Senate casts some doubt on the “fundamental importance” of Senate consent; in any event, failure to obtain such consent cannot be a “manifest” violation of the Constitution since no one can say with certainty when it is required. [Citations omitted]<sup>66</sup>

type of declaration is made with considerable frequency in connection with other multilateral conventions containing International Court of Justice dispute settlement clauses.

<sup>64</sup>For example, the British system has been described in the following way: “It is a truism that in the United Kingdom it is the Crown alone, that is to say the executive and without reference to Parliament, which has the exclusive responsibility for the negotiation, conclusion, and termination of treaties. In other words, treaty making forms part of what we call the royal prerogative. If the implementation of a treaty requires a change in domestic law or the conferment of new powers upon the executive, the government of the day will of course have to secure the passage through Parliament of the necessary enabling legislation. This will normally be done during the period between signature and ratification of the treaty, since otherwise there would be the risk that the United Kingdom’s domestic law would not permit full effect to be given to the treaty as and when it entered into force.” Sir Ian Sinclair (Legal Adviser, Foreign and Commonwealth Office, United Kingdom, 1976–1984), Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation, Proceedings of the American Society of International Law at its 78th Annual Meeting 272 (1984). For a comparison of practices of various nations, see Interparliamentary Union, Parliaments and the Treaty-making Power, Const. & Parl. Info., 1st Series, no. 145, 1st quarter (1986).

<sup>65</sup>See discussion under section, Senate Action on the Convention, earlier in this chapter, which includes the texts of Senate interpretations and understandings to the Vienna Convention proposed in 1972 and 1973.

<sup>66</sup>Louis Henkin, Foreign Affairs and the United States Constitution, note 174 at 499 (2d ed. 1996).

The potential ramifications of this problem were not addressed by Secretary of State William P. Rogers, when in his letter submitting the Vienna Convention to the President [for transmittal to the Senate], he referred to Article 46 and the effect of a limitation of domestic law upon a state's competence to conclude treaties. The Secretary noted generally that the U.S. delegation supported Article 46 on the basis that:

\*\*\* it deals solely with the conditions under which a state may invoke internal law on the international plane to invalidate its consent to be bound and that in no way impinges on internal law regarding competence to conclude treaties insofar as domestic consequences are concerned.<sup>67</sup>

This issue was, however, addressed by the Restatement (Third) which commented that:

Presumably, a manifest violation might involve either procedural irregularities or a contravention of substantive prohibitions or requirements of domestic law. As to the United States, all states may be presumed to know that the President of the United States cannot make a treaty without the consent of the Senate. \*\*\* The President has authority, however, to make many international agreements pursuant to treaty or congressional authorization \*\*\*, or on his own authority \*\*\*, and since the circumstances in which Senate consent is essential are uncertain, improper use of an executive agreement in lieu of a treaty would ordinarily not be a "manifest" violation. \*\*\* Some agreements, such as the United Nations Charter or the North Atlantic Treaty, are of sufficient formality, dignity, and importance that, in the unlikely event that the President attempted to make such agreement on his own authority, his lack of authority might be regarded as "manifest."<sup>68</sup>

A somewhat similar position on what constitutes a "manifest" violation of a nation's domestic law governing competence to conclude treaties was taken by the International Law Commission (a body of 25 legal scholars elected by the U.N. General Assembly) in its Commentary on its Final Draft of the Vienna Convention. The commission noted that differing viewpoints exist on the issue of whether or not an agent who is competent under international law to commit a state—but perhaps not authorized to do so under domestic law—and who expresses state consent to a treaty by an established international procedure in fact binds the state to the treaty under international law. In response to this issue, the commission noted that decisions of international tribunals, together with state practice, appear to support a position holding that failure of an agent to comply with domestic requirements does not affect the validity of the treaty under international law.<sup>69</sup>

<sup>67</sup>S. Exec. Doc. L at 5.

<sup>68</sup>Rest. 3d, § 311, Comment c.

<sup>69</sup>Such failure, however, may limit that state's power to enforce a treaty and may also render the agent liable to legal consequences under domestic law. For supporting citations, see *Travaux Préparatoires*, pp. 336-338 (1978). See also United Nations, Reports of the International Law Commission on the Second Part of its Seventeenth Session, January 3-28, 1966, and on Its Eighteenth Session, May 4-July 19, 1966, 61 *American Journal of International Law* 394-400 (1967).

A different position was taken in 1975 by the Office of the Legislative Counsel of the Senate. The office suggested that if a state should reasonably have known of a constitutional defect in an agreement with the United States, that is, that certain agreements are “beyond the power of the President to enter into without the advice and consent of the Senate,” then such an agreement would be without force and effect under international law. Its memorandum noted that under international law, as evidenced in many sources including the Vienna Convention:

- (1) a State may be bound, under international law, by an agreement made in violation of its constitutional process;
- (2) a State is not bound if (A) such violation is fundamental; and (B) the other party to such agreement should reasonably have known of the constitutional defect;
- (3) such State is bound, however, if its subsequent conduct indicates acquiescence in the validity of the agreement.<sup>70</sup>

This memorandum asserts a Senate viewpoint that other nations should “reasonably know” of constitutional defects such as the lack of Senate advice and consent to certain agreements, and that in some instances the Senate might maintain the agreement is invalid under international law.<sup>71</sup>

The issues discussed above resulted from the Vienna Convention’s lack of clarification of the circumstances which permit a state to invalidate a treaty (under the rare and exceptional circumstances when a manifest violation of a state’s internal law regarding competence to conclude treaties might occur).<sup>72</sup> Thus Article 46 has been an issue in the consideration of the convention by the Senate Foreign Relations Committee, discussed above.

#### E. NON-BINDING AGREEMENTS AND FUNCTIONAL EQUIVALENTS

A non-binding international agreement is one that does not meet the previously stated criteria for a binding international agreement.<sup>73</sup> Non-binding agreements do not convey an intention of the parties to create legally committing relationships under international law. Often such documents convey merely a present intention to perform an act or a commitment of a purely personal, politi-

<sup>70</sup>Memorandum of September 24, 1975, from Michael J. Glennon, Assistant Counsel, Office of the Legislative Counsel, U.S. Senate, regarding a memorandum of agreement between the United States and Israel, dated September 1, 1975. The agreements and assurances in question were made by the United States in connection with the Egypt-Israel disengagement agreement of September 4, 1975. See Early Warning System in Sinai: Hearings before the Senate Committee on Foreign Relations, 94th Cong. 79 (1975). Excerpts from the Senate Legislative Counsel’s memo are reproduced in U.S. Department of State, Digest of United States Practice in International Law, 1975, 320 (1976) (hereafter cited as Digest, 1975). See also section, “Senate Action on the Convention,” earlier in this chapter for views on the Vienna Convention expressed by Mr. Glennon in 1984.

<sup>71</sup>Note that whereas Art. 46 of the Vienna Convention describes a “manifest” violation in terms of “being *objectively* evident to any state,” the memorandum above employs the standard when states “should *reasonably* have known” of a constitutional defect [emphasis added]. Nevertheless, it is the President who voids an executive agreement, and not the Senate.

<sup>72</sup>See Section A above, The Vienna Convention on the Law of Treaties. However, because the internal laws of states vary in their requirements for invalidation of a treaty, it would be difficult for the Vienna Convention to provide more specificity in this area. Furthermore, the internal laws of a country may not even be clear on this issue. In the United States, for example, “[t]he Supreme Court has not held any executive agreement to be *ultra vires* the President and \*\*\* has upheld several agreements of particular character, but it has not laid down principles or given general guidance to define the President’s power to act alone.” See Louis Henkin, Foreign Affairs and the United States Constitution, *supra* note 66, note at 222.

<sup>73</sup>See previous discussion in Sec. C, Criteria for a Binding International Agreement.

cal, or moral nature.<sup>74</sup> The Helsinki Agreement mentioned above, for example,<sup>75</sup> avoids words of legal commitment and states that it is not eligible for registration as a treaty in force under Article 102 of the U.N. Charter.<sup>76</sup>

Non-binding agreements may take many forms, including unilateral commitments and declarations of intent, joint communiques and joint statements (including final acts of conferences), and informal agreements. Even when agreements are legally non-binding, the parties affected may to some degree expect adherence.

The Department of State described the difference between a legally binding obligation and a political obligation in describing certain declarations, intended to be politically rather than legally binding, exchanged in connection with the START Treaty:

An undertaking or commitment that is understood to be legally binding carries with it both the obligation of each Party to comply with the undertaking and the right of each Party to enforce the obligation under international law. A "political" undertaking is not governed by international law and there are no applicable rules pertaining to compliance, modification, or withdrawal. Until and unless a Party extricates itself from its "political" undertaking, which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a Party contravenes a political commitment, it will be subject to an appropriate political response.<sup>77</sup>

#### UNILATERAL COMMITMENTS AND DECLARATIONS OF INTENT

Unilateral commitments and related instruments such as unilateral declarations of intent cannot constitute international agreements in the strict sense because an agreement, by definition, requires at least two parties.<sup>78</sup> For example, a unilateral commitment or declaration in the form of a promise to send money to a country to help earthquake victims, but without reciprocal commitments on the part of the other country, would be a promise of a gift and not an international agreement.

Situations do exist, however, under which unilateral commitments or declarations of intent may become binding international agreements. Such instances involve parallel unilateral undertakings by two or more states that are unilateral in form but which in content constitute bilateral or multilateral agreements. Such reciprocal unilateral declarations occur regularly in international relations.<sup>79</sup>

<sup>74</sup> Rest. 3d, § 301, Comment e and Reporters' Note 2.

<sup>75</sup> 73 Dep't St. Bull. 323 (1975).

<sup>76</sup> See Digest, 1975, supra note 70 at 325-327. See also U.S. Department of State, 11 Foreign Affairs Manual, ch. 700 [Circular 175], § 740.2-5, reproduced in Appendix 4 of this volume.

<sup>77</sup> Treaty with the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms (START), Treaty Doc. 102-20, transmitted to the Senate November 25, 1991.

<sup>78</sup> Department of State Memo of March 12, 1976, supra note 30, at 266.

<sup>79</sup> Rest. 3d, § 301, Reporters' Note 3, which supports the premise that "reciprocal" unilateral declarations that accept the compulsory jurisdiction of the International Court of Justice under Article 26 of the Court's Statute have been held by that court to constitute an international agreement among the declaring states. See *Anglo-Iranian Oil cases (U.K. v. Iran)*, 1952 I.C.J. 93 (July 22).



It should be noted that in one important set of cases a unilateral commitment was held legally binding upon the party making it, even though it was not made in a multilateral context. Such a finding was reached by the International Court of Justice in the *Nuclear Tests* cases.<sup>80</sup> In these cases, the International Courts ruled that a series of unilateral declarations by France concerning its intention to refrain from future atmospheric nuclear testing in the South Pacific was legally binding upon France. The sense of the Court's holding was that publicity and an intent to be bound are sufficient in such an instance to give rise to a legal obligation. In the words of the Court:

It is well recognized that declarations made by way of unilateral acts \*\*\* may have the effect of creating legal obligations. Declarations of this kind may be, and very often are, very specific. When it is the intention of the State making the declaration that it should become bound \*\*\* that intention confers on the declaration the character of a legal undertaking \*\*\*. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding \*\*\*. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus, States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligations thus created be respected.<sup>81</sup>

The International Court's decision in this matter, although binding only on the parties in these particular cases,<sup>82</sup> is problematic to legal analysts because it runs contrary to the legal principles that have traditionally governed such unilateral pronouncements or statements of intent.<sup>83</sup> Moreover, the analysts argue, among other things, that governments are unlikely to accept the view that their policy pronouncements are binding. If such pronouncements are subject to interpretation as legal commitments by the International Court, some observers point out that few states would submit to its jurisdiction.<sup>84</sup>

#### JOINT COMMUNIQUEs AND JOINT STATEMENTS

Joint statements of intent are not binding agreements unless they meet the requirements of legally binding agreements, that is, that the parties intend to be legally bound. As in the case with all agreements, the substance and not the title is dispositive. Thus, whether or not a joint statement is titled a "joint statement" or "joint communique" or "declaration" has no effect on whatever legal standing it may hold independent of its title.<sup>85</sup>

<sup>80</sup> *Nuclear Tests* case (*Austl. v. Fr.*), 1974 I.C.J. 253, 267-268 (Dec. 20), and *Nuclear Tests* case (*N.Z. v. Fr.*), 1974 I.C.J. 457 (Dec. 20).

<sup>81</sup> *Ibid.*, ¶¶43 and 46 (*Austl. v. Fr.*), ¶¶46 and 49 (*N.Z. v. Fr.*). See also S. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 *Am. J. Int'l. L.* 1-30 (1977).

<sup>82</sup> Art. 59 of the Statute of the International Court of Justice.

<sup>83</sup> S. Rubin, *The International Legal Effects of Unilateral Declarations*, *supra* note 81, at 28-30.

<sup>84</sup> *Ibid.*

<sup>85</sup> The way an instrument is dealt with after its conclusion may be an indication of whether it is intended to have legal effect. For example, it may be published in a national treaty collec-

An important non-binding agreement was the communique and joint statement issued by the United States and the U.S.S.R. reaffirming their intention not to take action inconsistent with the interim strategic arms limitation agreement that expired in 1977. The Department of State and the counsel to the Senate Foreign Relations Committee both found that this communique and statement did not constitute an international agreement. In the words of then-committee counsel, Michael J. Glennon: "It [the statement] is nonbinding, it is not governed by international law, no exchange of promises has been bargained, other such actions have not been so construed, and the parties do not intend for an agreement to exist—indeed, there are no 'parties' as such."<sup>86</sup> Another example is the Bonn Declaration of July 17, 1978. This declaration was issued after an economic summit which was held at Bonn, West Germany, July 16 and 17, 1978, and was subscribed to by the leaders of seven nations including the United States.<sup>87</sup> The declaration, which summarized the problems discussed in the summit meeting and stated the commitments agreed to be necessary for their resolution, prompted a request from the Chairman of the Senate Foreign Relations Committee to the Department of State regarding its legal significance. The reply from the State Department read in part:

While the Declaration issued in Bonn is an important political commitment, it is not an international agreement within the meaning of United States law or international law since the parties did not evidence an intent to depart from the established international practice of concluding non-binding communique at the conclusion of a summit meeting. Accordingly, while we expect that the Bonn summit participants will comply with the accord, it is not a legally binding commitment.<sup>88</sup>

#### INFORMAL AGREEMENTS

In contrast to the calculated ambiguity of many non-binding declarations and agreements, governments may enter into precise and definite understandings that are clearly intended to affect their relations with each other, but with a clear understanding that agreements are not legally binding. Such informal agreements were formerly called "gentlemen's agreements."<sup>89</sup>

Informal agreements may be made by heads of state or government, by foreign ministers, or by other authorized officials. In these cases, the parties generally assume a commitment to perform or refrain from certain acts. Although the commitments are regarded as non-legal, there is nevertheless an expectation of performance by the parties.<sup>90</sup>

An example is a 1908 agreement between the U.S. and Japanese foreign ministers whereby the Japanese Government agreed to

tion, or it may be registered under Art. 102 of the U.N. Charter, or it may be described as a treaty during submission to a national parliament.

<sup>86</sup> See U.S. Department of State, *Digest of United States Practice in International Law*, 1977, 429 (1978) (hereafter cited as *Digest*, 1977).

<sup>87</sup> The nations were Canada, France, West Germany, Italy, Japan, the United Kingdom, and the United States. See *Digest*, 1977, *supra* note 86, at 799–800.

<sup>88</sup> *Ibid.*, at 799.

<sup>89</sup> Rest. 3d, § 301, Comment e.

<sup>90</sup> See Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 *Am. J. Int'l. L.*, 296, 299 (1977).

take administrative measures to limit the emigration of Japanese laborers to the United States. This was done with the understanding that the United States, in return, would not adopt discriminatory exclusionary legislation against Japanese citizens. The agreement terminated when the Congress enacted the 1924 immigration law that discriminated against Japanese.<sup>91</sup> More recent examples would include voluntary restraints agreed to by governments in the trade field.

Even though states do not accept legal responsibility for non-binding commitments such as informal agreements, a state may choose to regard a non-binding undertaking as a controlling one. It may do so even though the affected parties generally have no legal remedy or sanctions for breaches of such commitments. The failure to abide by an informal agreement may have political consequences, however, possibly including countermeasures.

#### STATUS OF NON-BINDING AGREEMENTS

Although legally not enforceable, non-binding agreements and unilateral commitments are useful to states in meeting certain needs. The need for flexibility—for keeping options open—is common to most governments and help to make non-binding agreements attractive to them. Non-binding agreements provide a recognized procedural means for a state to exercise this flexibility.

Often, non-binding agreements or commitments are used by states to signal broad policy guidelines which may be subject to change. Or, they may amount to nothing more than a propaganda ploy enabling a state to declare support for a policy it has no intention of following.

Another reason for a state entering into non-binding agreements may be a desire to avoid legal remedies in the event of non-compliance, even though it intends to comply. Non-binding agreements are well suited to such a role because that may relate to a very specific matter and may involve clear promises of intent and goodwill with expectations of reliance on them by all involved parties. And, if for some reason it is not possible to honor such an agreement, the aggrieved party may well have to pursue political rather than legal remedies.

Non-binding agreements also permit a head of state or his agent to make commitments with the intention of honoring them, but without the need of going through what may be perceived as a cumbersome constitutional approval or reporting process reserved for binding agreements.<sup>92</sup> Government officials may go on the record as expressing their intent to honor non-binding commitments. For example, Secretary of State Kissinger, while testifying before the Senate Foreign Relations Committee regarding U.S. undertakings in connection with the Sinai Disengagement Agreements of 1975, noted that some of the undertakings were “not binding commitments of the United States \* \* \* [but that] does not mean, of course, that the United States is morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and engage the good faith of the

<sup>91</sup> *Ibid.*, citing 2 *Foreign Relations of the United States*, 339–393 (1924).

<sup>92</sup> *Rest. 3d*, § 301, Reporters' note 2.

United States as long as the circumstances that gave rise to them continue.”<sup>93</sup> Supplemental statements of this type, however, do not affect the non-binding character of the commitment to which they relate.

As nations use non-binding agreements for different reasons, it is important to examine the motive for making a particular agreement non-binding, the context within which it is made, the wording and intent of the commitment as expressed by the language used, and the reputation and history of the state or representative for honoring such statements. Only by evaluating such criteria can a government arrive at realistic expectations as to whether or not the parties will comply with such commitments.

In conclusion, international agreements having the status of treaties clearly show an intent by the parties to be bound under international law. They describe specific legal obligations which the parties assume and deal generally with matters of consequence. Treaties are governed internationally by international law. The Vienna Convention on the Law of Treaties, which the United States has signed but not ratified, is the most widely recognized international law source on current treaty law practice.

Non-binding international understandings do not show an intent to create legal relationships. Frequently, such understandings convey only an intent to perform an act or a commitment of a purely personal, political, or moral nature. They may be important, however, as they are often used and often evoke expectations of compliance from affected states.

---

<sup>93</sup>See 73 Dep't St. Bull. 613 (1975).



## IV. INTERNATIONAL AGREEMENTS AND U.S. LAW<sup>1</sup>

The purpose of this chapter is to identify the sources of constitutional authority underlying the conclusion of international agreements and the status of such agreements in the domestic law of the United States. To facilitate an understanding of the constitutional principles that are relevant to this area of the law, the succeeding discussion treats separately international agreements that are concluded in the form of "treaties" and those that are made in non-treaty form by "executive agreements." The distinction between these two modes of agreement-making is, of course, "purely a constitutional one and has no international significance."<sup>2</sup> Even for purposes of domestic law, differentiation between treaties and executive agreements, at least on the basis of the nature or importance of the subject matter encompassed by these instruments, seems problematic in view of the actual practice of the nation under the Constitution. On the other hand, these two modes may be distinguished procedurally in that treaties, unlike executive agreements, are concluded exclusively pursuant to the joint action of the President and two-thirds of the Senate. Moreover, the domestic legal effect of treaties and executive agreements as law of the land may be identical in all circumstances.

### A. TREATIES

#### SCOPE OF THE TREATY POWER

In providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur," the treaty clause of the Constitution (Article II, Section 2, Clause 2) furnishes little textual guidance concerning the proper extent of the power so granted. Perhaps the most familiar judicial statement regarding the scope of this clause is that opined by the Supreme Court in *Geofroy v. Riggs*:

\*\*\* 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 gov-

<sup>1</sup> Prepared by Jeanne J. Grimmett, Legislative Attorney.

<sup>2</sup> Research in International Law of the Harvard Law School—Law of Treaties: Draft Convention with Comment. American Journal of International Law, v. 29, 1935, p. 697. See also Art. 2(1)(a) of the 1970 Vienna Convention on the Law of Treaties which defines "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (emphasis supplied). S. Ex. L., 92d Cong., 1st Sess. 1971. The Vienna Convention is also reprinted in Appendix 5 of this volume.

ernment itself and of the States. 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 one 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.<sup>3</sup>

It seems clear from the Court's pronouncement in *Geofroy v. Riggs* that the treaty power is indeed a broad one, extending to "any matter which is properly the subject of negotiation with a foreign country." However, it is equally apparent that treaties, like Federal statutes, are subject to the overriding requirements of the Constitution. Although the Supreme Court has apparently never expressly held a treaty to be unconstitutional, the validity of the general principle has been repeated often and most unequivocally by the court in *Reid v. Covert* where Justice Black declared that "[n]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."<sup>4</sup>

While there is little difficulty in light of the case law in establishing the theoretical supremacy of the Constitution over treaties,<sup>5</sup> the identification of specific constitutional limitations that may affect the treaty power is attended by some complexity. Various limitations have been suggested over the years and are reviewed in the following discussion.

It was asserted early by Jefferson in his Manual of Parliamentary Practice that the treaty power does not extend to "the rights reserved to the States; for surely the President and Senate can not do by treaty what the whole Government interdicted from doing in any way."<sup>6</sup> Notwithstanding Jefferson's view, it seems well-settled since *Missouri v. Holland*<sup>7</sup> that the powers reserved to the States under the 10th amendment constitute no bar to the exercise of the treaty power. In *Missouri v. Holland* the Supreme Court sustained a treaty and implementing legislation concerning the protection of migratory birds, a subject that previously had been held within the

<sup>3</sup> 133 U.S. 258, 267 (1890). For a discussion of the routinely used Senate treaty condition regarding constitutional supremacy, see "Condition Regarding Supremacy of the Constitution" in Chapter V, Section C, *infra*.

<sup>4</sup> 354 U.S. 1, 16 (1957). See also *Doe v. Braden*, 16 How. (57 U.S.) 635, 656 (1853); *The Cherokee Tobacco*, 11 Wall. (78 U.S.) 616, 620-621 (1871); *Geofroy v. Riggs*, 133 U.S. at 267; and *United States v. Wong Kim Ark*, 169 U.S. 649, 700 (1898).

<sup>5</sup> With the exception of Justice Holmes' dictum in *Missouri v. Holland*, 252 U.S. 416 (1920), there appears to have been little legal basis for questioning the validity of the general principle that treaties are subordinate to the Constitution. In *Missouri v. Holland*, Justice Holmes stated that— \* \* \* Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States [Art. VI, cl. 2]. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. 252 U.S. at 433.

Any intimations from Justice Holmes' language that treaties might not be subject to constitutional requirements were, however, subsequently laid to rest in *Reid v. Covert*, 354 at 16-18, where Justice Black, in expressly refusing to read *Missouri v. Holland* as support for such a proposition, indicated that "[n]o agreement with a foreign national can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."

<sup>6</sup> Jefferson's Manual of Parliamentary Practice, sec. LII, reprinted in H. Doc. 105-358, 105th Cong., 2d Sess. 1999, p. 301 (hereafter cited as Jefferson's Manual).

<sup>7</sup> 252 U.S. 416 (1920).

reserved powers of the States and beyond the legislative competence of Congress. According to Justice Holmes:

The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.

\* \* \*

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.<sup>8</sup>

Although the unspecified reserved powers of the States under the 10th amendment seem inoperative as a limitation upon the treaty power, there may be rights conferred upon the States by other provisions of the Constitution that, at least in theory, could restrict treaty-making. It has been suggested that a treaty could not undermine the guaranty of the States to a "Republican Form of Government" (Article IV, Section 4), or infringe the authority of a State concerning its militia (Article 1, Section 8, Clause 16, and Amendment 2) as in a treaty mandating abolition of State militias pursuant to a scheme of general disarmament.<sup>9</sup> While the Court in *Geofroy v. Riggs* further indicated that a treaty may not cede a portion of the territory of a State without the latter's consent, such a restriction upon the treaty power is not specifically mentioned in the Constitution and the validity of this alleged limitation seems questionable.<sup>10</sup>

A second major limitation upon treaty-making urged by Jefferson pertains to "those subjects of legislation in which [the Constitution] gave a participation to the House [of Representatives]." <sup>11</sup> Concerning this limitation, Jefferson added that "[t]his \* \* \* exception is de-

<sup>8</sup> *Ibid.* at 433-434 and 435.

<sup>9</sup> American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States §302, Reporters' Note 3 (1987) (hereafter cited as Rest. 3d). See also Henkin, Louis, Foreign Affairs and the United States Constitution, 2d ed. 1996, pp. 193-194 (hereafter cited as Henkin 1996). Recent Supreme Court decisions setting limits on congressional enactments vis a vis the states on the ground that the enactments fell outside the scope of Congress' Commerce Power or were subject to 10th amendment limitations (*New York v. United States*, 504 U.S. 144 (1992), *Lopez v. United States*, 514 U.S. 549 (1995), *Printz v. United States*, 521 U.S. 898 (1997), *Morrison v. United States*, 529 U.S. 598 (2000); note also *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (U.S. Jan. 9, 2001) have raised questions as to whether the treaty power may be similarly vulnerable to limitations grounded in federalism. Agreements that have been suggested as possibly raising such concerns are "a disarmament agreement with inspection provisions that permits intrusion upon the statehouse, or a treaty that commands state legislatures to adopt laws or that coopts state officials." Henkin 1996, p. 194. For discussion of these issues, see, for example, Bradley, Curtis A. The Treaty Power and American Federalism. *Michigan Law Review*, v. 97, 1998, p. 390; Healy, Thomas, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*. *Columbia Law Review*, v. 98, p. 1726 (1998); Vazquez, Carlos Manuel. Breard, Printz, and the Treaty Power. *University of Colorado Law Review*, v. 70, 1999, p. 1317; Golove, David M. Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Powers. *Michigan Law Review*, v. 98, 2000, p. 1075.

<sup>10</sup> See Henkin 1996, p. 193 and pp. 465-466, n. 72.

<sup>11</sup> Jefferson's Manual, p. 301.



nied by some on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.”<sup>12</sup> Although there is judicial dicta that perhaps indirectly suggest such a restriction,<sup>13</sup> Jefferson’s assertion seems to have been refuted by the actual practice under the Constitution. Thus, instances are readily found of treaties containing subject matter that lies within Congress’ delegated powers, as in treaties pertaining to foreign commerce, the payment of money, war, the organization of judicial tribunals, and rules of maritime blockage and capture.<sup>14</sup> Moreover, it recently has been held that Congress’ power to dispose of property belonging to the United States (Article IV, Section 3, Clause 2) presents no constitutional bar to disposition by treaty of American property interests in the Panama Canal.<sup>15</sup>

While there appears to be general agreement that subject matter falling within the scope of Congress’ delegated powers may be dealt with by treaty,<sup>16</sup> a separate question, which is considered infra, concerns the extent to which a treaty touching such subjects can become effective as domestic law without the aid of an implementing statute. The distinction between these two issues is noted in the following commentary which, with reference to the argument that the treaty power is limited by Congress’ delegated authority, states that:

[I]t is not clear what the limitation means. If it is meant that no international agreement could be constitutionally entered into by the United States within the sphere of such powers the practice from the beginning has been to the contrary; if it is meant that treaty provisions dealing with matters delegated to Congress must, in order to become the law of the land, receive the assent of Congress through implementing legislation, it states not a limitation on the power of making treaties as international conventions but rather a necessary procedure before certain conventions are cognizable by the courts in the enforcement of rights under them.<sup>17</sup>

A third limitation upon the treaty power has been raised in connection with treaties authorizing participation by the United States in proceedings before certain types of international judicial tribunals. The basic constitutional issue concerning such participation seems whether the authorizing treaty improperly delegates the “Judicial Power of the United States” which the Constitution otherwise vests in “one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish” (Article III, Section 1). It has been argued that where an international judicial tribunal adjudicates claims between nation-states, the type of

<sup>12</sup> *Ibid.*

<sup>13</sup> See, for example, *Geofroy v. Riggs*, 133 U.S. at 267, and *Holden v. Joy*, 17 Wall. (84 U.S.) 211, 243 (1872), noting general limitations upon the treaty power arising from “the nature of the government.”

<sup>14</sup> See Wright, Quincy. *Treaties and the Constitutional Separation of Powers in the United States*. American Journal of International Law, v. 12, 1918, pp. 65–85 (hereafter cited as Wright, *Treaties and Separation of Powers*).

<sup>15</sup> *Edwards v. Carter*, 580 F. 2d 1055 (D.C. Cir. 1978), cert. denied, 436 U.S. 907 (1978).

<sup>16</sup> See Wright, *Treaties and Separation of Powers*, pp. 65–85; Henkin 1996, pp. 194–195; Rest. 3d, § 303, Comment c and Reporters’ Note 2.

<sup>17</sup> *The Constitution of the United States of America—Analysis and Interpretation*, S. Doc. 6, 103d Cong., 1st Sess. 1996, pp. 485–486 (hereafter cited as *Constitution—Analysis and Interpretation*).

judicial power being exercised is international, and, hence, there is no improper usurpation by treaty of the domestic "Judicial Power of the United States" for constitutional purposes.<sup>18</sup> The International Court of Justice would be an example of this type of international tribunal.

On the other hand, a more serious constitutional objection might be raised against a treaty authorizing an international tribunal to exercise appellate jurisdiction over cases from U.S. courts. An arrangement of this nature was envisioned in The Hague Prize Court Convention of 1907<sup>19</sup> which established an international court with appellate jurisdiction from national courts in prize cases. Concerned that this procedure would be inconsistent with the final appellate jurisdiction of the Supreme Court, American negotiators proposed a supplementary protocol<sup>20</sup> authorizing *de novo* actions against the United States before the International Prize Court in lieu of appeals from domestic courts.<sup>21</sup>

A fourth limitation which has been alleged to circumscribe the treaty power is that treaties must relate to "proper subjects of negotiation" with a foreign nation. Such a limitation is suggested by judicial dicta<sup>22</sup> and may also be present in Jefferson's statement that "[b]y the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty \* \* \*."<sup>23</sup> This restriction is also associated with remarks made by Charles Evans Hughes before the annual meeting of the American Society of International Law in 1929 where he asserted that "[t]he power [of treaty-making], is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns."<sup>24</sup> While the "international concern" limitation upon treaty-making had been generally accepted,<sup>25</sup> the American Law Institute rejected this view in 1987 in its Restatement (Third) of the Foreign Relations Law of the United States.<sup>26</sup> There has been no clear test for determining the circumstances in which the doctrine should apply and it has been observed, moreover, that "[m]atters of international concern are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects, and the exist-

<sup>18</sup> Henkin 1996, p. 267.

<sup>19</sup> International Prize Court Convention, October 18, 1907, reprinted in *Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States of America and Other Powers*, S. Doc. 1063, 62d Cong., 3d Sess. 1913, p. 248 (G. Charles comp.) (hereafter cited as Charles, *Treaties*).

<sup>20</sup> Additional Protocol to the Convention Relative to the Establishment of an International Court of Prize, Sept. 19, 1910, reprinted in Charles, *Treaties*, p. 262.

<sup>21</sup> See Butte, *The "Protocol Additional" to the International Prize Court Convention*, *American Journal of International Law*, v. 6, 1912, p. 799; Scott, *The International Court of Prize*, *American Journal of International Law*, v. 5, 1911, p. 302; and Henkin, Louis, *Foreign Affairs and the Constitution*, 1972, p. 197 (hereafter cited as Henkin 1972), and Henkin 1996, pp. 518-519. Notwithstanding Senate consent, the United States did not ratify the convention.

<sup>22</sup> In *Holden v. Joy*, 17 Wall. (84 U.S.) at 243, the Court stated that the treaty power "should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty." See also *Geofroy v. Riggs*, 133 U.S. at 267, quoted in the text accompanying note 3 *supra*, and *Akasura v. Seattle*, 265 U.S. 332, 341 (treaty power "extend[s] to all proper subjects of negotiation between our government and other nations").

<sup>23</sup> Jefferson's Manual, p. 301.

<sup>24</sup> American Society of International Law Proceedings, v. 23, 1929, p. 194.

<sup>25</sup> Henkin 1972, p. 152.

<sup>26</sup> Rest. 3d, § 302, Comment c and Reporters' Note 2. See also Henkin 1996, pp. 197-198.

ence of the latter does not remove a matter from international concern.”<sup>27</sup> The limitation appears to have rarely been an issue in reported decisions. In *Power Authority of New York v. Federal Power Commission*,<sup>28</sup> a Federal Circuit Court of Appeals, in order to avoid declaring an entire treaty void for want of international concern, invoked the restriction against a “reservation” which the Senate had attached to the treaty but which the court viewed as merely an expression of the “Senate’s desires” and of “domestic policy.”<sup>29</sup>

A fifth and widely recognized limitation upon the treaty power is that provided by the Bill of Rights.<sup>30</sup> This restriction upon treaty-making seems implicit from the context of Justice Black’s reminder in *Reid v. Covert* that “[n]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution,” and that “[t]he prohibitions of the Constitution were designed to apply to all branches of the National government, and they cannot be nullified by the Executive or by the Executive and the Senate combined.”<sup>31</sup> The necessity for Justice Black’s statement originated in the contention, which the court rejected, that Article 2(11) of the Uniform Code of Military Justice,<sup>32</sup> which effectively denied trial by jury and other Bill of Rights protections to civilian dependents accompanying American armed forces abroad, could nevertheless be sustained as legislation necessary and proper to implement U.S. jurisdictional rights under specified bilateral agreements with foreign host governments.

Whatever specific constitutional limitations may be deemed applicable to the treaty power in a given case, the courts, in lieu of

<sup>27</sup> American Law Institute, Restatement 2d of the Foreign Relations Law of the United States (1965), § 117, Comment b. In this regard, the current Foreign Relations Restatement observes—There is no principle either in international law or in U.S. constitutional law that some subjects are intrinsically “domestic” and hence impermissible subjects for an international agreement. As to international law, it has been authoritatively stated that even a subject that is strictly of domestic concern “ceases to be one solely within the domestic jurisdiction of the State [and] enters the domain governed by international law,” if states conclude an international agreement about it. Nationality Decrees in Tunis and Morocco (*Great Britain v. France*), P.C.I.J. ser. B, No. 4, p. 26 (1923). Under U.S. laws, the Supreme Court has upheld agreements on matters that, apart from the agreement, were strictly domestic and indeed assumed to be within state rather than Federal authority. For example, *De Geofroy v. Riggs* [133 U.S. 258] \*\*\* (rights of inheritance in land); *Missouri v. Holland* [252 U.S. 416] \*\*\* (protection of migratory birds). Early arguments that the United States may not adhere to international human rights agreements because they deal with matters of strictly domestic concern were later abandoned. \*\*\* Rest. 3d, § 302, Reporters’ Note 2.

<sup>28</sup> 247 F. 2d 538 (D.C. Cir. 1957), *jud. vac. and rem. for mootness sub. nom. American Public Power Assn. v. Power Authority of New York*, 355 U.S. 64 (1957).

<sup>29</sup> The reservation at issue, which had been attached by the Senate to the Treaty Concerning Uses of the Waters of the Niagara River, Feb. 27, 1950, United States-Canada, 1 U.S.T. 694, specified that the United States reserved the right to develop its share of the Niagara River by an act of Congress and that redevelopment projects in such waters were prohibited until authorized by congressional enactment. The decision has been criticized for its failure to recognize the existence of genuine international concern regarding the Senate’s reservation. See Henkin, Louis, *The Treaty Makers and the Law Makers: The Niagara Reservation*. *Columbia Law Review*, v. 56, 1956, p. 1151. See also text at notes 36–38 *infra*. In *United States v. Lue*, 134 F. 3d 79 (2d Cir. 1998), the Federal Circuit Court of Appeals rejected appellant’s argument that the International Convention Against the Taking of Hostages was beyond the power of the Executive to sign under Article II because it regulated matters of domestic concern not involving relations with other nations. The court took note of the breadth of the treaty power, though admitting a possible constitutional “outer limit.” It concluded that the convention did not in any event “transgress” any such limit, as it addressed two issues of central international concern: the treatment of foreign nationals while they are on local soil and hostage taking as a vehicle for terrorism. 134 F. 3d at 83.

<sup>30</sup> Rest. 3d § 302(2), Comment b, and Reporters’ Note 1; Constitution—Analysis and Interpretation, p. 486; Henkin 1996, pp. 185 and 283 et seq.

<sup>31</sup> 354 U.S. 1, 16, 17 (1957).

<sup>32</sup> 64 Stat. 109 (1950).

express declarations of unconstitutionality, evidence a proclivity merely to refuse full effectuation of specific treaty provisions that might offend constitutional requirements. Thus, in *City of New Orleans v. United States*,<sup>33</sup> a treaty provision conferring “full sovereignty” upon the United States over ceded public lands was held ineffective by the Supreme Court to prohibit the sale of the land by city authorities where recognition of Federal title under the treaty would have deprived just compensation to vested private property interests in derogation of the fifth amendment. An additional example is afforded by *Rocca v. Thompson*,<sup>34</sup> where the Court, after noting “there is, of course no Federal law of probate or the administration of estates,” refused to preempt the local administration of an alien decedent’s estate notwithstanding a treaty provision which permitted resident foreign consuls to “intervene” in estate liquidation proceedings of foreign nationals dying intestate in the United States. In a similar vein is *United States ex rel. Martinez Augusto v. Mason*,<sup>35</sup> where a Federal Circuit Court of Appeals, in the absence of an authorizing statute or Presidential directive, refused to deem Navy and Immigration and Naturalization Service agents as “competent national or local authorities” under an applicable treaty for purposes of sanctioning the warrantless arrest and subsequent imprisonment of a deserting Spanish seaman. In *Colello v. U.S. Securities and Exchange Commission*, however, a case challenging a freeze of plaintiffs’ assets in Switzerland, a Federal District Court held that the failure of the U.S.-Switzerland Treaty on Mutual Assistance in Criminal Matters to require U.S. officials to notify U.S. citizens of a governmental request for assistance from Switzerland and to provide a prompt post-deprivation hearing violated their fifth amendment right to due process and to this extent the treaty was unconstitutional.<sup>36</sup> It further held that the treaty’s “reasonable suspicion” standard for freezing U.S. citizens’ assets in Switzerland violated the fourth amendment, stating that “[t]he executive cannot eliminate plaintiffs’ fourth amendment right to be free of unreasonable searches by treaty.”<sup>37</sup>

<sup>33</sup> 10 Pet. (35 U.S.) 662 (1836). For commentary concerning this case, see Cowles, Willard, *Treaties and Constitutional Law*. 1975 reprint ed., p. 112.

<sup>34</sup> 223 U.S. 317 (1912).

<sup>35</sup> 344 F. 2d 673 (5th Cir. 1965).

<sup>36</sup> 908 F. Supp. 738, 752 (C.D. Cal. 1995).

<sup>37</sup> *Ibid.* at 755. The court granted the plaintiffs summary adjudication on both constitutional issues.

Questions regarding fourth and fifth amendment protections for U.S. firms arose during Senate consideration of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons. Done at Paris, January 13, 1993, entered into force April 29, 1997, *International Legal Materials*, v. 32, 1993, p. 800. The convention was approved by the Senate April 24, 1997. *Congressional Record*, April 24, 1997, p. S3651 (daily ed.). Fourth amendment protections against unreasonable search and seizure were implicated by treaty obligations regarding routine and challenge inspections of chemical facilities in party countries. Fifth amendment protections against governmental takings were implicated by the inspections themselves, since they could possibly result in property loss, particularly that of confidential business information. See U.S. Congress. Senate. Committee on the Judiciary. *Constitutional Implications of the Chemical Weapons Convention*. S. Hrg. 104-859, Sept. 10, 1996; U.S. Congress. Senate. Committee on Foreign Relations. *Chemical Weapons Convention*. S. Hrg. 105-183, April 8-17, 1997.

The Senate’s advice and consent was made subject to numerous conditions, including (1) a direction to the President to withhold a portion of the U.S. contribution to the Organization of the Prohibition of Chemical Weapons created under the convention in the event certain disclosures of U.S. business information occurred or there were certain breaches of confidentiality, and (2) a requirement that the President, before depositing the U.S. instruments of ratification, certify to the Congress that in the event a firm withholds its consent to a search, the United

Continued

Judicial concern for constitutional requirements is also evident in *Power Authority of New York v. Federal Power Commission*, supra, where, as previously noted, the court declined to view a Senate “reservation” as part of the treaty to which it was attached, preferring instead to view the reservation as merely an expression of “the Senate’s desires” and of “domestic policy.”<sup>38</sup> The Senate’s reservation, which was appended to a bilateral treaty with Canada allocating the waters of the Niagara River for power development, specified that the United States reserved the right to redevelop its share of the river waters by an act of Congress and that redevelopment projects in such waters were prohibited until authorized by congressional enactment. In characterizing the reservation as purely domestic and hence not part of the treaty, the Circuit Court avoided possible holdings that the entire treaty was void for want of “international concern” and that the Senate was unconstitutionally “legislating” through “reservation” without the concurrence of the House of Representatives inasmuch as the reservation would have temporarily suspended the operation of existing law.<sup>39</sup>

#### TREATIES AS LAW OF THE LAND

By virtue of the supremacy clause of the Constitution (Article VI, Clause 2), a treaty which is concluded compatibly with applicable constitutional requirements of the type previously discussed may have status as the “Supreme Law of the Land” along with Federal statutes and the Constitution itself. However, a treaty’s effectiveness as domestic law of the United States does not result automatically upon its entry into force on the international level, but occurs only where the instrument is “self-executing,” that is, where it operates without any necessity for implementing legislation. The classic exposition of this principle is provided by Chief Justice Marshall in *Foster v. Neilson*:

---

States will first obtain a criminal search warrant supported by probable cause for challenge inspections and administrative warrant from a U.S. magistrate judge for routine inspections. Congressional Record, April 27, 1997, pp. S3655, S3657. Implementing legislation set forth further domestic legal requirements involving convention activities by, among other things, providing for civil actions against the United States for claims for taking of property and setting forth warrant requirements for routine and challenge inspections. Chemical Weapons Convention Implementation Act of 1998, Public Law 105-277, Division I, 112 Stat. 2681-858. See U.S. Congress. Senate. Committee on the Judiciary. Chemical Weapons Implementing Legislation S. Hrg. 105-552, May 13, 1997; Congressional Record, October 21, 1998, pp. S12744-S12748 (daily ed.); and Kellman, Barry. The Advent of International Chemical Regulation: The Chemical Weapons Convention Implementation Act. *Journal of Legislation*, v. 25, 1999, p. 117.

<sup>38</sup>247 F. 2d 538 (D.C. Cir. 1957), *jud. vac. and rem. for mootness sub. nom. American Public Power Assn. v. Power Authority of New York*, 355 U.S. 64 (1957). A pair of more recent cases involving international agreements the resolution of which are based on constitutional considerations are *McMullen v. United States*, 989 F. 2d 603 (2d Cir.), cert. denied, 510 U.S. 913 (1993) (Supplemental Extradition Treaty with United Kingdom eliminating political offense exception held not to constitute bill of attainder as applied retroactively and not to violate separation of powers doctrine by allegedly altering jurisdiction of the courts), and *Swearingen v. United States*, 565 F. Supp. 1019 (D. Colo. 1983) (agreement which created an exemption from taxation of income of U.S. citizens, contrary to the provisions of the Internal Revenue Code, was in contravention of the exclusive constitutional authority of the House of Representatives to originate all bills for raising revenue).

<sup>39</sup>See text accompanying notes 28-29 supra. The *Power Authority* case notwithstanding, Senate reservations are generally deemed part of the treaty to which they are made and held effective as domestic law in the United States. Rest. 3d, § 314(1), Comment b. Moreover, a dissenting opinion in the case indicated that the Senate, by its reservation “has not sought to limit the participation of the Congress at large and the President in decisions regarding domestic policy. It is a case in which the Senate has sought to enlarge their participation. 247 F. 2d at 547 (dissenting opinion of Judge Bastian).

\*\*\* 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.<sup>40</sup>

Application of this general rule seems relatively simple where the text of a treaty expressly recognizes the necessity for implementing legislation or where the subject matter of the treaty falls within an area traditionally regarded as requiring congressional effectuation by statute. Concerning the latter situation there appears to be general agreement that in view of Congress' exclusive power of appropriations (Article 1, Section 9, Clause 7) a treaty provision authorizing the payment of money is not self-executing.<sup>41</sup> Similarly, an implementing statute also seems required in connection with treaties which specify international crimes or criminal sanctions for particular activities.<sup>42</sup> In this connection, it has been noted that "[c]riminal law to implement the foreign relations of the United States is wholly statutory."<sup>43</sup> Moreover, in light of Congress' power under Article I, Section 8, Clause 11, "to declare War," it seems to be generally assumed that a treaty would not be sufficient of itself to place the United States in a state of war.<sup>44</sup> Concerning the general rule that treaties which pertain to the aforementioned matters require congressional implementation, it has been observed that:

\*\*\* There is no definitive authority for the rule \*\*\* that agreements on some subjects cannot be self-executing. That a subject is within the legislative power of Congress does not

<sup>40</sup> 2 Pet. (27 U.S.) 253, 314 (1829). See generally Vazquez, Carlos Manuel. *The Four Doctrines of Self-Executing Treaties*. American Journal of International Law, v. 89, 1995, p. 695.

<sup>41</sup> Rest. 3d, § 111, Comment i, and Henkin 1996, p. 203. The House of Representatives early asserted its prerogatives by reserving a right of independent judgment regarding monies required to be paid under the Jay Treaty of 1796. Jefferson's Manual, p. 297; Constitution—Analysis and Interpretation, p. 480. In *Turner v. American Baptist Missionary Union*, 24 F. Cas. 344 (No. 14,251) 347 (C.C. Mich. 1852), the Circuit court stated: A treaty under the Federal Constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government, can be regarded as law, until it shall have all the sanctions required by the Constitution to make it such. As well might be contended, that an ordinary act of Congress, without the signature of the President, was a law, as that a treaty which engages to pay a sum of money is in itself law. And in such a case, the representatives of the people and the States, exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power.

<sup>42</sup> Rest. 3d, § 111, Comment i; Henkin 1996, p. 203. In *The Over the Top*, 5 F. 2d 838, 845 (D. Conn. 1925), a district court stated that— \*\*\* It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing. Congress may be under a duty to enact that which has been agreed upon treaty, but duty and its performance are two separate and distinct things. Nor is there any doubt that the treaty-making power has its limitations. What these are has never been defined, perhaps never need be defined. Certain it is that no part of the criminal law of this country has ever been enacted by treaty.

<sup>43</sup> Rest. 3d, § 111, Reporters' Note 6, citing U.S. Constitution, Article I, Section 8, "giving Congress power 'to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.'"

<sup>44</sup> Rest. 3d, § 111, Comment i; Henkin 1996, p. 203.

preclude a treaty on the same subject. \*\*\* No particular clause of the Constitution conferring power on Congress states or clearly implies that the power can be exercised only by Congress, not by the treaty-makers. (Contrast the provision that Congress shall have the power to 'exercise exclusive legislation in all Cases whatsoever' over the District of Columbia and other places acquired for 'needful buildings.' U.S. Constitution, Article 1, Section 8, clause 17.) \*\*\* The power of Congress to declare war is not characterized or designated in any way that would distinguish it from, say, the power to regulate commerce with foreign nations, yet regulation of such commerce is surely a proper subject for a treaty. The provision that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" lends itself better to the suggestion that an international agreement cannot itself "appropriate money." Even here, it might have been possible to conclude that since treaties are declared to be "law" (Art. VI) and are treated as equal to an act of Congress for other purposes, an appropriation of funds through an international agreement is an appropriation "made by law."

\*\*\* The principle declared \*\*\* is nevertheless generally assumed for the cases given.<sup>45</sup>

Apart from instances where the terms of a treaty expressly contemplate implementing legislation or where such legislation is traditionally required owing to the nature of a particular treaty provision, whether a treaty is self-executing or not is a matter of interpretation, initially for the Executive and ultimately for the courts in the event of litigation.<sup>46</sup> Decisional criteria for resolving this issue have been variously and broadly phrased. Thus, it has been stated that "[i]n determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution."<sup>47</sup> Elsewhere it is maintained that where the self-executing

<sup>45</sup> Rest. 3d, § 111, Reporters' Note 6.

<sup>46</sup> Ibid. § 111, Comment h. See also Whiteman, Marjorie, Digest of International Law, v. 14, 1970, pp. 312-313. Henkin notes that sometimes "federal legislation adopted prior to the treaty (and even for other purposes) may be available to implement a treaty obligation; sometimes the President may have authority to carry out those obligations without Congressional authorization. State law may also serve to implement non-self-executing obligations." Henkin 1996, p. 200.

The Senate included an express declaration in the resolutions of ratification for various human rights treaties stating that the treaty is not self-executing; the declaration was later included in the U.S. instrument of ratification for the treaty. See Congressional Record, v. 136, Oct. 1, 1990, p. 36198 and Nash (Leich), Marian, Contemporary Practice of the United States Relating to International Law. American Journal of International Law, v. 89, 1995, pp. 109-111 (International Covenant on Civil and Political Rights (ICCPR)); Congressional Record, v. 138, April 2, 1992, p. 8071, and Leich, Marian Nash, Contemporary Practice of the United States Relating to International Law. American Journal of International Law, v. 85, 1991, pp. 335-337 (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)); and Congressional Record, v. 140, June 7, 1994, p. 8071 and Nash (Leich), Marian, Contemporary Practice of the United States Relating to International Law. American Journal of International Law, v. 88, 1994, pp. 721-728 (International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention)). For the text of the U.S. instruments of ratification, see United Nations. Multilateral Treaties Deposited with the Secretary-General; Status as at 31 December 1996. U.N. Doc. ST/LEG/SER.E/15, 1997, p. 101 (Race Convention), p. 130 (ICCPR), and p. 191 (Torture Convention). Courts have subsequently denied private claims under these treaties. See, for example, *Iguarta de la Rosa v. United States*, 32 F. 3d 8 (1st Cir. 1994) (ICCPR) and *Barapind v. Reno*, 72 F. Supp. 2d 1132 (E.D. Cal. 1994) (Torture Convention).

<sup>47</sup> *Diggs v. Richardson*, 555 F. 2d 848, 851 (D.C. Cir. 1976).

nature of an international agreement is unclear, “account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent \* \* \* and of any expression by the Senate \* \* \* in dealing with the agreement.”<sup>48</sup> Alternatively, it is urged that reference should be made to “the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternate enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.”<sup>49</sup>

Where a treaty is deemed to be self-executing, any conflicting provisions of State law must yield. This principle, which is expressly enshrined in the supremacy clause of the Constitution, was early affirmed by the Supreme Court in *Ware v. Hylton*.<sup>50</sup> According to Justice Chase:

A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State Legislature can stand in its way. If the Constitution of a State \* \* \* must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the State Legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the Constitution and laws of any individual State; and their will alone is to decide. If a law of a State, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole.<sup>51</sup>

In the event of a conflict between a self-executing treaty and a Federal statute, it is well-settled that legal primacy will be accorded the measure which is later in time, albeit the courts will endeavor to harmonize the respective international and domestic obligations if possible. As indicated by the Supreme Court in *Whitney v. Robertson*:

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dis-

<sup>48</sup> Rest. 3d, § 111, Comment h.

<sup>49</sup> *People of Saipan v. United States Department of Interior*, 502 F. 2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975). In *Frolova v. Union of Soviet Socialist Republics*, 761 F. 2d 370, 373 (7th Cir. 1985), the court listed the following as factors that courts consider in discerning the intent of the treaty parties as to whether a treaty is self-executing: “(1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.”

<sup>50</sup> 3 Dall. (3 U.S.) 199 (1796).

<sup>51</sup> *Ibid.* at 236-237. The principle has been reaffirmed by the Court in numerous cases. For additional case authority, see *Constitution—Analysis and Interpretation*, pp. 472-474.



satisfied with the action of the legislative department, it may present its complaint to the executive head of the government and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause or our country was justified in its legislation, are not matters for judicial cognizance.<sup>52</sup>

If a particular treaty is not self-executing, and, accordingly, requires legislative implementation to become law of the land, Congress may enact such legislation notwithstanding that the subject matter of the treaty would normally be beyond congressional competence. This result arises by virtue of the necessary and proper clause of the Constitution (Article I, Section 8, Clause 18) which authorizes Congress to make all laws necessary and proper to effectuate not only its expressly delegated powers, but also “all other Powers vested by this Constitution in the government of the United States or in any Department or Officer thereof.” Application of this principle seems most evident in *Missouri v. Holland*<sup>53</sup> where Justice Holmes sustained both a treaty and an implementing act even though comparable legislation, when unaided by a treaty, had previously been declared invalid by the courts. Concerning this bootstrapping effect on the treaty power it has been observed that:

\*\*\* [T]he treaty power cannot purport to amend the Constitution by adding to the list of Congress’ enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures which independently of a treaty Congress could not pass; the only question that can be raised as to such measures will be whether they are necessary and proper measures for carrying of the treaty in question into operation.<sup>54</sup>

To the foregoing, it may be added that where a treaty requires implementing legislation for its effectuation, strictly speaking it is the statute and not the treaty which is the law of the land for the courts.<sup>55</sup> A caveat to this proposition exists, however, when the treaty itself is incorporated as part of the statute.<sup>56</sup>

## B. EXECUTIVE AGREEMENTS<sup>57</sup>

Reference to the text of the Constitution suggests the preeminent legal status of the treaty mode of agreement-making. Treaties, for example, are made only by the President and two-thirds of the Sen-

<sup>52</sup> 124 U.S. 581, 594 (1888). The Court has repeated the rule in many cases. See discussion in *Constitution—Analysis and Interpretation*, pp. 478–479, and *Breard v. Greene*, 523 U.S. 371, 376–77 (1998).

<sup>53</sup> 252 U.S. 416. See also *Neely v. Henkel*, 180 U.S. 109, 121 (1901), indicating that the necessary and proper clause of the Constitution is sufficient authority for Congress “to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.” See generally *Constitution—Analysis and Interpretation*, pp. 480–482; Rest. 3d, § 111, Comment j.

<sup>54</sup> *Constitution—Analysis and Interpretation*, pp. 481–482.

<sup>55</sup> *Hopson v. Kreps*, 622 F. 2d 1375 (9th Cir. 1980); *H.J. Justin & Sons Inc. v. Brown*, 519 F. Supp. 1383, 1390 (E.D. Cal. 1981).

<sup>56</sup> Henkin 1996, p. 200. Note, however, Rest. 3d, § 111, Comment h: “\*\*\* strictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is ‘enacted’ by, or incorporated in, implementing legislation.”

<sup>57</sup> Executive agreements are also discussed in Chapters II, III, IX, and X.

ate (Article II, Section 2, Clause 2), form part of the “Supreme Law of the Land” (Article VI, Clause 2), and create a basis for invoking the jurisdiction of the Federal courts (Article III, Section 2, Clause 1). Moreover, the States are absolutely prohibited from entering into any treaty (Article I, Section 10, Clause 1). While the Constitution thus expressly references the treaty mode four times, only once does the text of the Nation’s fundamental law appear to recognize the existence of other types of international instruments, as in the prohibition against the States from concluding any “Agreement or Compact” with a foreign power in the absence of congressional approbation (Article I Section 10, Clause 3).

On the other hand, the actual practice of the Nation under the Constitution confirms a numerical primacy of agreements which have not been concluded in the form of treaties.<sup>58</sup> Such agreements are typically denominated as “executive agreements” and may be further categorized as follows: (1) congressional-executive agreements sanctioned by the joint authority of the President and both Houses of Congress; (2) agreements concluded pursuant to existing treaties; and (3) Presidential or “sole” executive agreements made by the President on his independent constitutional authority.

In view of the numerical superiority of executive agreements in actual practice as contrasted with the textual primacy accorded the treaty mode by the Constitution, and owing as well to the controversial nature of particular executive agreements, it is perhaps not surprising that questions have been raised concerning the exclusive scope *vel non* of the treaty clause and the possible existence of a substantive distinction between treaties and executive agreements. Notwithstanding substantial scholarship devoted to ascertain the Framers’ intentions concerning these matters, the understanding of the Drafters remains largely obscure.<sup>59</sup> By virtue of actual practice and judicial edification, however, it is now well-settled that the treaty mode is not an exclusive means of agreement-making for the United States and that executive agreements may validly co-exist with treaties under the Constitution. Somewhat less clear, it seems, is whether any subject that is dealt with by treaty may also be effected by an executive agreement, particularly

<sup>58</sup>The editors of the Constitution—Analysis and Interpretation, pp. 494–495, observe that—Once a stepchild in the family in which treaties were the preferred offspring, the executive agreement has surpassed in number and perhaps in international influence the treaty formally signed, submitted for ratification to the Senate, and proclaimed upon ratification.

During the first half-century of its independence, the United States was party to 60 treaties but to only 27 published executive agreements. By the beginning of World War II, there had been concluded approximately 800 treaties and 1,200 executive agreements \*\*. In the period since 1939, executive agreements have comprised more than 90 percent of the international agreements concluded.

<sup>59</sup>The literature is extensive, but useful reference may be made to: Weinfeld, Abraham. What did the Framers of the Federal Constitution Mean by “Agreements or Compacts?” University of Chicago Law Review, v. 3, 1936, p. 453; McClure, Wallace. International Executive Agreements. 1941 (hereafter cited as McClure); McDougal, Myres and Lans, Asher. Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy. Yale Law Journal, v. 54, 1945, pp. 181 and 534 (hereafter cited as McDougal and Lans); Borchard, Edwin. Shall the Executive Agreement Replace the Treaty? Yale Law Journal, v. 53, 1944, p. 664 (hereafter cited as Borchard 1944); Borchard, E. Treaties and Executive Agreements—A Reply. Yale Law Journal, v. 54, 1945, p. 616; Wright, Q. The United States and International Agreements. American Journal of International Law, v. 38, 1944, p. 341; Mathews, Craig. The Constitutional Power of the President to Conclude International Agreements. Yale Law Journal, v. 64, 1955, p. 345; Berger, Raoul. The Presidential Monopoly of Foreign Relations. Michigan Law Review, v. 71, 1972, p. 1; Henkin 1996, Chapter VII; and Slonim, Solomon. Congressional-Executive Agreements. Columbia Journal of Transnational Law, v. 14, 1975, p. 434 (hereafter cited as Slonim).

by an agreement concluded by the President on his sole constitutional authority.<sup>60</sup> The succeeding discussion further develops these points by presenting a review of the practice and case law associated with each of the three types of executive agreements.

#### CONGRESSIONAL-EXECUTIVE AGREEMENTS

Congressional authorization for the conclusion of international agreements dates from the earliest days of the Nation's constitutional history. Thus, in 1790 Congress empowered the President to pay off the Revolutionary War debt by borrowing money from foreign countries "upon terms advantageous to the United States" and to conclude "such other contracts respecting the said debt as shall be found for the interest of the said States."<sup>61</sup> Two years later the Postmaster General was authorized to "make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices."<sup>62</sup> The authority for the conclusion of postal agreements was continued in later enactments and formed the basis of numerous postal "conventions" which were never submitted to the Senate.<sup>63</sup> Over the years, Congress has authorized or sanctioned additional agreements concerning a wide variety of subjects including, inter alia, the protection of intellectual property rights,<sup>64</sup> acquisition of territory,<sup>65</sup> national participation in various international organizations,<sup>66</sup> foreign trade,<sup>67</sup> foreign military assistance,<sup>68</sup> foreign economic assist-

<sup>60</sup> See, for example, the statement of the Senate Foreign Relations Committee in its Report on the National Commitments Resolution, S. Res. 85, 91st Cong., 1st Sess. 1969, wherein it is maintained that "[t]he traditional distinction between the treaty as the appropriate means of making significant political commitments and the executive agreement as the appropriate instrument for routine, nonpolitical arrangements has substantially broken down." S. Rept. 129, 91st Cong., 1st Sess. 1969, p. 26.

<sup>61</sup> Act of Aug. 4, 1790, ch. 43, § 2, 1 Stat. 139.

<sup>62</sup> Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 239.

<sup>63</sup> See Crandall, Samuel. *Treaties—Their Making and Enforcement*. 1916 (2d ed.), pp. 131–132 (hereafter cited as Crandall), and McDougal and Lans, pp. 239–240. Miller states the "[p]ostal conventions are not, and with a very few exceptions, never have been submitted to the Senate as treaties." Miller, Hunter. *Treaties and Other International Acts of the United States of America*, v. 1, 1931, p. 7 (hereafter cited as Miller, *Treaties*). Current legislative authority for postal agreements is contained in 39 U.S.C. § 407. See also 19 Op. Atty. Gen. 513 (1890) in support of the constitutionality of this practice.

<sup>64</sup> See Crandall, pp. 127–131. A recent example is the World Trade Organization (WTO) Agreement on the Trade-Related Aspects of Intellectual Property Rights, approved by Congress in sec. 101 of Public Law 103–465, 108 Stat. 4809, 4814.

<sup>65</sup> See the Joint Resolution of March 1, 1845, 5 Stat. 797, consenting to the admission of Texas into the Union upon specified conditions, and the Joint Resolution of Dec. 29, 1845, 9 Stat. 108, admitting Texas into the Union). See also the Joint Resolution of July 7, 1898, 30 Stat. 750, annexing the Hawaiian Islands as part of the territory of the United States.

<sup>66</sup> See, for example, the Bretton Woods Agreement Act, 59 Stat. 512 (1945) (International Bank for Reconstruction and Development and the International Monetary Fund), and various Joint Resolutions authorizing U.S. membership and participation in such organizations as the International Labor Organization, 48 Stat. 529 (1945); United Nations Relief and Rehabilitation Agency, 58 Stat. 122 (1944); International Refugee Organization, 61 Stat. 214 (1947); Food and Agricultural Organization, 59 Stat. 529 (1945); United Nations Educational, Scientific, and Cultural Organization, 60 Stat. 712 (1946); the World Health Organization, 62 Stat. 441 (1948).

<sup>67</sup> See the Tariff Act of 1890, § 3, 26 Stat. 612, and of 1897, § 3, 30 Stat. 203; the Reciprocal Trade Agreements Act of 1934, § 350(a), 48 Stat. 943; the Trade Expansion Act of 1962, 19 U.S.C. § 1821; the Trade Act of 1974, 19 U.S.C. §§ 2111, 2115, 2131(b), 2435; and the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2902.

<sup>68</sup> See the Lend-Lease Act of 1941, § 3, 55 Stat. 31, and the Arms Export Control Act of 1976, 22 U.S.C. § 2751.

ance,<sup>69</sup> atomic energy cooperation,<sup>70</sup> and international fishery rights.<sup>71</sup>

The subject matter diversity of congressional-executive agreements is matched by the varying means by which Congress has authorized the conclusion of such agreements. Thus, Congress has enacted statutes providing authority in advance for the President to negotiate with other nations on a particular matter. This authority may be explicit,<sup>72</sup> or, in the case of agreements concluded in conformity with a generally enunciated congressional policy, implied from the terms of the enactment.<sup>73</sup> Legislative authorization for congressional-executive agreements may also be effected by passage of a statute following the negotiation of a concluded agreement. Again, congressional approval may be explicit,<sup>74</sup> or, implied, as in the case of legislation appropriating funds to carry out participation by the United States in an international organization.<sup>75</sup>

In regulating the use of congressional-executive agreements, Congress has specified in advance the general terms of negotiation<sup>76</sup> and conditioned the effectiveness of particular agreements alternatively upon the enactment of implementing legislation,<sup>77</sup> upon the legislative adoption of an approving concurrent resolution within a specified time following transmittal of the agreement to

<sup>69</sup>See the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2151 et seq., authorizing the President to furnish assistance to foreign nations "on such terms and conditions as he may determine" in such areas as agriculture, rural development, and nutrition, 22 U.S.C. § 2151a; population planning and health, 22 U.S.C. § 2151b; education and human resources development, 22 U.S.C. § 2151c; and disaster assistance, 22 U.S.C. § 2153.

<sup>70</sup>See Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2153.

<sup>71</sup>See Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1821, 1822.

<sup>72</sup>See, for example, sec. 202(a) of the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1822(a); secs. 101 and 405 of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2111 and 2435; and sec. 405(c) of the International Religious Freedom Act of 1998, 22 U.S.C. § 6445(c).

<sup>73</sup>See the Tariff Act of 1890, § 3, 26 Stat. 612, providing that "with a view to secure reciprocal trade with countries producing [specified articles,] \*\*\* whenever, and so often as the President shall be satisfied that the Government of any country producing and exporting [specified articles] imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such [specified articles], into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation \*\*\* the provisions of the act relating to the free introduction of such [specified articles], the production of such country for such time as he shall deem just." Pursuant to this authority, 10 agreements were concluded by the President. See Crandall, p. 122. Note also sec. 111(b) of the Uruguay Round Agreements Act, 108 Stat. 4819 (1994), authorizing the President to proclaim duty modifications and reductions pursuant to specified trade agreements negotiated under the auspices of the World Trade Organization (WTO).

<sup>74</sup>See, for example, the Bretton Woods Agreement Act of 1945, 59 Stat. 512; sec. 2 of H.J. Res. 1227, Sept. 30, 1972, Public Law 92-448, 86 Stat. 746, approving and authorizing the President to accept the Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, United States-Soviet Union, May 26, 1972, 23 U.S.T. 3462; and sec. 101 of the Uruguay Round Agreements Act, 19 U.S.C. § 3511, approving agreements resulting from the GATT Uruguay Round of Multilateral Trade Negotiations.

<sup>75</sup>See 25 Stat. 155; Act of Mar. 2, 1889, 25 Stat. 957; Act of Apr. 7, 1934, 48 Stat. 534, making appropriations for American participation in the Pan-American Union Act of May 24, 1888, and secs. 531 and 532 of the North American Free Trade Agreement (NAFTA) Implementation Act, 107 Stat. 2163-2164 (1993), authorizing U.S. participation in the Commission on Labor Cooperation and the Commission on Environmental Cooperation established under supplemental agreements to the North American Free Trade Agreement, as well as funds for the U.S. contribution to the each organization's annual budget. Congress did not, however, expressly approve the supplemental agreements. See also McDougal and Lans, p. 271, Henkin 1996, at pp. 215-216.

<sup>76</sup>See sec. 123 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2153(a); sec. 107 of the Trade Act of 1974, as amended, 19 U.S.C. § 2117; and sec. 201(c) of the Magnuson Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. § 1821(c).

<sup>77</sup>See sec. 102(e) of the Trade Act of 1974, 19 U.S.C. § 2112(e), and sec. 1103 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2903.

Congress,<sup>78</sup> or upon the failure of Congress to adopt a disapproving concurrent<sup>79</sup> or joint<sup>80</sup> resolution within designated time periods. Furthermore, congressional approval of some agreements has been accompanied by conditions.<sup>81</sup> The President is presently required by at least one statute to select Members of Congress from specified committees to serve as accredited advisers to American delegations attending international conferences, meeting, and negotiating sessions relating to trade agreements.<sup>82</sup> Other legislation has required the President to consult with specified committees before entering into trade agreements.<sup>83</sup>

The constitutionality of congressional-executive agreements appears to have been first raised before the Supreme Court in *Field v. Clark*.<sup>84</sup> In *Field* it was alleged that section 3 of the Tariff Act of 1890,<sup>85</sup> which authorized the President to suspend exemptions from import duties on specified articles unless reciprocity could be obtained with other nations, unconstitutionally delegated both the legislative and treaty-making power. Although no specific agreement was in issue, a number of reciprocal trade agreements had already been concluded pursuant to section 3.<sup>86</sup> In meeting the objection that the Act unlawfully delegated Congress' legislative powers, the Court cited numerous statutory precedents dating from the early days of the Nation's constitutional history. The existence of these precedents permitted the Court summarily to dispose of the additional argument—that the treaty power had been unlawfully delegated—with the reply that “[w]hat has been said [regarding the delegation of legislative authority] is equally applicable to the ob-

<sup>78</sup> See Sec. 405(c) of the Trade Act of 1974, 19 U.S.C. § 2435(c) (1988). The constitutionality of this procedure was undermined by a pair of 1983 Supreme Court actions which overturned on separation of powers grounds one and two house resolutions disapproving of executive branch exercises of statutorily delegated authority. *INS v. Chadha*, 462 U.S. 919 (1983) and *United States Senate and United States House of Representatives v. Federal Trade Commission*, 463 U.S. 1216 (1983). Accordingly, Congress in 1990 amended section 405(c) to substitute the enactment of a joint resolution for approval by concurrent resolution; the former complies with constitutionally specified requirements for enacting law, namely bicameral action and Presidential presentation. 19 U.S.C. § 2434(c).

<sup>79</sup> See sec. 123(d) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2153(d), and sec. 36 of the Arms Export Control Act of 1976, 22 U.S.C. § 2776, subjecting any Presidential “letter of offer” to sell defense articles or services for \$50 million or more, or any major defense equipment for \$14 million or more, to this procedure unless the President certifies that a national emergency exists which requires the sale in the national security interests of the United States. For reasons set forth in note 78, *supra*, Congress has revised these provisions of law to require lawmaking in conformity with constitutionally prescribed procedures.

<sup>80</sup> See sec. 203 of the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1823.

<sup>81</sup> Congressional approval of the United Nations Headquarters Agreement was accompanied by the condition that “any supplemental agreement entered into pursuant to section 5 of the Agreement \* \* \* shall be submitted to Congress for approval.” 61 Stat. 756, 758 (1947). In accepting U.S. adherence to the International Refugee Organization, Congress specified that its approval “is given upon condition and with reservation that no agreement shall be concluded on behalf of the United States and no action shall be taken by any officer, agency or any other person \* \* \* (1) whereby any person shall be admitted to or settled or resettled in the United States or any of its Territories or possessions without prior approval thereof by the Congress \* \* \* or (2) which will have the effect of abrogating, suspending, modifying, adding to, or superceding any of the immigration laws or any other laws of the United States.” 61 Stat. 214 (1947).

<sup>82</sup> See sec. 161 of the Trade Act of 1974, 19 U.S.C. § 2211.

<sup>83</sup> Sec. 1102 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2902.

<sup>84</sup> 143 U.S. 649 (1892). Although the issue was not squarely presented, the Supreme Court, in *Texas v. White*, 7 Wall. (74 U.S.) 700 (1868), and in *Hawaii v. Mankichi*, 190 U.S. 197 (1903), seemed implicitly to approve the bypassing of the treaty mode in the acquisition of Texas and Hawaii by the United States.

<sup>85</sup> 26 Stat. 612

<sup>86</sup> Crandall lists ten commercial agreements which were concluded under section 3 of the Tariff Act of 1890. See Crandall, p. 122. The decision in *Field v. Clark*, 143 U.S. 649 (1892), was rendered after six agreements had already become effective by proclamation.

jection that the third section of the Act invests the President with treaty-making power \* \* \* [T]he Court is of opinion that the third section of the Act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President.”<sup>87</sup>

Twenty years later, in *B. Altman & Co. v. United States*,<sup>88</sup> the Court held that a reciprocal trade agreement between the United States and France,<sup>89</sup> concluded pursuant to section 3 of the Tariff Act of 1897,<sup>90</sup> was a “treaty” for purposes of section 5 of the Circuit Court of Appeals Act of 1891<sup>91</sup> permitting direct appeals to the Supreme Court in any case involving the validity or construction of a “treaty.” Although the Court acknowledged that the trade agreement was not a treaty in the technical sense of Article II, Section 2, of the Constitution, it did not inquire into the constitutionality of the authorizing legislation, preferring simply to characterize the issue as one of ascertaining Congress’ intent under the Circuit Court of Appeals Act. According to the Court:

[The Circuit Court of Appeals Act] was intended to cut down and limit the jurisdiction of this court and many cases were made final in the Circuit Court of Appeals which theretofore came to this court, but it was thought best to preserve the right to a review by direct appeal or writ of error from a Circuit Court in certain matters of importance, and, among others, those involving the construction of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal Court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the Nation. While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court.<sup>92</sup>

Evidencing a similar lack of interpretative rigidity is *Louis Wolf & Co. v. United States*<sup>93</sup> wherein the U.S. Court of Customs and Patent Appeals held that a United States-Cuba Trade Agreement

<sup>87</sup> 143 U.S. at 694.

<sup>88</sup> 224 U.S. 583 (1912).

<sup>89</sup> Commercial Agreement of May 30, 1898, United States-France, 30 Stat. 1774.

<sup>90</sup> 30 Stat. 203.

<sup>91</sup> 26 Stat. 827-828.

<sup>92</sup> 224 U.S. at 601.

<sup>93</sup> 107 F. 2d 819 (C.C.P.A. 1939)

of 1934,<sup>94</sup> which had been effected under section 350(a) of the Tariff Act of 1930,<sup>95</sup> was a "commercial convention" within the meaning of treaties concluded by the United States with Norway<sup>96</sup> and Austria.<sup>97</sup> The latter two treaties exempted from unconditional most-favored-nation treatment goods accorded preferential treatment by the United States under a United States-Cuban Commercial Convention of 1902 or any other "commercial convention" which might subsequently be concluded between the United States and Cuba. In holding that the 1934 United States-Cuba Trade Agreement was a "commercial convention" within the meaning of the Austrian and Norwegian treaties, the court declared that:

\* \* \* We think that by the use of the term "commercial convention" such a trade agreement as the Cuban Trade Agreement of 1934 was intended to be included, and it is our opinion that that agreement is a commercial convention although it was not ratified by the Senate. It is true that the treaties with Norway and Austria refer to the Cuban treaty of 1902 as a "Commercial Convention" and that it was ratified by the Senate. The treaty of 1902 refers to itself as a "convention." We think it well settled that the term "commercial convention" is broad enough to include commercial conventions which are ratified by the Senate when negotiated by the executive department of the Government, but that it also includes certain commercial agreements which may be authorized by Congress, if such conventions are within the powers so delegated.

On this phase of the case we think it proper to say that the President, pursuant to acts of Congress, frequently has entered into agreements with foreign States.<sup>98</sup>

While the issue concerning the constitutionality of congressional-executive agreements was either summarily resolved or substantially avoided in *Field v. Clark, Altman, and Louis Wolf*, a more detailed resolution of this question was evidenced by the U.S. Customs Court in *Star-Kist Foods, Inc. v. United States*.<sup>99</sup> In *Star-Kist*, the court held that a trade agreement between the United States and Iceland,<sup>100</sup> which was authorized by section 350(a) of the Tariff Act of 1930,<sup>101</sup> was not an unconstitutional delegation of the treaty power. In determining that the Icelandic agreement was "not a treaty requiring concurrence by the United States Senate within the meaning of the term, as used in the Constitution," the court relied heavily upon *Field v. Clark, Altman, and Louis Wolf*.<sup>102</sup> Specifically noteworthy, however, is the concurring opinion of Judge Mollison which not only assessed the precedential significance of *Field v. Clark*, but also articulated a theoretical basis for

<sup>94</sup> Agreement Respecting Reciprocal Trade, United States-Cuba, Aug. 24, 1934, 49 Stat. 3559.

<sup>95</sup> Sec. 350(a) of the Tariff Act of 1930, 46 Stat. 708, as added by the Reciprocal Trade Agreements Act of 1934, 48 Stat. 943.

<sup>96</sup> Treaty of Friendship, Commerce, and Consular Rights, United States-Norway, June 5, 1928, 47 Stat. 2135.

<sup>97</sup> Treaty of Friendship, Commerce, and Consular Rights, United States-Austria, June 19, 1928, 47 Stat. 1876.

<sup>98</sup> 107 F. 2d at 826.

<sup>99</sup> 169 F. Supp. 268 (Cust. Ct. 1958), aff'd, 257 F. 2d 472 (C.C.P.A. 1959).

<sup>100</sup> Agreement Respecting Reciprocal Trade, United States-Iceland, Aug. 27, 1943, 57 Stat. 1075.

<sup>101</sup> Sec. 350(a) of the Tariff Act of 1930, 46 Stat. 708, as added by the Reciprocal Trade Agreements Act of 1934, 48 Stat. 943.

<sup>102</sup> 169 F. Supp. at 278-280.

congressional-executive agreements in the area of foreign trade. According to Judge Mollison:

The decision in *Field v. Clark* \*\*\* is supporting authority for the view of Congress, when it enacted the Reciprocal Trade Agreements Act of 1934 [adding section 350(a) to the Tariff Act of 1930], that it had the authority to authorize and empower the President, under prescribed standards and upon specified limitations upon his discretion, to negotiate and conclude reciprocal trade agreements and to make them effective by proclamation. The effect of the decision in *Field v. Clark*, coming after six of the ten reciprocal trade agreements had been concluded and made effective by proclamation, was an approval of such trade agreements and the exercise of such Executive authority and practice.

\*\*\* It can hardly be doubted that the Congress has the authority, in regulating foreign trade and commerce, to authorize the President, under prescribed standards and limitations, to negotiate, conclude, and make effective by proclamation reciprocal trade agreements lowering customs duties in return for concessions granted the United States.<sup>103</sup>

On appeal the U.S. Court of Customs and Patent Appeals affirmed the holding of the U.S. Customs Court and further amplified the constitutional doctrine supporting congressional-executive agreements in the area of foreign trade:

\*\*\* From reading the act, it is apparent that Congress concluded that the promotion of foreign trade required that the tariff barriers in this and other countries be modified on a negotiated basis. Since the President has the responsibility of conducting the foreign affairs of this country generally, it gave to him the added responsibility of negotiating the agreements in pursuance of the spirit of the act. Such a procedure is not without precedent nor judicial approval [citing, inter alia, the *Altman* and *Louis Wolf* cases, supra]<sup>104</sup>

The question whether trade agreements can constitutionally be entered into as congressional-executive agreements rather than treaties has arisen in a judicial challenge to the North American Free Trade Agreement (NAFTA), in which it was alleged that the failure to use the treaty process rendered the agreement and its implementing legislation unconstitutional. In *Made in the USA Foundation v. United States*, a Federal District Court held in July 1999 that “the President had the authority to negotiate and conclude NAFTA pursuant to his executive authority and pursuant to the authority granted to him by Congress in accordance with the terms of the Omnibus Trade and Competitiveness Act of 1988 \*\*\* and section 151 of the Trade Act of 1974 \*\*\* and as further ap-

<sup>103</sup> *Ibid.* at 287–288

<sup>104</sup> 275 F. 2d at 483. The court also relied on *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936); *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942). For a discussion of these cases, see text accompanying notes 135–144 and 151–152, *infra*.



proved by the [NAFTA] Implementation Act.”<sup>105</sup> The court concluded that the foreign commerce clause, combined with the necessary and proper clause and the President’s Article II foreign relations power, was a constitutionally sufficient basis for the NAFTA:

\*\*\* [W]hile the reason(s) for the existence and adoption of the Treaty Clause and its scope are debatable, the plenary scope of the Commerce Clause is clear. There exists no reason to apply a limiting construction upon the Foreign Commerce Clause or to assume that the Clause was not meant to give Congress the power to approve those agreements that are ‘necessary and proper’ in regulating foreign commerce. It is impossible to definitively conclude that the Framers intended the regulation of foreign commerce to be subject to the rigors of the Treaty clause procedure when commercial agreements with foreign nations are involved. Given the [Supreme] Court’s language in *Gibbons v. Ogden*, the power of Congress to regulate foreign commerce with foreign nations is so extensive that it is reasonably arguable \*\*\* that no ‘treaty’ affecting commerce with foreign nations is valid unless adopted by Congress as a whole. In the absence of specific limiting language in or relating to the Treaty Clause, I am led to conclude that the foreign commerce power of Congress is at least concurrent with the Treaty Clause power when an agreement, as is the case here, is dominated by provisions specifically related to foreign commerce and has other provisions which are reasonably ‘necessary and proper’ for ‘carrying all others into execution.’ \*\*\* Further, I note that the President, in negotiating the Agreement in connection with the fast track legislation, is acting pursuant to his constitutional responsibility for conducting the Nation’s foreign affairs and pursuant to a grant of authority from Congress.<sup>106</sup>

<sup>105</sup> *Made in the USA Foundation et al. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala 1999). The decision has been appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The issue had earlier emerged during Congress’ consideration in 1994 of implementing legislation for trade agreements concluded during the GATT Uruguay Round of Multilateral Trade Negotiations. The question originally was posed because of the perceived effect of the agreements on states. The agreements were negotiated and submitted to Congress for expedited approval and implementation pursuant to the statutes cited in the *Made in the USA Foundation* case, that is, the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, as amended, and section 151 of the Trade Act of 1974, which together required an “implementing bill” containing a provision expressly approving the agreements as well as any statutory provisions “necessary or appropriate” to implement them. The agreements were ultimately approved by both Houses of Congress in the Uruguay Round Agreements Act, Public Law 103-465. Legal arguments and discussion may be found in “Memorandum to Ambassador Michael Kantor, U.S. Trade Representative, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Treaty Ratification of the GATT Uruguay Round: Additional Memorandum” (November 22, 1994) <http://www.usdoj.gov/olc/1994opinions.htm>. See also U.S. Congress. Senate. Committee on Commerce, Science, and Transportation. S. 2467, GATT Implementing Legislation. S. Hrg. 103-823, October–November 1994; Henkin 1996, pp. 218–219; and Vagts, Detlev F. International Agreements, the Senate and the Constitution. *Columbia Journal of Transnational Law*, v. 36, 1997, p. 143.

<sup>106</sup> *Ibid.* at 1319–22 (citations omitted). *Gibbons v. Ogden*, 22 U.S. 1 (1824) recognized the plenary nature of Congress’ power under the commerce clause. The court also stated that it had been persuaded by language in *Edwards v. Carter*, 580 F. 2d 1055, 1057–58 (D.C. Cir.), cert. denied, 436 U.S. 907 (1978), addressing concurrent power under the property clause (U.S. Constitution, Article IV, Section 3, Clause 2). *Edwards* considered whether the clause, which authorizes Congress “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,” prevented the President and the Senate from transferring ownership of the Panama Canal pursuant to a treaty. The *Edwards* court stated in part that “on its face, the Property Clause is intended not to restrict the scope of the Treaty Clause, but, rather is intended to permit Congress to accomplish through legislation what may concurrently be accomplished through other means provided in the Constitution.” 580 F. 2d at 1058, as quoted in 56 F. Supp. 2d 1309.

The Supreme Court earlier addressed the question of congressional-executive agreements in *Weinberger v. Rossi*,<sup>107</sup> where it held that the term “treaty,” as used in a statute prohibiting employment discrimination against U.S. citizens on American military bases abroad unless permitted by “treaty,” embraced a base labor agreement between the United States and the Philippines authorizing the preferential hiring of Filipino nationals.<sup>108</sup> The Court deemed the issue as “solely one of statutory interpretation” and noted, inter alia, the imprecision of Congress’ use of the term “treaty” in various legislative enactments and the rule of construction favoring the harmonization of statutory requirements with the Nation’s international obligations.<sup>109</sup>

The use of congressional-executive agreements in the extradition area was recently affirmed in *Ntakirutimana v. Reno*, which challenged the constitutionality of the 1995 extradition agreement between the United States and the International Criminal Tribunal for Rwanda.<sup>110</sup> The agreement had been entered into as an executive agreement and implemented pursuant to Section 1342 of Public Law 104–106.<sup>111</sup> Petitioner argued that a treaty was constitutionally required for an extradition, but the Federal Circuit Court of Appeals disagreed, finding that neither the text of the Constitution, constitutional history, nor historical practice supported such a requirement. Addressing the Supreme Court’s ruling in *Valentine v. United States*<sup>112</sup> that executive power to extradite must be based in a statute or a treaty, the court concluded that the required authorization could be found in Public Law 104–106, which, along with the agreement, created the constitutionally valid “congressional-executive agreement” used in this situation.

From the foregoing review of the practice and case law associated with congressional-executive agreements, it would seem that the constitutionality of this mode of agreement-making is well established. Notwithstanding that the text of the Constitution confers no explicit authority for the making of congressional-executive agreements, such agreements have been authorized frequently by Congress over the years on a wide variety of subjects. Similarly, courts

<sup>107</sup> 456 U.S. 25 (1982).

<sup>108</sup> At issue in the case was the scope of section 106 of Public Law 92–129, 85 Stat. 355, 5 U.S.C. § 7201 note, prohibiting employment discrimination of the type described. Earlier, in 1944, Congress had authorized the President, “by such means as he finds appropriate,” to acquire by negotiations with the President of the Philippines, military bases “he may deem necessary for the protection of the Philippine Islands and of the United States.” 22 U.S.C. § 1392. Pursuant to this authority, the President concluded the Military Bases Agreement of March 14, 1947, 62 Stat. 4019, as well as the Base Labor Agreement of May 27, 1968, 19 U.S.T. 5892, the latter providing for the preferential hiring of Filipino citizens at American military facilities in the Philippines.

<sup>109</sup> 456 U.S. at 26, 31, and 32. The Court stated that “[a]t the time § 106 [of Public Law 92–129] was enacted, there were in force 12 agreements in addition to the [Philippine base labor agreement] providing for preferential hiring of local national on United States military [bases] over seas. Since the time of the enactment of § 106, four more such agreements have been concluded, and none of these were submitted to the Senate for its advice and consent \* \* \* We think that some affirmative expression of congressional intent to abrogate the United States’ international obligations is required in order to construe the word ‘treaty’ in § 106 as meaning only Article II treaties.” *Ibid.* at 32.

<sup>110</sup> Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committee in the Territory of Neighboring States, signed January 24, 1995, entered into force February 14, 1996, TIAS 12601.

<sup>111</sup> 184 F. 3d 419 (5th Cir. 1999).

<sup>112</sup> 299 U.S. 5 (1936).

have been little troubled by theoretical considerations and have sustained such agreements largely on the basis of the actual practice of the political branches of the government and the cumulative weight of prior judicial decisions. Where the constitutionality of a congressional-executive agreement was directly challenged, the commerce clause coupled with the necessary and proper clause and the President's foreign affairs power was held to provide an adequate constitutional basis for a trade agreement that took this form.<sup>113</sup> Moreover, it appears to be the majority view of legal scholars that congressional-executive agreements and treaties are wholly interchangeable modes of agreement-making for the United States, although this proposition has been periodically questioned where the "interchange" is initiated by the President in his discretion rather than by prior congressional authorization.<sup>114</sup>

#### AGREEMENTS PURSUANT TO TREATIES

Agreements in this category comprise those which are expressly authorized by the text of an existing treaty or whose making may be reasonably inferred from the provisions of a prior treaty. Numerous agreements pursuant to treaties have been concluded by the Executive, particularly of an administrative nature, to implement in detail generally worded treaty obligations. Early agreements of this type consist of instruments accepting the results of boundary surveys mandated by a pre-existing treaty, accepting the accession of additional parties to a previously concluded treaty, or implementing transit rights across foreign territory as envisioned by a treaty of earlier date.<sup>115</sup> Modern examples of agreements pursuant to treaties may be found in the many arrangements and understandings implementing the North Atlantic Treaty Organization (NATO) Treaty.<sup>116</sup>

Agreements concluded pursuant to existing treaties have occasionally provoked controversy when it has been alleged that particular agreements either required Senate approval in treaty form or were otherwise not within the purview of an existing treaty.<sup>117</sup>

<sup>113</sup> For a cogent argument that the combined foreign affairs powers of the Congress and the President would prove sufficient to sustain congressional-executive agreements, see McDougal and Lans, pp. 217 et seq.

<sup>114</sup> For expressions of the majority view, see Henkin 1996, p. 217; Slonim, p. 449; and Murphy, John, *Treaties and International Agreements Other Than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives, and the Senate*, University of Kansas Law Review, v. 23, 1975, p. 237. Arguably, the case favoring interchangeability is enhanced by the *Altman, Louis Wolf, Rossi, Made in U.S.A. Foundation*, and *Ntakirutimana* cases discussed in the text accompanying notes 88-98 and 105-112, supra. Compare, however, Borchard 1944, p. 671, and the several contentious memoranda issued by the Legal Adviser, Department of State, and the Office of Legislative Counsel, United States, concerning the President's characterizations of the four Sinai Agreements of 1975, involving the United States, Egypt, and Israel, as "executive agreements," Congressional Record, v. 121, 1975, pp. 36718-36731 and v. 122, 1976, pp. 3374-3379. Note also the debate described in note 105, supra.

<sup>115</sup> See Crandall, pp. 117-119.

<sup>116</sup> In 1953 Secretary of State Dulles estimated that some 10,000 agreements had been concluded under the NATO Treaty. Hearings before a Subcommittee of the Senate Judicial Committee on S.J. Res. 1 and S.J. Res. 43, 83d Cong., 1st Sess. 1953, p. 877.

<sup>117</sup> Taft, William H. Our Chief Magistrate and His Powers. 1925, pp. 111-112 (modus vivendi of 1904 under the Hay-Varilla Treaty with Panama "attacked vigorously in the Senate as a usurpation of the treaty-making power"); Constitution—Analysis and Interpretation, p. 498 (Senate approval in 1905 of bilateral arbitral treaty with Great Britain, when made contingent upon President's subsequent submittal of arbitral *compromis* for Senate approval, deemed a rejection of the treaties by President Roosevelt); and Executive Agreements with Portugal and Bahrain: Hearings before the Senate Foreign Relations Committee on S. 214, 92d Cong., 2d Sess. 11 (1972) (Executive reliance upon Article III of NATO Treaty deemed "farfetched" as sup-

While the President's authority to conclude such agreements seems well-established, the constitutional doctrine underlying his power is seldom detailed by legal commentators or by the courts. It has been suggested that sufficient authority may be found in the President's duty under Article II, Section 3, of the Constitution to "take care that the laws [i.e., treaty law] be faithfully executed."<sup>118</sup> If the making of such agreements is indeed sustainable on this ground, then the instruments technically would seem more properly characterized as Presidential or sole executive agreements in view of the reliance upon one of the Executive's independent powers under Article II of the Constitution.

On the other hand, an alternate legal basis is suggested by *Wilson v. Girard*,<sup>119</sup> where the Supreme Court seemed to find sufficient authorization in the Senate's consent to the underlying treaty. The Court's decision was predicated on the following factual chronology. Pursuant to a 1951 bilateral security treaty,<sup>120</sup> Japan and the United States signed an administrative agreement<sup>121</sup> which became effective on the same date as the security treaty and which was considered by the Senate before consenting to the treaty. The administrative agreement provided that once a NATO Status of Forces Agreement concerning criminal jurisdiction came into effect, the United States and Japan would conclude an agreement with provisions corresponding to those of the NATO Arrangements. Accordingly, subsequent to the entry into force of the NATO Agreement,<sup>122</sup> the United States and Japan effected a protocol agreement<sup>123</sup> containing provisions at issue in the case at bar. In sustaining both the administrative agreement and the protocol agreement, the Court stated that:

In the light of the Senate's ratification of the Security Treaty after consideration of the Administrative Agreement, which had already been signed, and its subsequent ratification of the NATO Agreement, with knowledge of the commitment to Japan under Administrative Agreement, we are satisfied that the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol embodying the NATO Agreement provisions governing jurisdiction to try criminal offenses.<sup>124</sup>

#### PRESIDENTIAL OR SOLE EXECUTIVE AGREEMENTS

Agreements concluded exclusively pursuant to the President's independent authority under Article II of the Constitution may be denominated Presidential or sole executive agreements. Unlike congressional-executive agreements or agreements pursuant to

porting authority for 1971 agreement with Portugal under which the United States agreed to provide some \$435 million in credits and assistance to Portugal in exchange for the right to station American forces at Lajes Airbase in the Azores).

<sup>118</sup>Henkin, pp. 219-220.

<sup>119</sup>354 U.S. 524 (1957).

<sup>120</sup>Security Treaty Between the United States and Japan, Sept. 8, 1951, 3 U.S.T. 3329, TIAS 2491.

<sup>121</sup>Administrative Agreement under the United States-Japan Security Treaty, Feb. 28, 1952, 3 U.S.T. 3341, TIAS 2492.

<sup>122</sup>Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, TIAS 2846.

<sup>123</sup>Protocol Amending the Administrative Agreement under the United States-Japan Security Treaty, Sept. 29, 1953, 4 U.S.T. 1846, TIAS 2848.

<sup>124</sup>354 U.S. at 528-29.

treaties, Presidential agreements lack an underlying legal basis in the form of a statute or treaty.

Numerous Presidential agreements have been concluded over the years on the basis of the President's independent constitutional authority. Agreements of this type deal with a variety of subjects and reflect varying degrees of formality. Many Presidential agreements, of course, pertain to relatively minor matters and are the subject of little concern. Other agreements, however, have provoked substantial interbranch controversy, notably between the Executive and the Senate.

Some idea of both the modern scope and contentious nature of Presidential agreements may be gained by noting that such agreements were responsible for the open door policy toward China at the beginning of the 20th century,<sup>125</sup> the effective acknowledgment of Japan's political hegemony in the Far East pursuant to the Taft-Katsura Agreement of 1905 and the Lansing-Ishii Agreement of 1917,<sup>126</sup> American recognition of the Soviet Union in the Litvinov Agreement of 1933,<sup>127</sup> the Destroyers-for-Bases Exchange with Great Britain prior to American entry into World War II,<sup>128</sup> the Yalta Agreement of 1945, a secret portion of which made far-reaching concessions to the Soviet Union to gain Russia's entry into the war against Japan,<sup>129</sup> the 1973 Vietnam Peace Agreement,<sup>130</sup> and, more recently, the Iranian Hostage Agreement of 1981.<sup>131</sup>

As previously indicated, legal authority supporting the conclusion of Presidential agreements may be found in the various foreign affairs powers of the President under Article II of the Constitution.

<sup>125</sup> The open door policy in China as initiated during the administration of President McKinley in the form of notes from Secretary of State John Hay to the Governments of France, Germany, Great Britain, Italy, Japan, and Russia. The text of the Hay notes may be found in Malloy, William. *Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States of America and Other Powers*, v. 1, 1910, pp. 244-260 (hereafter cited as Malloy). Concerning the significance of these agreements, see McClure, p. 98, and Bemis, Samuel Flagg. *A Diplomatic History of the United States*. 1965, pp. 486 and 504 (hereafter cited as Bemis).

<sup>126</sup> The Taft-Katsura Agreement of 1905 may be found in Dennett, Tyler. *Roosevelt and the Russo-Japanese War*, 1925, pp. 112-114. The Lansing-Ishii Agreement of 1917 may be found in Malloy, v. 3, pp. 2720-2722. Concerning the latter agreement, see Bemis, pp. 690-693.

<sup>127</sup> The correspondence establishing the agreement may be found in U.S. Department of State, *Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics*, Eastern European Series No. 1 (1933) [No. 528]. Concerning President Roosevelt's failure to give the Senate formal notification of the agreement, see the remarks of Senator Vandenberg in *Congressional Record*, January 11, 1934, pp. 460-461.

<sup>128</sup> See the Agreement Respecting Naval and Air Bases (Hull-Lothian Agreement), *United States-Great Britain*, Sept. 2, 1940, 54 Stat. 2405, and the Opinion of Attorney General Robert Jackson supporting the constitutionality of the arrangement, 39 Op. Atty. Gen. 484 (1940). See also Wright, Q. *The Transfer of Destroyers to Great Britain*. *American Journal of International Law*, v. 34, 1940, p. 680; Borchard, E. *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*. *Id.*, p. 690; and Bemis, p. 858.

<sup>129</sup> For the text of the Yalta Agreement, see 59 Stat. 1823. Seven years after the Yalta Conference, the agreement was still being denounced in the Senate as "shameful," "infamous," and a usurpation of power by the President. *Congressional Record*, February 7, 1952, p. 900 (remarks of Senator Ives). See also Bemis, p. 904. Although there were statements made by President Roosevelt and Secretary of State James Byrnes which seemed to imply that Senate consent to the agreement would be necessary, the treaty mode was not utilized. In this connection, see Pan, *Legal Aspects of the Yalta Agreement*. *American Journal of International Law*, v. 46, 1952, p. 40, and Briggs, *The Leaders' Agreement at Yalta*. *American Journal of International Law*, v. 40, 1946, p. 380.

<sup>130</sup> See the Agreement on Ending the War and Restoring Peace in Vietnam, January 27, 1973, 24 U.S.T. 1, TIAS 7542, and the supporting case offered by the State Department in Rovine, Arthur. *Digest of United States Practice in International Law 1973*. 1974, p. 188.

<sup>131</sup> See the Declarations of the Government of the Democratic and Popular Republic of Algeria Concerning Commitments and Settlement of Claims by the United States and Iran with Respect to Resolution of the Crisis Arising Out of the Detention of 52 United States Nationals in Iran, with Undertakings and Escrow Agreement, Jan. 19, 1981, TIAS \_\_\_\_\_, *Department of State Bulletin*, v. 81, February 1981, p. 1.

In a given instance, a specific agreement may be supportable on the basis of one or more of these independent executive powers.

One possible basis for sole executive agreements seem to lie in the President's general "executive power" under Article II, Section 1, of the Constitution. Early judicial recognition of this power in the context of Presidential agreements, and perhaps the earliest judicial enforcement of this mode of agreement-making as well, was accorded by the Supreme Court of the Territory of Washington in *Watts v. United States*.<sup>132</sup> The agreement at issue was concluded between the United States and Great Britain in 1859 and provided for the joint occupation of San Juan Island pending a final adjustment of the international boundary by the parties.<sup>133</sup> The court stated that "[t]he power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and adheres where the executive power is vested."<sup>134</sup>

The President's executive power was later acknowledged in broad terms in *United States v. Curtiss-Wright Export Corporation*<sup>135</sup> where the U.S. Supreme Court referred to the "very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations."<sup>136</sup> Although no agreement was at issue in *Curtiss-Wright*, the quoted language was subsequently applied by the Court in *United States v. Belmont*<sup>137</sup> to validate the Litvinov Agreement of 1933, supra, wherein the parties settled mutually outstanding claims incident to formal American recognition of the Soviet Union. Concerning this agreement, the Court declared that:

\* \* \* [I]n respect of what was done here, 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 (Art. II, § 2), require the advice and consent of the Senate.<sup>138</sup>

Similarly, in *United States v. Pink*,<sup>139</sup> the Court again approved the Litvinov Agreement on the ground that "[p]ower to remove such obstacles to full recognition as settlement of claims \* \* \* certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.'" <sup>140</sup> More recently, in *Dames & Moore v. Regan*,<sup>141</sup> the Court relied upon, inter alia, the *Pink* case to sustain President Carter's suspension of claims pending in American courts against Iran as

<sup>132</sup> 1 Wash. Terr. 288 (1870).

<sup>133</sup> Joint Occupation of San Juan Island, Exchanges of Notes of Oct. 25 and 29 and Nov. 2, 3, 5, 7, and 9, 1859, and Mar. 20 and 23, 1860, reprinted in Bevens, Charles, *Treaties and Other International Agreements of the United States of America 1776-1949*, v. 12, 1974, p. 123 (hereafter cited as Bevens, *Treaties*).

<sup>134</sup> 1 Wash. Terr. at 294. As the American correspondence establishing the agreement for the joint occupation of the island was conducted by military officials, the agreement may owe much for its authority to the Commander in Chief Power of the Executive (Article II Section 2 Clause 1). The *Watts* case is further discussed in the text accompanying note 160 infra.

<sup>135</sup> 299 U.S. 304 (1936).

<sup>136</sup> *Ibid.* at 320.

<sup>137</sup> 301 U.S. 324 (1937).

<sup>138</sup> *Ibid.* at 330.

<sup>139</sup> 315 U.S. 203 (1942).

<sup>140</sup> *Ibid.* at 229, citing *Curtiss-Wright*, 299 U.S. at 320.

<sup>141</sup> 453 U.S. 654 (1981).

required by the Hostage Release Agreement of 1981, *supra*, and, more directly, by Executive order.<sup>142</sup> In light of *Pink*, the Court indicated that “prior cases \*\*\* have recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate.”<sup>143</sup> Moreover, the Court’s decision was heavily influenced by a finding the general tenor of existing statutes reflected Congress’ acceptance of a broad scope for independent executive action in the area of international claims settlement agreements.<sup>144</sup>

A second Article II power potentially available to the President for purposes for concluding sole executive agreements appears to lie in Article II, Section 2, Clause 1, of the Constitution which provides that the President shall be “Commander-in-Chief of the Army and Navy.” Cautious acceptance of the President’s power to conclude agreements pursuant to this power is reflected in dictum of the Supreme Court in *Tucker v. Alexandroff*<sup>145</sup> where the Court, after noting previous instances in which the Executive unilaterally had granted permission for foreign troops to enter the United States, declared that “[w]hile no act of Congress authorized the Executive Department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander in chief of the military and naval forces of the United States.”<sup>146</sup>

The treaty clause of the Constitution (Article II, Section 2, Clause 2), in empowering the President to make treaties with the consent of the Senate, may itself be viewed as supporting authority for some types of sole executive agreements. The President’s power under this clause, together with his constitutional role as sole international negotiator for the United States<sup>147</sup> suggest the existence of ancillary authority to make agreements necessary for the conclusion of treaties. Intermediate stages of negotiations or temporary measures pending conclusion of a treaty may, for example, be reflected in protocols or *modus vivendi*.<sup>148</sup> Although there appear to be no cases explicitly recognizing the treaty clause as authority for sole executive agreements, the Court’s opinion in *Bel-*

<sup>142</sup> Executive Order No. 12294, 46 Fed. Reg. 14111 (1981).

<sup>143</sup> 453 U.S. at 682.

<sup>144</sup> The Court found that related statutes, though not authorizing the President’s action, might be viewed as inviting independent Presidential measures in a situation such as the one at issue “at least \*\*\* where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence of the sort engaged in by the President,” namely, claims settlement by executive agreement. *Ibid.* at 677–682. In *Barquero v. United States*, 18 F. 3d 1311 (5th Cir. 1994), *Dames & Moore* criteria were used by a Federal Circuit Court of Appeals to find an alternative constitutional basis for the President’s entry into tax information exchange agreements with countries that were not “beneficiary countries” under the Caribbean Basin Economic Recovery Act. The court primarily held, however, that the agreements were authorized under the 1986 Tax Reform Act.

<sup>145</sup> 183 U.S. 424 (1902).

<sup>146</sup> *Ibid.* at 435. Four dissenters felt that such exceptions from a nation’s territorial jurisdiction must rest on either a treaty or a statute, but noted that it was not necessary, in this case, to consider the full extent of the President’s powers in this regard. *Ibid.* at 456 and 459. Wright states, however, that “in spite of this dissent the power has been exercised by the President on many occasions. \*\*\*” Wright, Q. The Control of American Foreign Relations. 1922, p. 242 (hereafter cited as Wright, Control of Foreign Relations). See also Moore, John Bassett, A Digest of International Law, v. II, 1906, p. 389.

<sup>147</sup> The Supreme Court indicated in the *Curtiss-Wright* case that the “[President] alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.”: 299 U.S. at 319.

<sup>148</sup> Constitution—Analysis and Interpretation, p. 500.

*mont* seems suggestive in acknowledging that there are many international compacts not always requiring Senate consent “of which a protocol [and] a modus vivendi are illustrations.”<sup>149</sup>

A fourth power of the President under Article II which is relevant to the conclusion of sole executive agreements lies in his authority to “receive Ambassadors and other public Ministers” (Article II, Section 3). To the extent that the receive clause is viewed as supporting the President’s authority to “recognize” foreign governments,<sup>150</sup> it is arguable that sole executive agreements may be concluded incident to such recognition. Although the *Belmont* and *Pink* cases appear to sustain the Litvinov Agreement principally on the basis of the President’s general foreign affairs powers as Chief Executive or “sole organ” of the government in the field of international relations, the Court also seemed to emphasize that the agreement accorded American “recognition” to the Soviet Union. Thus, in *Belmont* the Court stated that:

We take judicial notice of the fact that coincident with the assignment [of Soviet claims against American nationals to the United States government], the President recognized the Soviet Government, and normal diplomatic relations were established between that government and the government of the United States, followed by an exchange of ambassadors \* \* \* The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted \* \* \* [I]n respect of what was done here, the Executive had authority to speak as the sole organ of [the] government.<sup>151</sup>

Similarly, in *Pink* the Court declared that:

“What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government” \* \* \* That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition \* \* \* Recognition is not always absolute; it is sometimes conditional \* \* \* Power to remove such obstacles to full recognition as settlement of claims of our nationals \* \* \* Unless such a power exists, the power of recognition might be thwarted or seriously impaired. No such obstacles can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of

<sup>149</sup> 301 U.S. at 330–331.

<sup>150</sup> See *Goldwater v. Carter*, 617 F. 2d 697, 707–708 (D.C. Cir. 1979), *jud. vac. and rem. with directions to dismiss complaint*, 444 U.S. 996 (1979). Professor Henkin observes that “[r]ecognition is indisputably the President’s sole responsibility, and for many it is an ‘enumerated’ power implied in the President’s express authority to appoint and receive ambassadors.” Henkin 1996, p. 220. See also Wright, *Control of Foreign Relations*, p. 133; Mathews, pp. 365–366; and McDougal and Lans, pp. 247–248.

<sup>151</sup> 301 U.S. at 330.



the powers and responsibilities of the president in the conduct of foreign affairs \*\*\* is to be drastically revised.<sup>152</sup>

A fifth source of Presidential power under Article II possibly supporting the conclusion of sole executive agreements is the President's duty to "take care that the laws be faithfully executed" (Article II, Section 3). Although there appear to be no cases holding that the take care clause is specific authority for such agreements, legal commentators have asserted that the clause sanctions the conclusion of agreements in implementation of treaties.<sup>153</sup> Moreover, it was early opined by Attorney General Wirt in 1822 that the President's duty under this constitutional provision extends not only to the Constitution, statutes, and treaties of the United States but also to "those general laws of nations which govern the intercourse between the United States and foreign nations."<sup>154</sup> This view appears to have been accepted subsequently by the Supreme Court in *In re Neagle*,<sup>155</sup> where it was suggested in dictum that the President's responsibility under the clause includes the enforcement of "rights, duties, and obligations growing out of \*\*\* our international relations \*\*\*"<sup>156</sup> Accordingly, it has been argued that the clause "sanctions agreements which are necessary to fulfill [non-treaty] international obligations of the United States."<sup>157</sup>

Sole executive agreements validly concluded pursuant to one or more of the President's independent powers under Article II of the Constitution may be accorded status as Supreme Law of the Land for purposes of superseding any conflicting provisions of state law. As explained by the Supreme Court in *Belmont*:

Plainly, the external powers of the United States are to be exercised without regard to the state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning \*\*\* And while this rule in respect of 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.<sup>158</sup>

<sup>152</sup> 315 U.S. at 229–230. See also *Dole v. Carter*, 444 F. Supp. 1065 (D. Kan. 1977), *motion for injunction pending appeal denied*, 569 F. 2d 1108 (10th Cir. 1977), where the district court relied on the President's recognition power and his general "sole organ" executive authority to validate a Presidential agreement transferring Hungarian coronation regalia to the Republic of Hungary. On appeal, however, the Court of Appeals "decline[d] to enter into any controversy relating to distinctions which may be drawn between executive agreements and treaties" and adjudged the issue a nonjusticiable political question.

<sup>153</sup> See McDougal and Lans, p. 248, and Mathews, p. 367. See also Henkin 1996, pp. 219–220.

<sup>154</sup> 1 Op. Atty. Gen. 566, 570 (1822).

<sup>155</sup> 135 U.S. 1 (1890).

<sup>156</sup> *Ibid.* at 64.

<sup>157</sup> McDougal and Lans, p. 248. McDougal and Lans state that the "take care" clause provides an alternate source of authority for the Boxer Indemnity Protocol of 1901 following cessation of the Boxer Rebellion in China. *Ibid.*, p. 248, n. 150. The text of the protocol may be found in Malloy, *Treaties*, v. 2, p. 2006. Concerning the use of the "take care" clause as authority for executive implementation of international law, Professor Henkin notes that— \*\*\* Writers have not distinguished between (a) authority to carry out the obligations of the United States under treaty or customary law (which can plausibly be found in the 'take care' clause); (b) authority to exercise rights reserved to the United States by international law or given it by treaty; and (c) authority to compel other states to carry out their international obligations to the United States. Henkin 1996, p. 347, n. 54.

<sup>158</sup> 301 U.S. at 331. See also *Pink*, 315 U.S. at 230–234.

However, notwithstanding that treaties and Federal statutes are treated equally by the Constitution with legal primacy accorded the measure which is later in time,<sup>159</sup> the courts have been reluctant to enforce Presidential agreements in the face of prior congressional enactments. Judicial uncertainty was early evidenced in *Watts v. United States*, supra, where the Supreme Court of the Territory of Washington, after affirming on the basis of the President's "executive power" the validity of an agreement with Great Britain providing for the joint occupation of San Juan Island, tentatively enforced the agreement against a prior Federal law defining the government of the territory. According to the court:

Such conventions are not treaties within the meaning of the Constitution, and, as treaties supreme law of the land, conclusive on the court, but they are provisional arrangements, rendered necessary by national differences involving the faith of the nation and entitled to the respect of the courts. They are not a casting of the national will into the firm and permanent condition of law, and yet in some sort they are for the occasion an expression of the will of the people through their political organ, touching the matters affected; and to avoid unhappy collision between the political and judicial branches of the government, both which are in theory inseparably all one, such an expression to a reasonable limit should be followed by the courts and not opposed, though extending to the temporary restraint or modification of the operation of existing statutes. Just as here, we think, this particular convention respecting San Juan should be allowed to modify for the time being the operation of the organic act of this Territory (Washington) so far forth as to exclude to the extent demanded by the political branch of the government of the United States, in the interest of peace, all territorial interference for the government of that island.<sup>160</sup>

Decisions by lower Federal courts of more recent date, however, have voided sole executive agreements which were incompatible with pre-existing Federal laws. Thus, in *United States v. Guy W. Capps, Inc.*,<sup>161</sup> a U.S. Circuit Court of Appeals refused to enforce a Presidential agreement concerning the importation of Canadian potatoes into the United States inasmuch as the agreement contravened the requirements of the Agricultural Act of 1948.<sup>162</sup> According to the court, " \* \* \* whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress."<sup>163</sup> The court's rationale for this conclusion was grounded upon Congress' expressly delegated authority under Article I, Section 8, Clause 3, of the Constitution to regulate foreign commerce (as reflected in the statute in the present case) and upon the following statement

<sup>159</sup> *Whitney v. Robertson*, 124 U.S. 190 (1888).

<sup>160</sup> 1 Wash. Terr. at 294. Elsewhere the court "presumed" that Congress had been "fully apprised" of the situation by the President and noted tacit congressional acquiescence for a long term of years. *Ibid.*, p. 293.

<sup>161</sup> 204 F. 2d 655 (4th Cir. 1953), *aff'd* on other grounds, 348 U.S. 296 (1955).

<sup>162</sup> Agricultural Act of 1948, § 3, 62 Stat. 1247, 1248-1250.

<sup>163</sup> 204 F. 2d at 659-660.

from Justice Jackson's frequently quoted concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>164</sup>

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>165</sup>

Similar holdings have occurred in subsequent cases on the authority of *Guy Capps*. In *Seery v. United States*,<sup>166</sup> for example, the U.S. Court of Claims denied enforcement of a Presidential agreement settling post-World War II claims with Austria<sup>167</sup> in the face of prior Federal law authorizing suit against the United States on constitutional claims.<sup>168</sup> The court declared that:

\*\*\* It would indeed be incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the constitutional right of a citizen. In *United States v. Guy W. Capps* \*\*\* the court held that an executive agreement which conflicted with an Act of Congress was invalid.<sup>169</sup>

Reference may also be made to *Swearingen v. United States*<sup>170</sup> where a Federal District Court treated the Agreement in Implementation of Article III of the Panama Canal Treaty of 1977<sup>171</sup> as a sole executive agreement, and, as such, void for purposes of conferring an income tax exemption on American employees of the Panama Canal Commission in derogation of Section 61(a) of the Internal Revenue Code.<sup>172</sup> The rule of the *Guy Capps* case is also reflected in the Department of State's Circular 175 procedure governing the making of international agreements,<sup>173</sup> as well as in the American Law Institute's current Restatement (Third) of the Foreign Relations Law of the United States.<sup>174</sup>

Notwithstanding that the rule of the *Guy Capps* case appears to enjoy general acceptance, contrary arguments have been advanced by other authorities, including the just cited Restatement (Third).<sup>175</sup> The latter thus states that:

<sup>164</sup> 343 U.S. 579 (1952).

<sup>165</sup> *Ibid.* at 659, quoting Justice Jackson's concurring opinion in *Youngstown*, 343 U.S. at 637-638.

<sup>166</sup> 127 F. Supp. 601 (Ct. Cl. 1955).

<sup>167</sup> Agreement Respecting the Settlement of Certain War Accounts and Claims, United States-Austria, June 21, 1947, 61 Stat. 4168.

<sup>168</sup> 28 U.S.C. § 1491.

<sup>169</sup> 127 F. Supp. at 607.

<sup>170</sup> 565 F. Supp. 1019 (D. Colo. 1983).

<sup>171</sup> Agreement in Implementation of Article III of the Panama Canal Treaty, with Annexes, Agreed Minute and Related Notes, signed Sept. 7, 1977, 33 U.S.T. 141, TIAS 10031.

<sup>172</sup> 26 U.S.C. § 61(a). Compare *Corliss v. United States*, 567 F. Supp. 162 (1983), holding, on the basis of the legislative history of the agreement in the U.S. Senate, that the agreement was not intended to exempt American employees from Federal income tax liability.

<sup>173</sup> 11 For. Aff. Man. § 721.2b(3).

<sup>174</sup> Rest. 3d, § 115, Reporters' Note 5.

<sup>175</sup> *Ibid.*

\*\*\* it has been argued that a sole executive agreement within the President's constitutional authority is federal law, and United States jurisprudence has not known federal law of different constitutional status. "All Constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature." The Federalist No. 64 (Jay), cited in *United States v. Pink*, supra, 315 U.S. at 230 \*\*\* See Henkin, *Foreign Affairs and the Constitution* 186, 432-33 (1972). Of course, even if a sole executive agreement were held to supersede a statute, Congress could reenact the statute and thereby supersede the intervening executive agreement as domestic law.<sup>176</sup>

The precedential effect of the *Guy Capps* rule may also be somewhat eroded by judicial dicta suggesting that the circuit court's opinion in the case was "neutralized" by the Supreme Court's affirmance on other grounds<sup>177</sup> and that the question as to the effect of a Presidential agreement upon a prior conflicting act of Congress has "apparently not yet been completely settled."<sup>178</sup> Moreover, in the two cases which have specifically adhered to the *Guy Capps* rule—*Seery* and *Swearingen*—the courts, respectively, were either strongly influenced by Bill of Rights considerations or failed to consider the possibility that the agreement in issue may have effectively received the sanction of the Senate as an agreement pursuant to an existing treaty. It appears, therefore, that the law on this point may yet be in the course of further development.

---

<sup>176</sup> Ibid.

<sup>177</sup> *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F. 2d 622, 634, n. 16 (Ct. Cl. 1964).

<sup>178</sup> *American Bitumils & Asphalt Co. v. United States*, 146 F. Supp. 703, 708 (Ct. Cl. 1956), citing both *Guy Caps* and *Seery*.



## V. NEGOTIATION AND CONCLUSION OF INTERNATIONAL AGREEMENTS<sup>1</sup>

Treatymaking begins with the negotiation and conclusion or signing of an agreement and ends with its ratification or acceptance as binding by the parties and its entry into force. This chapter examines the first stage, negotiation and conclusion.

### A. NEGOTIATION

The negotiation of a treaty is the process by which the representatives of governments agree on the substance, terms, and wording of an international agreement. The word “negotiation” has been defined as “the exchange and discussion of proposals by the representatives of the parties concerned with a view to reaching a mutually acceptable agreement.”<sup>2</sup>

Nations negotiate and conclude treaties through individuals who have been issued “full powers” to represent their states for that purpose or are otherwise clearly intended to represent their states. Under international law, heads of state, heads of government, or foreign ministers are accepted as representing their states without a “full powers” document. Similarly, chiefs of diplomatic missions are considered representatives for purposes of negotiating a treaty with the state to which they are assigned, as are accredited representatives to international organizations and conferences for purposes of adopting a treaty text within those groups.<sup>3</sup> U.S. practice is that a “full power” is not usually issued for conclusion of an international agreement other than a treaty.<sup>4</sup>

In the United States, the actual negotiation of treaties and other international agreements is widely recognized as being within the power of the President. One authority calls negotiation “a Presidential monopoly.”<sup>5</sup> Others argue that the Senate’s advice and consent function applies before and during the negotiations as well as prior to ratification.<sup>6</sup>

Article II, Section 2 of the Constitution provides that the President “shall have Power, by and with the Advice and Consent of the

<sup>1</sup> Prepared by Marjorie Ann Browne, Specialist in International Relations.

<sup>2</sup> U.S. Department of State. Digest of International Law. Prepared by and under the direction of Marjorie M. Whiteman, Assistant Legal Adviser, Department of State. Vol. 14, p. 19. (hereafter cited as 14 Whiteman).

<sup>3</sup> Vienna Convention, Art. 7.

<sup>4</sup> Circular 175 Procedure, sec. 730.3. Reprinted in Appendix 4 of this volume.

<sup>5</sup> U.S. Library of Congress. Congressional Research Service. The Constitution of the United States of America: Analysis and Interpretation. Annotation of Cases Decided by the Supreme Court of the United States to June 29, 1992. Washington, GPO, 1996, p. 470. (hereafter cited as Annotated Constitution).

<sup>6</sup> Webb, Richard E. Treaty-Making and the President’s Obligation to Seek the Advice and Consent of the Senate with Special Reference to the Vietnam Peace Negotiations. Ohio State Law Journal, v. 31, summer 1970, pp. 450–515.

Senate, to make Treaties, provided two-thirds of the Senators present concur." The President's control of negotiations also springs from three other provisions of the Constitution which result in his being the official channel of communications with other nations. Article II, Section 2 states that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls \* \* \*." Section 3 of Article II provides that the President "shall receive ambassadors and other public ministers." This power has made the President "the sole mouthpiece of the nation in its dealings with other nations."<sup>7</sup> Finally, Article II, Section 1, provides: "The executive power shall be vested in a President \* \* \*."

The President or his representative begins the process of negotiations by inviting representatives of another nation, or responding to another country's invitation, to discuss proposals for an agreement. The President nominates and, with Senate advice and consent, appoints a person, usually an ambassador, minister, or foreign service officer, or delegation to represent the United States. He issues the negotiator "full powers" (a document certifying that the individual represents the United States) and provides instructions on the objectives and scope of the negotiations. He determines whether and when the text is signed by the United States.

Nonetheless, during the negotiation phase Congress frequently plays a part. The Department of State procedures for negotiating treaties include timely and appropriate consultation with congressional leaders and committees as an objective. The procedures provide for consultations on the intention to negotiate significant new agreements, the form of the agreement, legislation that might be necessary, and other developments concerning treaties.<sup>8</sup>

If the terms "negotiation and conclusion" of a treaty are used in a broader sense to include all the aspects of "making" a treaty prior to the decision on ratification, clearly there are other aspects of this process in which the Senate or the entire Congress may participate. These include proposing a subject for a treaty to the President, advising and consenting on the appointment of an ambassador or minister to conduct the negotiations, and participating in the negotiations as observers or advisers to U.S. delegations. Some contend Senate attachment of conditions to its advice and consent constitutes an additional stage in the negotiating process.

#### LOGAN ACT

One statute passed by Congress in 1799, the Logan Act, appears to have strengthened executive branch control over negotiations by prohibiting unauthorized citizens from initiating or carrying out correspondence or intercourse with foreign governments on disputes with the United States. The Logan Act was enacted into positive law in the U.S. Code on June 25, 1948, and states:

*Private correspondence with foreign governments*

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly

<sup>7</sup> Annotated Constitution, p. 541.

<sup>8</sup> Circular 175 Procedures, Sections 720.2, 721.4, and 723.1e. The text of Circular 175 procedures is contained in Appendix 4 of this volume. See also discussion in Chapter X.

commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of an officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than \$5,000 or imprisoned not more than three years or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.<sup>9</sup>

The law was enacted after a private citizen, Dr. George Logan, traveled to France and attempted to end the plundering of American merchant ships authorized by the French director of the revolutionary government. Although there have been no known prosecutions under the Act and only one indictment, there have been several judicial and congressional references to it, indicating, in the words of one analyst, that the Act “has not been forgotten and that it is at least a political weapon against any one who without authority interferes in the foreign relations of the United States.”<sup>10</sup>

Questions concerning the Logan Act were raised concerning activities of a number of individuals including Henry Ford, Senator Warren Harding, President William Howard Taft, after he was out of office, Harold Stassen, Senator Joseph McCarthy, Cyrus Eaton, Jane Fonda, the Reverend Jesse Jackson, and Speaker of the House Jim Wright.<sup>11</sup>

After the journey of former Attorney General Ramsey Clark to Iran in connection with the Americans held hostage there, the Senate passed an amendment supporting “the enforcement of any applicable statutes not excluding the Logan Act or any other Act that may be violated in the course of private negotiating initiatives.”<sup>12</sup> However, action was not completed on the Department of Justice authorization bill to which the amendment was attached.

One issue is whether Members of Congress fit in the category of private citizens, and whether their communication with foreign governments would be “unauthorized by the United States.” These were addressed by the Department of State in 1975. Assistant Secretary of State for Congressional Relations Robert J. McCloskey wrote that certain contacts of Senators John Sparkman and George McGovern with Cuban officials were not inconsistent with the Logan Act. The opinion stated:

The clear intent of [the Logan Act] is to prohibit unauthorized persons from intervening in disputes between the United States and foreign governments. Nothing in Section 953, however, would appear to restrict members of the Congress from engaging in discussions with foreign officials in pursuance of their legislative duties under the Constitution. In the case of

<sup>9</sup> 18 U.S.C. 953. June 25, 1948, c.645, 62 Stat. 744. Originally enacted on January 30, 1799 as 1 Stat. 613.

<sup>10</sup> Seitzenger, Michael. The Logan Act. Congressional Research Service Report No. 78-212 A.  
<sup>11</sup> Simpson, Curtis C., III. The Logan Act of 1799: May It Rest In Peace. *California Western International Law Journal*, v. 10, spring 1980, pp. 365-385. Remarks of Representative Newt Gingrich. Role of Executive and Legislative Branches in Foreign Policy. Congressional Record, November 17, 1987, pp. H10109-H10115 (daily ed.).

<sup>12</sup> Debate on S. 2377, Congressional Record, June 18, 1980, p. S7371 (daily ed.).



Senators McGovern and Sparkman the executive branch, although it did not in any way encourage the Senators to go to Cuba, was fully informed of the nature and purpose of their visit, and had validated their passports for travel to that country.

Senator McGovern's report of his discussions with Cuban officials stated: "I made it clear that I had no authority to negotiate on behalf of the United States—that I had come to listen and learn \* \* \*" Senator Sparkman's contacts with Cuban officials were conducted on a similar basis. The specific issues raised by the Senators (e.g., the Southern Airways case; Luis Tiant's desire to have his parents visit the United States) would, in any event, appear to fall within the second paragraph of Section 953.

Accordingly, the Department does not consider the activities of Senators Sparkman and McGovern to be inconsistent with the stipulations of Section 953.<sup>13</sup>

The Logan Act raises constitutional issues as well, especially regarding freedom of speech and the right to travel.<sup>14</sup>

Some Members of Congress have made efforts to repeal the Logan Act. Senator Edward Kennedy attempted to delete the measure from the 1978 bill to amend the U.S. criminal code (S. 1437, 95th Cong.) but agreed to leave it in to prevent prolonged debate.<sup>15</sup> Representative Anthony Beilenson introduced H.R. 7269 to repeal the Act on May 6, 1980, stating that there were fundamental constitutional problems with the Act and that its main use had been to "allow periodic calls for prosecution motivated by opposition to the cause being expressed instead of actual concern about treason."<sup>16</sup>

In regard to the negotiation of treaties, under international law any treaties concluded by persons who have not been issued full powers from their governments, outside of specific officials such as the head of state, are considered without legal effect unless afterward confirmed by the state.<sup>17</sup>

#### B. INITIATIVE FOR AN AGREEMENT; SETTING OBJECTIVES

Within the United States, the proposal that the United States enter negotiations for an international agreement usually springs from the executive branch in the course of its diplomatic activities with other nations or in its administration of U.S. foreign policy. On occasion, however, Congress or its committees, subcommittees, or individual Members have formally or informally proposed that the President undertake negotiations or diplomatic actions aimed at achieving international agreement on a certain course of action. Proposals have been embodied both in sense of the Congress resolutions and in binding legislation.

<sup>13</sup> *Digest of United States Practice in International Law* 1975, p. 750.

<sup>14</sup> Vagts, Alfred. *Paper Tiger or Sleeping Giant*. *American Journal of International Law*, v. 60, 1966, p. 268. Kearney, Kevin M. *Private Citizens in Foreign Affairs: A Constitutional Analysis*. *Emory Law Journal*, v. 36, winter 1987, pp. 285-355.

<sup>15</sup> *Congressional Record*, January 30, 1978, p. 767 (daily ed.).

<sup>16</sup> *Congressional Record*, v. 126, part 8, May 6, 1980, pp. 10112-10113.

<sup>17</sup> *Vienna Convention*. Article 8.

One of the best known examples of a congressional proposal is the Vandenberg Resolution that ultimately led to negotiations culminating in the North Atlantic Treaty. Adopted by the Senate on June 11, 1948, it expressed the sense of the Senate "that this Government, by Constitutional processes, should particularly pursue" certain objectives including:

\*\*\* Progressive development of regional and other collective arrangements for individual and collective self-defense in accordance with the purposes, principles, and provisions of the Charter.

\*\*\* Association of the United States, by constitutional process, with such regional and other collective arrangements as are based on continuous and effective self-help and mutual aid, and as affect its national security.<sup>18</sup>

The Senate Foreign Relations Committee which had, in close cooperation with the Department of State, worked out the resolution, later reported: "Pursuant to this advice the President in July authorized the Secretary of State to enter into exploratory conversations on the security of the North Atlantic area. \*\*\*"<sup>19</sup> The North Atlantic Treaty was signed on April 4, 1949, and received the advice and consent of the Senate.

The Monroney Resolution suggesting the International Development Association is also often cited as a congressional initiative. On July 23, 1958, the Senate adopted a resolution introduced by Senator A.S. Mike Monroney suggesting that the administration study the possibility of proposing to other governments the establishment of an international development association as a soft-loan affiliate of the World Bank.<sup>20</sup> The articles of agreement for this international financial institution were negotiated and submitted to Congress with a request for legislation to authorize U.S. participation. Congress authorized the participation on June 30, 1960.<sup>21</sup>

The Seabed Arms Control Treaty, prohibiting the emplacement of nuclear weapons on the seabed and ocean floor, was in part a congressional initiative. Senator Claiborne Pell introduced resolutions in 1967 expressing the Senate's concern for reasonable rules governing the extraterritorial marine environment, and the need to negotiate a treaty to prohibit stationing nuclear weapons on the seabed.<sup>22</sup> The treaty was signed in 1971, and the Senate approved it, by a vote of 83-0 on February 15, 1972.

Similarly, Congress helped initiate the Environmental Modification Convention. In July 1972, the U.S. Government renounced the use of climate modification techniques for hostile purposes, and beginning in 1972 both the House and Senate held hearings on a resolution to prohibit the use of any environmental or geophysical modification activity as a weapon of war. Senate Resolution 71, introduced by Senator Pell and passed July 11, 1973, stated the sense of the Senate that the U.S. Government "should seek" the agreement of other governments to a treaty along the following lines" and suggested wording of a treaty. A Convention on the Pro-

<sup>18</sup> S. Res. 239, 80th Cong., 2d Sess.

<sup>19</sup> S. Exec. Rept. 8, 81st Cong., 1st Sess.

<sup>20</sup> S. Res. 264, 85th Cong., 2d Sess.

<sup>21</sup> Public Law 86-565.

<sup>22</sup> S. Res. 172 and S. Res. 186, 90th Cong.

hibition of Military or Other Hostile Use of Environmental Modification Techniques was concluded on May 18, 1977, and entered into force for the United States January 17, 1980.

Other congressional resolutions have also proposed negotiations. For example, on August 3, 1977, Congress stated the sense of the Congress "that the President should initiate a major diplomatic initiative toward the creation of an international system of nationally held grain reserves which provides for supply assurance to consumers and income security to producers."<sup>23</sup> On May 25, 1983, S. Res. 95 expressed the sense of the Senate that the President should initiate negotiations on a new long-term agreement on agricultural trade with the Soviet Union.

On occasion the resolutions proposing negotiations have contained a reporting request or requirement. S. Res. 95 mentioned above stated the sense of the Senate that the President should report to Congress as soon as practicable on the potential impact of the agreement on the U.S. economy. S. Res. 133, adopted April 18, 1975, called for the President to report within 30 days on efforts to promote a settlement in Vietnam.<sup>24</sup>

Congress also utilized binding legislation to authorize, call for, or suggest negotiations for international agreements. In the Trade Agreements Act of 1974, Congress urged the President to utilize the authority granted in order to negotiate trade agreements with other countries that would reduce and eliminate nontariff barriers. The Act specified negotiating objectives for the United States.<sup>25</sup>

Section 36 of the Foreign Assistance Act of 1973 called for the President or his delegate to seek, as soon as possible, a revision of the Social Progress Trust Fund Agreement, between the United States and the Inter-American Development Bank, specifying revisions to be made. Section 36(e) stated, "Not later than January 1, the President shall report to Congress on his action taken pursuant to this section."<sup>26</sup> Section 39 of the same Act stated the sense of Congress that the United States should participate in efforts to alleviate world food shortages and that "To this end, the President shall—" among other things request member nations of the General Agreement on Tariffs and Trade to explore certain questions, consult and cooperate with appropriate international agencies in certain purposes, and report his findings and recommendations on the implementation of the section by December 31, 1974.

Legislation passed in 1981 required the Secretary of the Treasury to submit a report to both Houses of Congress by December 15, 1981, on the status of negotiations within the Organization for Economic Cooperation and Development on arrangements involving official export financing including an assessment of the progress and the prospects for a successful conclusion.<sup>27</sup>

The Comprehensive Anti-Apartheid Act of 1986, passed over the veto of President Reagan, called for negotiations to reach international cooperative agreements with the other industrialized democracies on measures to bring about the complete dismantling of

<sup>23</sup> Sec. 510, Public Law 95-105.

<sup>24</sup> S. Rept. 94-39.

<sup>25</sup> Secs. 102, 103, 104, and 106 of the Trade Act of 1974, Public Law 93-618, approved January 3, 1975.

<sup>26</sup> Public Law 93-189.

<sup>27</sup> Sec. 381(a) of Public Law 97-35, approved August 13, 1981.

apartheid, and a report from the President within 180 days describing efforts to negotiate multilateral measures.<sup>28</sup> The measure also provided that agreements submitted to Congress under the provision should enter into force only if the President notified Congress 30 days in advance and Congress enacted a joint resolution of approval within 30 days under expedited procedures.

President Bush objected to some directives concerning negotiation of agreements in signing both Foreign Relations Authorization Acts enacted during his administration.<sup>29</sup> As an example, section 102 of Public Law 101-246 prohibited the use of funds for any U.S. delegation to any meeting within the framework of the Conference on Security and Cooperation in Europe (CSCE), unless the U.S. delegation included individuals representing the Commission on Security and Cooperation in Europe. The commission was a legislative-executive body which had been established earlier by Congress. President Bush said the section "impermissibly intrudes upon my constitutional authority to conduct our foreign relations and to appoint our Nation's envoys."<sup>30</sup> Although President Bush stated that he would construe the measure as expressing the sense of the Congress but not imposing a binding legal obligation, representatives of the commission have been regularly included in delegations to meetings of what is now the Organization on Security and Cooperation in Europe.

### C. ADVICE AND CONSENT ON APPOINTMENTS

Most treaties and international agreements are negotiated by ambassadors or foreign service officers already assigned to particular countries or functions.<sup>31</sup>

Nevertheless, the Senate sometimes has an exclusive opportunity to advise on treaty negotiations at the outset, through the constitutional requirement that it advise and consent to appointments of "ambassadors, other public ministers and consuls."<sup>32</sup>

The requirement for Senate confirmation appears to have been a basic part of the plan to divide the foreign relations powers between Congress and the President, with a special role for the Senate in the making of treaties. The Constitution divides the power relating to making treaties and appointing ambassadors in essentially the same manner, although it requires a two-thirds majority only for treaties.

At the time of the writing of the Constitution, there was reason to distribute the power to appoint ambassadors and ministers in the same fashion as the power to make treaties. Treaties were made by ambassadors with full powers from the sovereign, usually a king, who issued instructions relating to the treaty. If the ambas-

<sup>28</sup> Sec. 401(b)(1) of Public Law 99-440 (22 U.S.C. 5081), approved October 2, 1986, as amended by Public Law 99-631, approved November 7, 1986.

<sup>29</sup> Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Public Law 101-246, approved February 16, 1990; Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Public Law 102-138, approved October 28, 1991.

<sup>30</sup> Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, February 16, 1990. Weekly Compilation of Presidential Documents, February 19, 1990, vol. 26.

<sup>31</sup> This section is based in part on The Senate Role in Foreign Affairs Appointments. U.S. Congress. Senate. Committee on Foreign Relations. Committee Print. 97th Cong., 2d Sess. Revised July 1982. 119 pp.

<sup>32</sup> Constitution, Article II, Section 2, Clause 2.

sador stayed within his instructions, it was considered obligatory for the sovereign to ratify the treaty his emissary concluded.

Under the doctrine of obligatory ratification, the only way the Senate could have a meaningful role in treatymaking was to participate during the negotiating stage or during the proposing stage when the instructions to the plenipotentiaries were being drawn up. Gradually, the Senate practice of approving treaties with reservations, the French Revolution, and moves toward democratic control in other countries, brought about a change in concept and ratification of a treaty came to be recognized as discretionary rather than obligatory.<sup>33</sup>

The Framers of the Constitution took into account the link between appointments and treaties. In discussing a proposal that “no treaty shall be binding on the United States which is not ratified by a law” and thus would have required the consent of the entire Congress, one delegate to the Constitutional Convention, according to Madison’s notes, “thought there was something of solecism in saying that the acts of a Minister with plenipotentiary powers from one body should depend for ratification on another body.”<sup>34</sup> Another delegate, according to McHenry’s notes for August 23, 1787, objected to requiring ratification by a law because “a minister could not then be instructed by the Senate who were to appoint him, or if instructed there could be no certainty that the House of Representatives would agree to confirm what he might agree to under these instructions.”<sup>35</sup>

Early practice under the Constitution also indicates that the Framers expected that the Senate’s confirmation of appointments of ambassadors and ministers would give the Senate a significant role in making treaties. Often nominations were submitted along with a description of the treaty the nominee was to seek. To illustrate, on January 11, 1792, President Washington nominated William Carmichael, the chargé d’affaires at Madrid, and William Short, then chargé d’affaires at Paris, to be commissioners plenipotentiary for negotiating a treaty with Spain concerning the navigation of the Mississippi, and they were confirmed by the Senate on January 24, 1792. In March, the President sent a memo to the Senate proposing to extend the negotiations to the subject of commerce, setting forth the instructions that would be given to the commissioners, and asking if the Senate would “advise and consent to the extension of the powers of the commissioners, as proposed, and to the ratification of a treaty which shall conform to those instructions, should they enter into such a one.” On March 16, 1792, the Senate passed a resolution giving its advice and consent to the extension of powers and stating that “they will advise and consent to the ratification of such treaty as the said commissioners shall enter into with the Court of Spain in conformity to those instructions.”<sup>36</sup>

The practice of submitting the instructions for negotiations along with the nominations did not continue long. In the case of the nom-

<sup>33</sup> Jones, J. Mervyn. *Full Powers and Ratification, A Study in the Development of Treaty-Making Procedure*. Cambridge University Press, 1946, pp. 1–20.

<sup>34</sup> Madison’s notes, p. 13.

<sup>35</sup> Farrand, Max. *The Records of the Federal Convention of 1787*. New Haven, Yale University Press, vol. II, p. 395.

<sup>36</sup> U.S. Congress. Senate. *Executive Journal*, vol. I, 1792, p. 115.

ination of John Jay to conclude a treaty with Great Britain in 1794, the Senate rejected a motion that the President be requested to inform the Senate of "the whole business with which the provided envoy is to be charged."<sup>37</sup> Nevertheless, the debate on the nomination indicated that the Senate "passed not only upon the choice of the envoy but also upon the expediency of the mission itself."<sup>38</sup>

In recent years the Senate or the Senate Foreign Relations Committee has on occasion used nominations as a vehicle for discussion of treaty negotiations. When Paul H. Nitze was nominated as ambassador while serving as the head of the U.S. Delegation to the Intermediate Range Nuclear Forces Negotiations, the committee held both a closed and open session with him. Ambassador Nitze had been in the post for 6 months with the personal rank of ambassador.<sup>39</sup> Chairman of the Senate Foreign Relations Committee Charles Percy noted that the open hearing provided an opportunity to review the issues that involve arms control. In the nomination of Sol M. Linowitz for the rank of ambassador as personal representative of the President to the West Bank and Gaza Strip Autonomy Negotiations, the committee hearing covered problems relating to the Middle East and Mr. Linowitz's status as a "special Government employee" receiving no compensation.<sup>40</sup>

#### UNCONFIRMED PRESIDENTIAL AGENTS

A continuing problem has been the appointment or use of persons not confirmed by the Senate to negotiate international agreements. In such cases, the Senate does not have an opportunity to vote on the appointment or to advise on the mission for which he is appointed. The negotiator remains a personal agent of the President. Similarly, the Assistant to the President for National Security Affairs, also called the National Security Adviser, is not confirmed by the Senate, but on occasion conducts negotiations.

The subject has been controversial through most of American history. For example, in 1888, a fisheries treaty with Great Britain was criticized in the Senate Foreign Relations Committee report and in Senate debate on the grounds that the negotiators had not been appointed by and with the consent of the Senate. Proponents of the treaty countered with a list showing that of the persons conducting negotiations for the United States since 1789, 438 had been appointed without Senate confirmation and only 35 had been confirmed.<sup>41</sup>

One authority has attributed the initiation of the practice of appointing special, unconfirmed agents for negotiation of specific treaties to the President's embarrassment over the Senate refusal in 1813 to approve the nomination of Albert Gallatin, Secretary of the Treasury, as a member of the mission to negotiate the Treaty of

<sup>37</sup> U.S. Congress. Senate. Executive Journal, vol. II, 1809, p. 113.

<sup>38</sup> Hayden, Joseph Ralston. *The Senate and Treaties, 1789-1817*. New York, Macmillan, 1920, p. 70.

<sup>39</sup> U.S. Senate. Committee on Foreign Relations. Hearing on Nomination of Paul H. Nitze, March 24, 1982, 16 pp.

<sup>40</sup> U.S. Senate. Committee on Foreign Relations. Nomination of Sol. M. Linowitz. Exec. Rept. 96-26, 38 pp.

<sup>41</sup> Holt, W. Stull. *Treaties Defeated by the Senate*. Gloucester, Mass., Peter Smith, 1964, p. 145.

Ghent until he had resigned his position as Secretary of the Treasury.<sup>42</sup>

Recent Presidents have also decided not to submit some appointments of negotiators to the Senate, although in the 20th century such nominations were rarely rejected by the Senate, and none have been since World War II. Nevertheless the possibility remains that a nomination might not be approved. Several nominations have raised a controversy or not been acted upon, and two were unfavorably reported by the Foreign Relations Committee.<sup>43</sup>

Presidents have sometimes conferred the "personal rank" of ambassador on persons appointed without Senate approval in order for the person to have equal diplomatic standing with representatives of other nations. The first person to receive the personal rank of ambassador was Whitelaw Reid, sent by President McKinley in 1897 for the ceremonial occasion of the 60th anniversary of Queen Victoria's accession to the throne. Later the practice was extended to negotiating occasions. After the First World War, for example, the Secretary of the American commission to negotiate peace was given the rank of minister plenipotentiary.<sup>44</sup>

Congress has taken action to curb the practice of according persons the title of ambassador without the advice and consent of the Senate.<sup>45</sup> In 1972, Congress incorporated into law a limitation that the President could confer the personal rank of ambassador or minister on an individual only in connection with a special mission for the President of a temporary nature and for a period not exceeding 6 months.<sup>46</sup> The Foreign Service Act of 1980 also requires the President, except in urgent circumstances, 30 days prior to the conferral of the personal rank to submit a written report to the Foreign Relations Committee justifying the appointment.<sup>47</sup>

#### D. CONSULTATIONS DURING THE NEGOTIATIONS

The earliest practice under the Constitution indicates that originally the Framers planned for the Senate to give advice to the President during the treatymaking process as well as to give or withhold consent to the final treaty,<sup>48</sup> but this procedure soon ended. By the time President Polk referred the proposal to divide the Oregon Territory at the 49th parallel to the Senate for its advice prior to the signing of the Oregon Treaty of 1846, as well as for its consent afterward, it was a rare practice.<sup>49</sup>

As the process has evolved, the Senate as a whole does not give, and the President does not seek, its advice on a treaty until the

<sup>42</sup> Wright, Quincy. *The Control of Foreign Relations*. New York, Macmillan, 1922. pp. 328-331.

<sup>43</sup> In 1981, the Senate Foreign Relations Committee reported unfavorably the nomination of Ernest W. Lefever as Assistant Secretary for Human Rights and Humanitarian Affairs; the President, at the nominee's request, then withdrew the nomination. In 1983, the committee reported unfavorably the nomination of Kenneth L. Adelman as Director of the Arms Control and Disarmament Agency, but the nomination was approved by the full Senate.

<sup>44</sup> Wriston, Henry Merritt. *Executive Agents in American Foreign Relations*. Gloucester, Mass., Peter Smith, 1967, p. 197.

<sup>45</sup> U.S. Congress. *Senate Committee on Foreign Relations. The Ambassador in U.S. Foreign Policy: Changing Patterns in Rules, Selection, and Designation*. Committee Print, July 1981, pp. 9-11.

<sup>46</sup> Public Law 92-352.

<sup>47</sup> Public Law 96-465, as amended; Sec. 302(a)(2)(B).

<sup>48</sup> See Chapter II.

<sup>49</sup> Cheever, Daniel S. and H. Field Haviland. *American Foreign Policy and the Separation of Powers*. Cambridge, Harvard University Press, 1952. p. 49.

end of the process when it is asked to give its advice and consent to ratification.

Nevertheless, Presidents or their Secretaries of State have often consulted with individual Senators or committees prior to or during the negotiating process in order to enhance the prospects of the final treaty. Secretary of State Webster consulted frequently with important Senators about the Webster-Ashburton Treaty of 1842 settling the Canadian-Maine boundary.<sup>50</sup> With President Taylor a Whig and the Senate in control of the Democrats, Secretary of State Clayton consulted Senators of both parties over the Clayton-Bulwer Treaty of 1850 concerning a canal in Central America. The practice has been continued intermittently throughout the 20th century.

The consultations can take many forms and can be initiated either by the Senate or the executive branch. The Senate Foreign Relations Committee or other committees may hold consultative meetings with executive branch officials on objectives and problems in treaties. Executive branch officials frequently discuss prospective treaties with individual Senators or committees, particularly the Senate Foreign Relations Committee because of its jurisdiction over treaties. Other methods of consultation include public oversight hearings, telephone discussions, letters, and contacts through staff members to exchange information and views on progress and problems in the negotiations.

Sometimes the consultation is effective in the sense that congressional views help shape the final product. One of the best examples is the drafting of the U.N. Charter. On May 27, 1942, the chairman of the Foreign Relations Committee Senator Tom Connally, and Senator Warren R. Austin, the minority member of the committee designated after consultation with Republican leaders, and later other Members of both houses of Congress, were invited to participate in an Advisory Committee on Postwar Foreign Policy that did much of the initial planning for the United Nations. By 1944 a bipartisan committee of eight Members was meeting weekly for this purpose. In the case of the North Atlantic Treaty the Senate Foreign Relations Committee was consulted frequently during the negotiations and suggested specific language in the text.<sup>51</sup>

On occasion Congress has passed legislation requesting or requiring provision of information about negotiations. The International Development and Food Assistance Act of 1978 required the Secretary of State to keep the Senate Foreign Relations and House Foreign Affairs and the Appropriations Committees "fully and currently informed of any negotiations with any foreign government with respect to any cancellation, renegotiations, rescheduling, compromise, or other form of debt relief \* \* \* with regard to any debt owed to the United States by any such foreign government," and to submit the texts of any agreement that would result in debt relief no less than 30 days prior to its entry into force.<sup>52</sup>

At other times legislation has required consultations on the negotiations. Since 1981, the International Financial Institutions Act

<sup>50</sup> Cheever and Haviland, p. 48.

<sup>51</sup> U.S. Congress. Senate. Committee on Foreign Relations. S. Exec. Rept. 8, 81st Cong., 1st Sess. Report on North Atlantic Treaty, p. 6.

<sup>52</sup> Sec. 603, Public Law 95-424, approved October 6, 1978.



has required the administration to consult with 16 specified Members of Congress (the chairmen and ranking minority members of the authorizing and appropriations committees and subcommittees having appropriate jurisdiction) prior to, during, and at the close of any international negotiations that might involve new U.S. contributions to the multilateral development banks.<sup>53</sup>

The Trade Act of 1974 provided that before the President enters into any trade agreement relating to nontariff barriers, he “shall consult” with the Committee on Ways and Means of the House, the Finance Committee of the Senate, and each committee or joint committee of Congress having jurisdiction over legislation involving subject matters affected by the agreement.<sup>54</sup> The legislation made consultation mandatory by providing that any agreement could enter into force only if the President gave Congress 90 days prior notification and presented an implementing bill which was enacted into law.<sup>55</sup> The Omnibus Trade and Competitiveness Act of 1988 revised “fast-track” or expedited procedures for implementing trade legislation and required increased consultation with Congress.<sup>56</sup>

Another category of Senate or congressional action might be considered “consultation”: action critical of executive branch positions taken during or just after negotiations, with clear notice or the implication that the Senate will not favorably consider any treaty adopted with the offending provisions or effect remaining in the adopted treaty text. At least four recent examples can be identified. First, during the protracted negotiations that led to adoption of the 1982 United Nations Convention on the Law of the Sea, Congress considered legislation setting up a U.S. domestic regime for deep seabed hard mineral resource development. During Senate floor debate on these legislative proposals on December 14, 1979, several Senators identified the problems they found with the treaty provisions being negotiated and specifically characterized their statements as “instructions” to the executive branch, to be considered as “advice” under the Constitution’s “advice and consent” clause relating to treaties. Thereafter, Congress passed the Deep Seabed Hard Mineral Resources Act, which was signed by President Carter in June 1980 (Public Law 96-283). President Reagan, in 1982, after reviewing the treaty texts, decided not to support its adoption. Later, in 1994, an agreement was adopted changing many of the objectionable convention provisions, and President Clinton transmitted the convention and agreement to the Senate (Treaty Doc. 103-39) where they remain, pending since 1994.<sup>57</sup> The Senate thus expressed its views, and some in Congress, even many years afterward and with treaty amendments adopted, viewed the treaty as flawed.

Senate and congressional actions after negotiation and adoption, in 1988, of the Convention on the Regulation of Antarctic Mineral Resource Activities show the way congressional expressions of dis-

<sup>53</sup>Sec. 1201 of International Financial Institutions Act, Public Law 95-118, approved October 3, 1977.

<sup>54</sup>Sec. 102(c) of the Trade Act of 1974, Public Law 93-618, approved January 3, 1975.

<sup>55</sup>Sec. 102(d) of the Trade Act of 1974.

<sup>56</sup>Public Law 100-418, approved August 23, 1988.

<sup>57</sup>See U.S. Congress. House. Committee on Foreign Affairs. *Congress and Foreign Policy—1980*. Washington, U.S. Government Printing Office, 1981 (Committee Print). Chapter on Congress and Deep Seabed Mining Legislation, especially pp. 124-126. See also, last section in this chapter, *infra*.

approval of a just adopted and signed treaty led to the negotiation and adoption of a completely new treaty. Congress, by joint resolution, stated that the signed convention did not “guarantee the protection” of the Antarctic marine environment and “could actually stimulate \* \* \* commercial exploitation.” Congress urged the executive branch to negotiate protocols or agreements that would provide “comprehensive environmental protection of Antarctica” and close the region to “commercial minerals development \* \* \* for an indefinite period.” The resolution also stated that the President should not send the convention to the Senate before the environmental agreements were in force.<sup>58</sup> On October 7, 1992, the Senate approved the Protocol on Environmental Protection to the Antarctic Treaty which had been signed a year earlier and sent to the Senate.<sup>59</sup>

Another example of the Senate’s expression of its views on the content of a treaty, both during negotiations and after its adoption and U.S. signature, is the Kyoto Protocol to the United Nations Framework Convention on Climate Change. Detailed information on this protocol, adopted in December 1997 and signed by the United States on November 12, 1998, is found in Chapter X, *infra*. In July 1997, before the protocol was adopted, the Senate had expressed its views on the treaty text in S. Res. 98. The protocol text did not meet the requirements set by the Senate resolution.

A fourth example is the Statute of the International Criminal Court (ICC), adopted in Rome in July 1998 and signed on behalf of the United States on December 31, 2000. While some Senators expressed support for an ICC, others expressed concerns over the content of the statute while it was under negotiation and afterward. They worried that ICC actions could infringe on or diminish the rights of American citizens under the first and fourth amendments of the U.S. Constitution. During the 106th Congress, the Senate Foreign Relations Committee, in response to these concerns, added understandings to resolutions of advice and consent to ratification of U.S. treaties on mutual legal assistance in criminal matters and to extradition treaties. See Chapter X, *infra*, for further discussion.

#### INCLUSION OF MEMBERS OF CONGRESS ON DELEGATIONS

On occasion Senators or Representatives have served as members of or advisers to the U.S. delegation negotiating a treaty. The practice has occurred throughout American history. In September 1898, President William McKinley appointed three Senators to a commission to negotiate a treaty with Spain. President Warren G. Harding appointed Senators Henry Cabot Lodge and Oscar Underwood as delegates to the Conference on the Limitation of Armaments in 1921 and 1922 which resulted in four treaties, and President Hoover appointed two Senators to the London Naval Arms Limitation Conference in 1930.

<sup>58</sup>U.S. Congress. Senate. Committee on Foreign Relations. Legislative Activities Report \* \* \*, 101st Congress, January 3, 1989–October 28, 1990. Washington, U.S. Government Printing Office, 1991. pp. 96–97 (102d Cong., 1st Sess. S. Rept. 102–30)

<sup>59</sup>U.S. Congress. Senate. Committee on Foreign Relations. Legislative Activities Report \* \* \*, 102d Congress, January 3, 1991–October 8, 1992. Washington, U.S. Government Printing Office, 1993. pp. 72–74. (103d Cong., 1st Sess. Senate. Report 103–35)

The practice has increased since the end of the Second World War, in part because President Wilson's lack of inclusion of any Senators in the American delegation to the Paris Peace Conference was considered one of the reasons for the failure of the Versailles Treaty. Four of the eight members of the official U.S. delegation to the San Francisco Conference establishing the United Nations were Members of Congress: Senators Tom Connally and Arthur Vandenberg and Representatives Sol Bloom and Charles A. Eaton.

There has been some controversy over active Members of Congress serving on such delegations. When President James Madison appointed Senator James A. Bayard and Speaker of the House Henry Clay to the commission that negotiated the Treaty of Ghent in 1814, both resigned from Congress to undertake the task. More recently, as in the annual appointment of Senators or Members of Congress to be among the U.S. representatives to the United Nations General Assembly, Members have participated in delegations without resigning, and many observers consider it "now common practice and no longer challenged."<sup>60</sup>

One issue has been whether service by a Member of Congress on a delegation violated Article I, Section 6 of the Constitution. This section prohibits Senators or Representatives during their terms from being appointed to a civil office if it has been created or its emoluments increased during their terms, and prohibits a person holding office to be a Member of the Senate or House. Some contend that membership on a negotiating delegation constitutes holding an office while others contend that because of its temporary nature it is not.

Another issue concerns the separation of powers. One view is that as a member of a negotiating delegation a Senator would be subject to the instructions of the President and would face a conflict of interest when later required to vote on the treaty in the Senate. Others contend that congressional members of delegations may insist on their independence of action and that in any event upon resuming their legislative duties have a right and duty to act independently of the executive branch on matters concerning the treaty.

A compromise solution has been to appoint Members of Congress as advisers or observers, rather than as members of the delegation. The administration has on numerous occasions invited one or more Senators and Members of Congress or congressional staff to serve as advisers to negotiations of multilateral treaties.<sup>61</sup> In 1991 and 1992, for example, Members of Congress and congressional staff were included as advisers and observers in the U.S. delegations to the United Nations Conference on Environment and Development and its preparatory meetings. In 1992, congressional staff advisers were included in the delegations to the World Administrative Radio

---

<sup>60</sup>Henkin, Louis. *Foreign Affairs and the Constitution*. Mineola, N.Y. Foundation Press, 1972, p. 132.

<sup>61</sup>The names of congressional advisers to international conferences before December 15, 1995 may be found in an annual list of U.S. accredited delegations that includes private sector representatives, published in the Federal Register in accordance with Article III(c)(5) of the guidelines (March 23, 1987). The last list was published in Federal Register, December 2, 1996, vol. 61, no. 232, pp. 63892-63916. Publication of this list was discontinued after the preparing Office of International Conferences, Department of State, ceased receiving funding that enabled the Office to compile and file the report with the Federal Register.

Conference (WARC) of the International Radio Consultative Committee (CCIR) of the International Telecommunications Union.

In the early 1990s, Congress took initiatives to assure congressional observers. The Senate and House each designated an observer group for strategic arms reductions talks with the Soviet Union that began in 1985 and culminated with the Strategic Arms Reduction Treaty (START) approved by the Senate on October 1, 1992. In 1991, the Senate established a Senate World Climate Convention Observer Group. As of late 2000, at least two ongoing groups of Senate observers existed:

1. *Senate National Security Working Group*.—This is a bipartisan group of Senators who “act as official observers to negotiations \* \* \* on the reduction or limitation of nuclear weapons, conventional weapons or weapons of mass destruction; the reduction, limitation, or control of missile defenses; or related export controls.”

2. *Senate Observer Group on U.N. Climate Change Negotiations*.—This is a “bipartisan group of Senators, appointed by the Majority and Minority Leaders” to monitor “the status of negotiations on global climate change and report[ing] periodically to the Senate \* \* \*.”<sup>62</sup>

#### E. CONCLUSION OR SIGNING

The conclusion of an international agreement, usually indicated by signing or initialing a document or by an exchange of notes, is the end of the negotiations process and indicates that the negotiators have agreed on the terms of the agreement. Like the negotiation, the conclusion or signing is done by the President or his representatives and is considered a function of the executive branch.

On occasion, Members of Congress have been among the signatories of treaties. Among those signing the U.N. Charter for the United States were Senators Tom Connally and Arthur H. Vandenberg and Representatives Sol Bloom and Charles A. Eaton. Senators Alexander Wiley and John Sparkman signed the Peace Treaty with Japan on September 8, 1951, and Senators Arthur Vandenberg and Tom Connally and Representative Sol Bloom signed the Inter-American Treaty of Reciprocal Assistance on September 2, 1947.

Signing an international agreement may indicate a nation’s consent to be bound if this is its intention. Under U.S. practice this would be the case only with executive agreements; treaties are required to go through the ratification process to be binding. Occasionally, one government may intend signing of an international agreement to indicate consent to be bound while another signs subject to ratification. This was the case with the Agreement on Friendship, Defense, and Cooperation between the United States and the Kingdom of Spain, signed July 2, 1982. The Spanish representative signed the agreement subject to ratification by the Cortes Generale, the Spanish Parliament, while the U.S. represent-

<sup>62</sup>Congressional Yellow Book, Winter 2000, pp. 10–11. (Published by Leadership Directories, Inc., New York and Washington, D.C.)

ative signed the document as an executive agreement that did not require ratification.

#### F. RENEGOTIATION OF A TREATY FOLLOWING SENATE ACTION

One view is that the Senate, in effect, participates in the negotiation of a treaty when the Senate's consideration of a treaty leads to a renegotiation of articles in the treaty. At the turn of the century, Senator Henry Cabot Lodge took the position that the Senate's consideration of a treaty should be viewed as a stage in the negotiation, and that a Senate amendment to a treaty is a proposition "offered at a later stage of the negotiation by the other part of the American treaty-making power in the only manner in which they could then be offered. \* \* \*" He continued:

The treaty, so called, is therefore still inchoate, a mere project for a treaty, until the consent of the Senate has been given to it \* \* \* the Senate can only present its views to a foreign government by formulating them in the shape of amendments, which the foreign government may reject, or accept, or meet, with counter propositions, but of which it has no more right to complain, than it has to complain of the offer of any germane proposition at any other stage of the negotiation.<sup>63</sup>

Renegotiation of a treaty after Senate consideration is not frequent, and in the case of multilateral treaties is usually considered infeasible because of the number of countries involved and the problems in arriving at the original agreement. Nevertheless, on occasion treaties, particularly bilateral treaties, are renegotiated or negotiated further and amended by protocol as a result of Senate consideration.<sup>64</sup>

To illustrate, after hearings by various congressional committees on the Panama Canal treaties signed by President Carter and General Torrijos on September 7, 1977, President Carter and General Torrijos met on October 14, 1977, and issued a statement of understanding clarifying U.S. rights under the Neutrality Treaty. A number of congressional delegations, including separate ones headed by Senators Robert Byrd, the Majority Leader of the Senate, Howard Baker, the Minority Leader, and John Sparkman, chairman of the Foreign Relations Committee, visited Panama and discussed possible modifications with United States and Panamanian officials. The Senate gave its advice and consent to ratification of the Neutrality Treaty subject to two amendments that incorporated the Carter-Torrijos statement of understanding into Articles IV and VI.<sup>65</sup>

As a second illustration, in 1978 the Senate added a reservation before approving a tax convention with the United Kingdom. Another reservation had been withdrawn after the Treasury Department assured the sponsor that a protocol would be negotiated to take care of the issue.<sup>66</sup> In 1979 a protocol to the tax convention

<sup>63</sup>Lodge, Henry Cabot. *The Treaty-Making Powers of the Senate*. In *A Fighting Frigate and Other Essays and Addresses*. New York, Scribner's 1902, pp. 222-224.

<sup>64</sup>See also discussion in Chapter VII, Resubmission of the Treaty or Submission of Protocol.

<sup>65</sup>U.S. Congress. Senate. Committee on Foreign Relations. *Legislative Activities Report, 95th Cong., S. Rept. 96-47*, p. 21.

<sup>66</sup>*Ibid.*, pp. 4-6.

dealing with the concerns in both reservations was submitted to and approved by the Senate.<sup>67</sup>

G. INTERIM BETWEEN SIGNING AND ENTRY INTO FORCE;  
PROVISIONAL APPLICATION

Although it has been signed, a bilateral treaty does not enter into force until the parties ratify it and exchange ratifications. A multilateral treaty does not enter into force until a specified number of parties deposit their ratifications. Between the signing and entry into force, there is an interim period in which governments are not yet legally bound, but they have tentatively agreed to a future course of action. In the United States, this includes those periods (1) from signing to submission to the Senate, (2) during Senate consideration, (3) from Senate approval to Presidential signing of the ratification, and (4) from the ratification to the exchange or deposit of ratifications and entry into force.

During this interim period the treaty is not yet in effect, but under international law nations have an obligation not to do anything that would defeat the purpose of the treaty. The Vienna Convention states in Article 18:

A state is obliged to refrain from acts which would defeat the object and purpose of an international agreement when: (a) it has signed the agreement or has exchanged instruments constituting the agreement subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the agreement; or (b) it has expressed its consent to be bound by the agreement, pending the entry into force of the agreement and provided that such entry into force is not unduly delayed.

Beyond this there is the question of taking measures during the interim period to begin to carry out the treaty, such as establishing a preparatory commission. Sometimes treaties themselves provide for their provisional application. The Vienna Convention states in Article 25:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
  - (a) the treaty itself so provides; or
  - (b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

In the United States, provisional application of a treaty may be subject to question especially if it gives temporary effect to a treaty prior to its receiving the advice and consent of the Senate. An agreement to apply a treaty provisionally is in essence an executive agreement to undertake temporarily what the treaty may call for

<sup>67</sup>U.S. Congress. Senate. Committee on Foreign Relations. Legislative Activities Report, 96th Cong., S. Rept. 97-29, pp. 7-10.

permanently. It “must normally rest on the President’s own constitutional authority.”<sup>68</sup> According to the Department of State, the President may also make a unilateral policy decision, without reaching agreement with the other parties to apply the treaty provisionally, “so long as the obligations undertaken are all within the competence of the President under U.S. law.”<sup>69</sup> The primary factor for determining the appropriateness of provisional application, in the State Department view, “relates to the immediate need to settle quickly matters in the interest of the United States which are within the President’s domestic law competence.”<sup>70</sup>

An example of a treaty pending in the Senate that has been provisionally applied by executive agreement is the maritime boundary agreement between the United States and Cuba, signed December 16, 1977. Originally, an executive agreement, by exchange of notes on April 27, 1977, had established a *modus vivendi* on a provisional maritime boundary to serve during that year while negotiations were underway. The treaty signed on December 16, 1977, contained a provision that the parties agree to apply the terms of the agreement “provisionally” for a period of 2 years from January 1, 1978. According to the Department of State, “this agreement constituted an executive agreement contained within the text of the treaty.”<sup>71</sup> The treaty was transmitted to the Senate on January 23, 1979, and debated in the Senate, but final action was not taken. The treaty is still pending in the committee. The provisional application was subsequently extended for additional periods, most recently by an exchange of notes of December 30, 1997 and March 30, 1998.<sup>72</sup>

The Senate Foreign Relations Committee raised questions concerning the provisional application in its hearings on the treaty. The Department of State said that in its judgment the President had authority to enter into provisional maritime boundary agreements, and cited as precedents a provisional boundary line between Alaska and Canada on October 20, 1899, and on the Stacking River on February 20, 1878.<sup>73</sup>

If a treaty has been approved by the Senate but not yet ratified by the President, or if there has been consultation with the Senate, the provisional application of a treaty may not raise objections. In one instance the United States submitted a declaration of provisional application of the 1962 International Coffee Agreement after the Senate gave its advice and consent but before the implementing legislation had been passed by Congress. The declaration indicated that the United States would not assume any obligations for which such legislation was necessary.<sup>74</sup>

<sup>68</sup> Rest. 3d, § 312.

<sup>69</sup> Administration’s Responses to Additional Questions Submitted for the Record by Senator Javits. In U.S. Congress. Senate. S. Exec. Rept. 96–49. Report to Accompany Execs. F, G, and H, 96–1. Washington, U.S. Government Printing Office, 1980. pp. 26–27. [Hearing on treaties is included in this document.]

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> Agreement effective January 1, 1998, for 2 years through January 1, 2000. The text was transmitted to Congress under the provisions of 1 U.S.C. 112b (the Case-Zablocki Act), and can be found online in TIARA, a subscription database of Oceana Publications, “<http://www.oceanalaw.com>.” As of December 15, 2000, information on a further extension was not transmitted to Congress.

<sup>73</sup> S. Exec. Rept. 96–49, pp. 26–27.

<sup>74</sup> 14 Whiteman, p. 92.

In another case the executive branch submitted a declaration of provisional application of the 1971 International Wheat Agreement after consultation and consent by the Senate Foreign Relations Committee, and for the 1975 and 1976 protocols before the Foreign Relations Committee completed action.

The observance in practice of two agreements between the United States and the Soviet Union on strategic arms limitation that had either not been ratified or had expired has also raised the question of application of a treaty that was not in force. The SALT I Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, was authorized by Congress and entered into force on October 3, 1973, for 5 years.

The SALT II Treaty on the Limitation of Strategic Offensive Arms was signed by the United States on June 18, 1979, but Senate action on it was indefinitely postponed after the Soviet invasion of Afghanistan. The administration adopted the policy, as expressed by President Reagan on May 31, 1982, that "As for existing strategic arms agreements, we will refrain from actions which undercut them so long as the Soviet Union shows equal restraint." The Senate Foreign Relations Committee reported a resolution (S.J. Res. 212) on July 12, 1982, which resolved that to provide a basis for progress during new negotiations, "the United States shall continue to refrain from actions which would undercut the SALT I and SALT II agreements, provided the Soviet Union shows equal restraint." The committee reported that its purpose was to give the President's statement the full force and effect of law. The Subcommittee on Separation of Powers of the Senate Judiciary Committee held hearings on the resolution and urged its rejection on grounds, among others, that,

In attempting to bind the United States to treaty obligations without securing the approval of two-thirds of the Senate, the resolution improperly limits the President's negotiating powers in the area of foreign affairs; it improperly attempts to transform a treaty into some other form of international obligation; and it improperly ignores the exclusive advice and consent function of the Senate by making the obligation dependent upon approval by the House of Representatives.<sup>75</sup>

On October 12, 2000, the Senate, in passing S. Res. 267, returned the SALT II Treaty (Treaty Doc. 96-25) to the President, as part of a package of 17 treaties. This action had been recommended by the Senate Foreign Relations Committee.

Another recent example of the use of provisional application is in the 1994 Agreement Relating to Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea. The agreement was adopted between the time the 1982 convention was adopted and the time it entered into force (November 16, 1994). The agreement was applied provisionally between November 16, 1994, and July 28, 1996, when it entered into force. Thereafter, States that had not ratified the convention/agreement package by July 28, 1996, could continue membership in the International Sea-

<sup>75</sup>U.S. Congress. Senate. Committee on the Judiciary. Joint Resolution with Respect to Nuclear Arms Reductions. Report on S.J. Res. 212. Committee Print. September 1982, 97th Cong., 2d Sess., p. 9.



bed Authority, the international organization set up by the convention/agreement package until November 16, 1998. Negotiators, in 1994, considered this 4-year interval to be a time period sufficient to allow non-states parties to adhere to the package. On November 16, 1998, however, the United States and seven other countries that enjoyed provisional membership in the International Seabed Authority but had not yet ratified or adhered to the convention/agreement package lost that membership, becoming observer states.

If the provisional application of a treaty became contentious, it would be up to the President or the Senate, depending on where the treaty resided at the time, to make clear either the intention to proceed with the ratification process and become a party, or the intention not to become a party.

## VI. SENATE CONSIDERATION OF TREATIES<sup>1</sup>

---

The Constitution, in Article II, Section 2, Clause 2, provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.” It is the President who negotiates and ultimately ratifies treaties for the United States, but only if the Senate in the intervening period gives its advice and consent. This chapter concerns the practices and procedures that the Senate follows after the President formally submits a treaty for the Senate’s advice and consent.

Whatever the authors of the Constitution may have meant by the phrase “advice and consent” with regard to treaties, it is generally used today to describe the process of Senate approval following Presidential transmission to the Senate of a fully negotiated and signed document. The “Founding Fathers” undoubtedly envisioned in their original conception of “treaty-making” that the Senate would fulfill the role of collective advisor to the President in the initiation and conduct of negotiations. For reasons outlined earlier in this study, however, that type of advice now is rarely sought from the Senate. Consultations are not uncommon with respect to treaties on matters of major national importance, such as nuclear arms control, and Members of the Senate (and the House as well) frequently are appointed as advisors or observers to U.S. delegations. In addition, pursuant to the Case-Zablocki Act<sup>2</sup> and the consultation procedures to which the State Department agreed in 1978,<sup>3</sup> the Senate and the executive branch have taken steps toward increased notification to and consultation with the Senate with respect to executive branch negotiation and execution of international agreements and treaties.<sup>4</sup> What Presidents generally seek from Senators, however, is not advice in advance but consent after the fact—after negotiations have been completed. Most treaties engage the Senate only after their formal transmission by the President for approval. Nevertheless, the Senate often provides a measure of after-the-fact “advice” along with its “consent.”

Contrary to past characterizations of the Senate as the “graveyard of treaties,” the overwhelming majority of treaties receive favorable Senate action within a reasonable period of time. Few treaties languish indefinitely or are returned to the President without approval, and even fewer are defeated outright by vote of the Sen-

---

<sup>1</sup> Prepared by Stanley Bach, Senior Specialist in the Legislative Process and David M. Ackerman, Legislative Attorney. For additional information see: Riddick, Floyd M. and Alan S. Frumin, *Riddick’s Senate Procedure*, Sen. Doc. 101–28, 1992, especially pp. 832–843 (“Executive Business and Executive Sessions”) and 1294–1310 (“Treaties”).

<sup>2</sup> Public Law 92–403, as amended, 1 U.S.C. 112b. See Appendix 2.

<sup>3</sup> See S. Res. 536 and S. Rept. 95–1171, 95th Cong.

<sup>4</sup> See discussion in Chapter X.

ate. Likewise, most treaties survive the process of advice and consent without material change, although the Senate in recent years has expanded its use of conditions that are attached to its resolutions of ratification. In most cases, the process of Senate consideration is expedited, without using the full procedures available under Senate rules, and Senate approval frequently is unanimous. However, the most controversial and important treaties can receive extended consideration, in committee and on the Senate floor, during which numerous amendments and conditions may be proposed.

#### A. SENATE RECEIPT AND REFERRAL

All treaties are transmitted to the Senate in the President's name, a procedure that typically first involves formal submission of the agreement to the President by the Secretary of State and may include a separate review of the agreement by the White House staff. Therefore, the time period between signature of a treaty and its actual transmission to the Senate for advice and consent may be considerable, as much for bureaucratic as for substantive or political reasons. But the President controls the timing of a treaty's submission. Occasionally an administration may decide not to submit a treaty that it or a previous administration had signed.

The Senate receives a Presidential message consisting of the official title and text of the treaty (the original in the case of a bilateral treaty, a certified copy in the case of a multilateral one) and a letter of transmittal, signed by the President, requesting Senate advice and consent and incorporating the earlier Letter of Submittal from the Secretary of State to the President. The Secretary's letter usually contains a detailed description and analysis of the treaty. The Presidential message also may contain protocols, annexes, or other documents that the President submits to the Senate to be considered as integral parts of the proposed treaty (as distinguished from documents submitted for information purposes only). They are referred to collectively as the treaty and its official papers. These documents, which have been submitted to the Senate for advice and consent to ratification as integral parts of a treaty, are subject to a single vote of advice and consent. For the same reason, only a treaty and its official papers, when formally before the Senate, are subject to amendment.

If the executive branch concludes a protocol amending a treaty that is pending in the Senate, the protocol is submitted to the Senate as a new treaty. The Senate may decide, however, to consider the treaty and protocol together and approve them by means of a single resolution of ratification.<sup>5</sup>

#### SENATE RULE XXX

Senate Rule XXX governs the process of treaty consideration in the Senate. As revised on February 27, 1986, Rule XXX states<sup>6</sup>:

<sup>5</sup> See Appendix 7, Simultaneous Consideration of Treaties and Amending Protocols: Selected Precedents.

<sup>6</sup> The Senate's standing rules were revised and renumbered in 1980, which can lead to difficulties when references are made to earlier publications. In addition, S. Res. 28, adopted on February 27, 1986, made a significant change in Rule XXX. Previously, the rule provided for a first stage of floor consideration, during which the Senate would meet "as in Committee of the Whole" and act on any proposed amendments to each article of the treaty in sequence. Although

## EXECUTIVE SESSION—PROCEEDINGS ON TREATIES

1. (a) When a treaty shall be laid before the Senate for ratification, it shall be read a first time; and no motion in respect to it shall be in order, except to refer it to a committee, to print it in confidence for the use of the Senate, or to remove the injunction of secrecy.

(b) When a treaty is reported from a committee with or without amendment, it shall, unless the Senate unanimously otherwise directs, lie over one day for consideration; after which it may be read a second time, after which amendments may be proposed. At any stage of such proceedings the Senate may remove the injunction of secrecy from the treaty.

(c) The decisions thus made shall be reduced to the form of a resolution of ratification, with or without amendments, as the case may be, which shall be proposed on a subsequent day, unless, by unanimous consent, the Senate determines otherwise, at which stage no amendment to the treaty shall be received unless by unanimous consent; but the resolution of ratification when pending shall be open to amendment in the form of reservations, declarations, statements, or understandings.

(d) On the final question to advise and consent to the ratification in the form agreed to, the concurrence of two-thirds of the Senators present shall be necessary to determine it in the affirmative; but all other motions and questions upon a treaty shall be decided by a majority vote, except a motion to postpone indefinitely, which shall be decided by a vote of two-thirds.

2. Treaties transmitted by the President to the Senate for ratification shall be resumed at the second or any subsequent session of the same Congress at the stage in which they were left at the final adjournment of the session at which they were transmitted; but all proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon.

## ACTION ON RECEIPT OF TREATY FROM THE PRESIDENT

When a treaty message is received from the President, it is transmitted by the Senate Parliamentarian to the Executive Clerk, who is responsible for treaties and nominations. The Executive Clerk assigns it a message number and prepares a procedural request for unanimous consent to remove the injunction of secrecy referred to in Senate Rules XXIX and XXX.<sup>7</sup> (This injunction originated during the days when Senate executive sessions were conducted in secret. Treaties today are normally made public when signed or even earlier.) Ordinarily, the Senate routinely agrees to

the full procedures of Rule XXX rarely were invoked, they were followed during Senate consideration of the Versailles Peace Treaty following World War I, the Panama Canal Treaties in 1978, and the Genocide Convention in 1986. Citations to Senate rules are to the publication *Standing Rules of the Senate*, 106th Cong., 2d Sess., November 19, 1999, Document 106-15.

<sup>7</sup> Paragraph 3 of Rule XXIX provides that "All confidential communications made by the President of the United States to the Senate shall be by the Senators and the officers of the Senate kept secret; and all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy."

the Majority Leader's request to remove the injunction of secrecy. If any Senator should object to the request, the full Senate can agree to a resolution removing the injunction of secrecy, as provided in Senate Rule XXIX. On at least one recent occasion, such an objection was used to throw a temporary procedural roadblock in the way of Senate consideration of a tax treaty.<sup>8</sup>

Since Senate consideration of treaties is a matter of executive business, the Senate must be in executive session<sup>9</sup> in order to remove the injunction of secrecy or take any other floor action with respect to a treaty. The motion to go into executive session is non-amendable and non-debatable but is subject to a request for a roll call vote. Normally, however, the Senate moves between executive and legislative session by unanimous consent.

The request of the Majority Leader is typically in the following form:

I ask unanimous consent that the injunction of secrecy be removed from the Third Protocol to the 1975 Tax Convention with the United Kingdom of Great Britain and Northern Ireland, as amended, signed at London on March 15, 1979 (Executive Q, 96th Cong., 1st Sess.), transmitted to the Senate by the President of the United States on April 12, 1979.

I ask that the treaty be considered as having been read the first time, that it be referred to the Committee on Foreign Relations and ordered to be printed, and that the President's message be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.<sup>10</sup>

Following the first reading and removal of the injunction of secrecy at the initiative of the Majority Leader, the Presiding Officer refers the treaty to the Committee on Foreign Relations, in accordance with Senate Rule XXV on the jurisdiction of standing committees. At this stage, the text of the President's message, the treaty, all documents submitted as integral parts of the treaty, and any other documents submitted for the information of the Senate, are printed by the U.S. Government Printing Office and made available online to the public.<sup>11</sup>

Treaties are referred to committee after being read once, whereas bills and joint resolutions must, in principle, go through a second reading (a subsequent procedural step) before they are eligible for referral.

Thereafter, each treaty is referred to by its Treaty Document Number, which consists of the number of the Congress in which it was transmitted, followed by a number representing the order in

<sup>8</sup>On July 21, 1980, Senator Mike Gravel of Alaska objected to a unanimous consent request to remove the injunction of secrecy from a revised income tax convention with Israel.

<sup>9</sup>The Senate meets in legislative session to transact its legislative business. The consideration of treaties and nominations, on the other hand, constitutes the Senate's executive business and takes place in executive session. By unanimous consent, the Senate sometimes transacts some executive business without first resolving into executive session. On January 3, 2001, the first day of the 107th Congress, for example, the Senate agreed to a unanimous consent request that, "for the duration of the 107th Congress, it shall be in order to refer [to committee] treaties and nominations on the day when they are received from the President, even when the Senate has no executive session that day." Congressional Record, January 3, 2001, p. S8 (daily ed.).

<sup>10</sup>Riddick, Floyd M. and Alan S. Frumin, Riddick's Senate Procedure. Sen. Doc. 101-28, 1992, p. 1300.

<sup>11</sup>Information may be found online at <http://www.access.gpo.gov/congress/doccat.html>.

which treaties were submitted in that Congress, for example, Treaty Doc. 97-1 or 106-13. Before the 97th Congress in 1981, a letter designation was used rather than consecutive numbering (for example, Executive Q in the example quoted above). Treaties that were transmitted before that time and that, for one reason or another, have not been acted upon by the Senate retain their original designation. The International Labor Organization Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize, for example, which was originally transmitted by President Truman in 1949, is designated Ex. S, 81-1, for Eighty-first Congress, First Session.

Since its creation in 1816, the Foreign Relations Committee has had exclusive jurisdiction over treaties, as presently recognized in Rule XXV.<sup>12</sup> From time to time other Senate committees have sought referral of particular treaties, but without success. There have been various occasions, however, on which other committees have conducted hearings on the issues raised by particular treaties even though those committees did not have authority to make formal recommendations to the Senate regarding the treaties.

In the case of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms and the Protocol Thereto,<sup>13</sup> commonly known as SALT II, for example, the Committee on Armed Services held extensive hearings on the military implications of the treaty,<sup>14</sup> similar to the parallel hearings it held in 1963 on the Nuclear Test Ban Treaty, in 1969 on the Nuclear Non-Proliferation Treaty, and in 1978 on the Panama Canal Treaties. The Armed Services Committee even took a vote on the SALT II Treaty and prepared an extensive report in opposition to Senate approval.<sup>15</sup> In the cases of the Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles (INF), the Conventional Armed Forces in Europe Treaty (CFE), the Treaty on the Reduction and Limitation of Strategic Offensive Arms (START), and the Open Skies Treaty, the Armed Services and Intelligence Committees reported their findings to the Senate Foreign Relations Committee during that committee's consideration of the treaties, and the other committees' recommendations were included in the reports of the Committee on Foreign Relations.<sup>16</sup> More recently, the Armed Services Committee received testimony in 1995 on the national security implications of U.S. ratification of the START II Treaty before the Foreign Relations Committee reported that treaty to the Senate. Similarly, the Armed Services Committee received testimony on several occasions

<sup>12</sup> Senate Rule XXV(l)(j)(1)17 states the Committee on Foreign Relations has jurisdiction over "Treaties and executive agreements, except reciprocal trade agreements." Rule XXV(l)(i)7 states the Committee on Finance has jurisdiction over "Reciprocal trade agreements."

<sup>13</sup> Ex. Y, 96-1, 96th Cong., 1st Sess. (June 25, 1979), ordered returned to the President without the Senate's approval by S. Res. 267, 106th Cong., 2d Sess. (2000).

<sup>14</sup> Military Implications of the Treaty of the Limitation of Strategic Offensive Arms and Protocol Thereto (SALT II Treaty). Hearings before the Committee on Armed Services, U.S. Senate, 96th Cong., 1st Sess., Four Parts, July-October 1979.

<sup>15</sup> U.S. Congress. Senate Committee on Armed Services. Report No. 96-1054, Military Implications of the Proposed SALT II Treaty relating to the National Defense. Report of the Hearings on the Military Aspects of the Proposed SALT II Treaty (Ex. Y, 96-1), based on hearings held before the committee in accordance with its responsibilities under Rule XXV(c) of the Standing Rules of the Senate, together with Additional Views. December 4, 1980.

<sup>16</sup> U.S. Congress. Senate. Committee on Foreign Relations. INF Treaty. Exec. Rept. 100-15, pp. 74-79. CFE Treaty. Exec. Rept. 102-22, pp. 124-137. START Treaty. Exec. Rept. 102-53, pp. 73-75. Treaty on Open Skies. Exec. Rept. 103-5, pp. 9-10, 115, 140.

in 1997 and 1998 on North Atlantic Treaty Organization (NATO) expansion, both before and after the Foreign Relations Committee completed action on a treaty on that subject.<sup>17</sup>

Other Senate and House committees have occasionally prepared reports on treaties of particular concern to them. Sometimes the Foreign Relations Committee has invited members of other committees to participate in its hearings relating to treaties, such as the SALT II Treaty, of obvious interest to such committees.

#### B. FOREIGN RELATIONS COMMITTEE CONSIDERATION

Once referred to the Foreign Relations Committee, each treaty is placed on the committee calendar, in a separate treaty section and arranged chronologically in order of referral date. Committee Rule 9 governs the committee's consideration of treaties. It states:

(a) The Committee is the only committee of the Senate with jurisdiction to review and report to the Senate on treaties submitted by the President for Senate advice and consent. Because the House of Representatives has no role in the approval of treaties, the Committee is therefore the only congressional committee with responsibility for treaties.

(b) Once submitted by the President for advice and consent, each treaty is referred to the Committee and remains on its calendar from Congress to Congress until the Committee takes action to report it to the Senate or recommend its return to the President, or until the Committee is discharged of the treaty by the Senate.

(c) In accordance with Senate Rule XXX.2, treaties which have been reported to the Senate but not acted on before the end of a Congress "shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon."

(d) Insofar as possible, the Committee should conduct a public hearing on each treaty as soon as possible after its submission by the President. Except in extraordinary circumstances, treaties reported to the Senate shall be accompanied by a written report.<sup>18</sup>

The decision to hold hearings or take other action on particular treaties ordinarily is made by the committee chairman, in consultation with the ranking minority member. The chairman's decisions in this regard are influenced to an important degree by the preferences of the executive branch. At the beginning of each Congress, the committee routinely requests from the Department of State a written ranking of its treaty priorities, which is normally conveyed in several general groupings. Although such requests have no formal status or procedural consequences, the committee usually gives great weight to them in planning its schedule. Such decisions also are affected by the overall priorities and time constraints of the chairman and other committee members.

<sup>17</sup>U.S. Congress. Senate. Committee on Armed Services. Legislative Calendar, 104th Cong., S. Prt. 104-74, p. 66; U.S. Congress. Senate. Committee on Armed Services. Legislative Calendar, 105th Cong., S. Prt. 105-92, pp. 67-68.

<sup>18</sup>U.S. Congress. Senate. Committee on Rules and Administration. Authority and Rules of Senate Committees, 1999-2000. Sen. Doc. 106-6. 106th Cong., 1st Sess., 1999; p. 99.

Committee hearings on treaties principally involve executive branch, usually State Department, witnesses. Since most treaties are noncontroversial, the objective is to develop a record explaining the purposes, provisions, and significance of the agreement. When a treaty is controversial or complicated, however, the hearing process can be extensive, involving many witnesses and days of questioning and deliberations. Extensive hearings in recent years have included those in 1977–1978 on the Panama Canal Treaties, in 1979 on the SALT II Treaty, in 1988 on the INF Treaty, and in 1991–1992 on the START Treaty. More recently, the committee held hearings on the Chemical Weapons Convention on a total of 14 days.

The chairman of the Foreign Relations Committee generally decides on the timing for committee markup of treaties, which normally comes soon after the completion of hearings. The predominant tendency is for the committee to recommend Senate advice and consent without numerous conditions, and the committee usually votes on treaties without extended debate or discussion. In the case of a controversial treaty, however, or when it is clear that particular problems must be resolved to assure Senate approval, the chairman may initiate proposals for conditions or other specific language to address those problems. The types of conditions available are discussed in the following section. Whether or not the committee does decide to recommend Senate conditions, when it reports out the treaty the committee also proposes a “resolution of ratification,” usually in the following form:

*Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of [or accession to] the [official treaty title].*

Generally, treaties are considered within a year of their transmission, after allowing sufficient time for public notice and comment. From time to time, however, the press of other business has resulted in backlogs of unreported treaties. Particular treaties may languish on the committee’s calendar, not necessarily because of serious opposition but for want of interested advocates with the time to do justice to them. In other cases, treaties have been shepherded through with dispatch, owing to their importance and timeliness or to the interest of the chairman or particular members of the committee. Groups of similar treaties frequently have been considered en bloc, both in committee and on the Senate floor, thereby facilitating comparison and reducing the demands on Senators’ time.

If the chairman does expect opposition or difficulty in gaining Senate approval of a particular treaty, his decision on the nature and timing of committee action becomes more problematic. Furthermore, unless the President is clearly in support of ratification (and a successor President may not always support all treaties submitted prior to his taking office), Senate action may be pointless, since the President can simply decline to ratify a treaty even after Senate approval.

All treaties remain on the committee’s calendar until the committee takes action on them. In accordance with Senate Rule XXX, paragraph 2, all treaties reported by the committee that are not thereafter disposed of by the Senate (either by favorable advice and consent or by formal return to the President) rest on the Executive



Calendar and then, at the end of the Congress, automatically are returned, or re-referred, to the committee. The committee must then report those treaties again during a subsequent Congress if they are to be considered on the Senate floor.

As a consequence, the calendar of the Foreign Relations Committee contains some treaties that were transmitted years earlier and never finally disposed of by the Senate. The Genocide Convention, for instance, remained on the committee calendar from 1949 until 1986, when the Senate finally gave its advice and consent to ratification; by that time the committee had reported the convention favorably five times. In 1996 the committee reported the Chemical Weapons Convention that had been referred to it in 1993. The Senate debated but did not take final action on the convention in 1996, so it was re-referred to the committee at the end of the 104th Congress. During the following year, the committee held additional hearings on the convention. The Senate then considered it again, after discharging the committee from its further consideration, and ultimately consented to its ratification.

The workload of the committee and the Senate regarding treaties varies from Congress to Congress. In the past four Congresses, for example, the number of treaties to which the Senate gave its advice and consent grew from 27 in the 103d Congress (1993–1994) to 37 in the 104th (1995–1996) to 52 in each of the 105th (1997–1998) and 106th (1999–2000) Congresses.<sup>19</sup>

### C. CONDITIONAL APPROVAL

The Foreign Relations Committee may recommend that the Senate approve treaties conditionally, granting its advice and consent only subject to certain stipulations that the President must accept before proceeding to ratification.<sup>20</sup> The President, of course, also may propose, at the time of a treaty's transmission to the Senate or during the Senate's consideration of it, that the Senate attach certain conditions or stipulations in the course of giving its advice and consent.

#### TYPES OF CONDITIONS

Conditions traditionally have been categorized as amendments, reservations, understandings, declarations, and provisos. Whatever they are called, however, conditions generally are binding on the President, and the President cannot proceed to ratify a treaty without giving them effect. Because not all conditions necessarily affect the substance of a treaty, not all are necessarily communicated to the other party or parties to an agreement. But whatever name the Senate gives to a condition, if the President considers that it alters

<sup>19</sup>See Appendix 8 for a list of all treaties to which the Senate gave its advice and consent to ratification during the 100th–106th Congresses. During this period, the chairmen of the committee have been Claiborne Pell of Rhode Island (100th–103d Congresses) and Jesse Helms of North Carolina (104th–106th Congresses).

<sup>20</sup>See American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*. American Law Institute Publishers, 1987, Vol. I, § 314, pp. 186–189. During Senate consideration of SALT II, the Foreign Relations Committee gave considerable attention to the nature and legal effect of Senate conditions and discussed the matter extensively in its report on the treaty. See S. Exec. Rept. 96–14, 96th Cong., 1st Sess. (Nov. 19, 1979). An earlier discussion of these issues with several useful illustrations appears in U.S. Congress, Senate, *The Role of the Senate in Treaty Ratification*, A Staff Memorandum to the Committee on Foreign Relations. Committee Print. 95th Cong., 1st Sess., November 1977, pp. 3–13.

an international obligation under a treaty, he is expected to transmit it to the other party or parties. The result may be further negotiations or even abandonment of the treaty.

Both amendments and reservations are proposed revisions in the obligations undertaken by the United States pursuant to a treaty. Amendments are proposed changes in the actual text of the treaty; reservations are specific qualifications or stipulations that modify U.S. obligations without necessarily changing treaty language.<sup>21</sup> Both types of revisions amount, therefore, to Senate counter offers that alter the original deal agreed to by the United States and the other country or countries involved. In the case of treaties that represent significant trade-offs and compromises, such conditions normally require the re-opening of negotiations, assuming the other parties are willing to do so. In less delicate circumstances, or on secondary issues, such conditions may be accepted without extended delay, although that prospect is not always easy to evaluate during Senate committee or floor deliberations.

In the case of large, multilateral agreements, amendments seldom are realistic; the difficulties in reconvening negotiations mean that significant amendments are normally taken by the other parties as tantamount to rejection of the treaty itself. Reservations on important provisions of the treaty can have the same result.

The Foreign Relations Committee has repeatedly expressed concern with the inclusion of a provision in some multilateral treaties stating that no reservations may be made. In the committee's view, such a provision has the effect of preventing the Senate from exercising its constitutional duty to give advice and consent to a treaty, and the committee has asserted that its approval of a treaty containing such a provision should not be construed as a precedent.<sup>22</sup>

In the case of bilateral treaties, there is little substantive difference between amendments and reservations, although there may be a significant diplomatic difference. (As discussed below, there also is a procedural difference in the Senate's consideration of amendments and reservations under Senate Rule XXX.) While it may be politically easier for the other country involved to accept a reservation rather than a change in the actual language of the treaty text, the legal effect is substantively the same: either form of condition amounts to a counter offer.

Understandings, by contrast, are interpretive statements that clarify or elaborate, rather than change, the provisions of an agreement and that are deemed to be consistent with the obligations imposed by the agreement. The actual effect of any particular pro-

<sup>21</sup>The Vienna Convention on the Law of Treaties, which the U.S. has not ratified but which is viewed as codifying customary international law in most respects, defines "reservation" as follows:

"[R]eservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. Vienna Convention, Article 2.

<sup>22</sup>See, for example, the United Nations Framework Convention on Climate Change, Exec. Rept. 102-55 to accompany Treaty Doc. 102-38, October 1, 1992, p. 15; and the Protocol on Environmental Protection to the Antarctic Treaty, Exec. Rept. 102-54, to accompany Treaty Doc. 102-22, September 22, 1992. More recently, the Senate has begun to incorporate such statements in its resolutions of ratification as well as in its reports on treaties containing "no-reservations" clauses. See, for example, the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, Exec. Rept. 106-14 to accompany Treaty Doc. 105-51, April 27, 2000, p. 11; and 146 Congressional Record, September 20, 2000, p. S8867 (daily ed.). For further discussion of this point, see *infra* Chapter IX.

posed understanding may, of course, be debatable. What may seem to the Senate to be a reasonable interpretation, and therefore an understanding, might appear to the other country or countries involved to be an important modification, and therefore a reservation, particularly if it concerns an aspect of the agreement that is considered fundamental. If that is the conclusion of another party to a treaty, the mere characterization of a condition as an understanding rather than a reservation will do little to change that conclusion. True understandings are commonly used in the ratification of both multilateral and bilateral treaties as a means of clarification and reassurance rather than revision.

Declarations are statements of purpose, policy, or position related to matters raised by the treaty in question but not altering or limiting any of its provisions. The President has on occasion interpreted such declarations as falling outside of the formal provisions to be incorporated in the instruments used in the ratification process,<sup>23</sup> and the Senate itself has at times so directed.<sup>24</sup> As a consequence, such statements are often placed in a separate section of the Senate's resolution of ratification. The term "declaration" sometimes is used interchangeably with the term "proviso."

Provisos often include conditions relating to the process of implementing a treaty within the United States. Among the conditions attached to the Senate's resolution of ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, was a proviso, specifically not to be included in the instrument of ratification, that the President of the United States would not deposit the instrument of ratification until such time as he had notified all parties that nothing in the convention required or authorized legislation, or other action, by the United States prohibited by the Constitution as interpreted by the United States.<sup>25</sup>

The Senate Committee on Foreign Relations gave considerable attention to the types of conditions added to treaties and to their legal effect during its consideration of the SALT II Treaty in 1979.<sup>26</sup> The committee included a number of declarations, understandings, and reservations in the resolution of ratification it recommended to the Senate. But, concerned that the traditional labels

<sup>23</sup>In the case of the 1976 Treaty of Friendship and Cooperation with Spain, the State Department decided that it was inappropriate to include the text of a lengthy Senate declaration in the instruments of ratification, because the declaration related in part to the encouragement of "free institutions" in a "democratic Spain" and was certain to be offensive to Spain. The Department defended its position on this point in a memorandum that appears in the 1976 Digest of United States Practice in International Law. Eleanor C. McDowell ed., State Department pub. 8908, November 1977, pp. 215-217. A number of Senators protested however; and ultimately the declaration was included as a separate "annex" to the U.S. instrument of ratification.

<sup>24</sup>See, for example, the resolution of ratification on the "Inter-American Convention on Serving Criminal Sentences Abroad," 146 Congressional Record, October 18, 2000, p. S10658 (daily ed.).

<sup>25</sup>Treaty Doc. 100-20. See 136 Congressional Record, October 27, 1990, p. S17492 (daily ed.).

<sup>26</sup>The committee's concern had been stimulated in part by the administration's refusal in 1976 to include a Senate declaration in the instruments of ratification of a Treaty of Friendship and Cooperation with Spain. See n. 22. In addition, during hearings on the SALT II Treaty, former Yale Law School Dean Eugene V. Rostow had expressed the view that reservations did not have the same legal effect as amendments to the treaty itself. A reservation, he argued, "has the same effect as a letter from my mother." Testimony of Eugene Rostow, chairman, Executive Committee, Committee on the Present Danger, before the Senate Foreign Relations Committee, July 19, 1979, in the SALT II Treaty, Hearings before the Committee on Foreign Relations, U.S. Senate, 96th Cong., 1st Sess., Part 2, p. 393, and subsequently repeated on September 6, 1979, Part 4, p. 13.

left some ambiguity regarding the legal effect of the proposed conditions, it grouped them into the following three categories:

- (I) conditions that did not need to be formally communicated to, or accepted by, the Soviet Union;
- (II) conditions that did need to be formally communicated to, but not necessarily accepted by, the Soviet Union; and
- (III) conditions that required the explicit agreement of the Soviet Union.<sup>27</sup>

In addition, the committee obtained the prior agreement of the administration to this format. Secretary of State Cyrus Vance gave assurances to the committee that

- (1) all conditions would be deemed equally binding on the President regardless of the category in which they were placed;
- (2) category II conditions would be conveyed to the Soviet Union by formal diplomatic note prior to the exchange of the instruments of ratification, thus assuring that the Soviet Union understood the U.S. position in advance of the treaty's entry into force, yet not requiring explicit Soviet approval as in the case of a condition conveyed in the instrument of ratification; and
- (3) the executive branch would follow a procedure for securing Soviet agreement to the provisions in category III that would leave no doubt as to the explicit agreement of the Soviet Union. This would probably be done, the Secretary said, by securing explicit Soviet agreement in the "Protocol of Exchange of Instruments of Ratification" that is signed by both parties.<sup>28</sup>

Because of the Soviet Union's intervention in Afghanistan, the Senate never voted on the SALT II Resolution of Ratification. But it subsequently used these categories in its Resolution of Ratification on the INF Treaty. As noted, these categories, when used, have supplemented, not replaced, the traditional typology.

The Committee on Foreign Relations re-emphasized its view regarding conditions in its 1985 report on the Genocide Convention, asserting that all conditions placed by the Senate on its advice and consent were to be included in the instrument of ratification unless the Senate expressly stated otherwise. The report said:

Unless there is an express statement by the Senate to the contrary, it is the Committee's firm view that all conditions adopted by the Senate are to be included in the instrument of ratification and therefore furnished to all other parties to the treaty. Not only does the Committee believe this to be the law, but it believes it to be essential for practical reasons as well. The Senate's conditions, together with the treaty and its accompanying documents, describe in full the obligation undertaken by the United States in ratifying the treaty. To insure an identity of expectations by all parties concerning the rights and obligations imposed by the treaty, each party should be accorded formal notice of the Senate's conditions. Notification by

<sup>27</sup>U.S. Congress. Senate. Committee on Foreign Relations. SALT II Treaty. S. Exec. Rept. 96-14, November 19, 1979.

<sup>28</sup>*Id.*, at 29-32 (exchange of letters between the committee and the Secretary of State).

any method other than inclusion in the instrument of ratification simply increases the possibility of misunderstanding.<sup>29</sup>

More recently, the committee has adopted the practice of specifying which conditions are to be included in the instrument of ratification and which should not be included. It also has specified that particular declarations in its resolutions of ratification are binding on the President.<sup>30</sup>

#### CONDITION REGARDING TREATY INTERPRETATION

In the mid-1980s a controversy erupted that has resulted in the inclusion of a condition regarding treaty interpretation in every resolution of ratification adopted by the Senate. In the early 1980s the Reagan Administration initiated a "Strategic Defense Initiative" (SDI) to develop new means, including mobile- and space-based means, of protecting the United States against missile attack. Critics immediately charged that SDI would violate the 1972 Anti-Ballistic Missile (ABM) Treaty, which barred the United States and the Soviet Union from deploying ABM systems (except for one fixed site to protect either the nation's capital or an offensive missile complex) and from developing, testing, or deploying "ABM systems which are sea-based, air-based, space-based, or mobile land-based." The administration responded that a broader interpretation of the treaty allowed the development and testing of ABM systems based on different physical principles than those that existed in 1972. It said that the text of the treaty was "ambiguous" in this respect, that the negotiating record of the treaty supported the broader interpretation, that the subsequent practice of the parties was consistent with the broader interpretation, and that as a consequence the President was justified in reinterpreting the treaty to more accurately reflect what the negotiating record said it meant.<sup>31</sup>

Usually when the Foreign Relations Committee and the Senate consider a treaty, they do not have access to the full negotiating record, including all the instructions, transcripts, correspondence, and other often voluminous material relating to it. Instead, they rely on the testimony and other formal communications from the executive branch to ascertain a treaty's meaning. But in response to the administration's claims regarding the ABM Treaty, the Senate, at the initiative of Senators Nunn and Levin, sought and gained access to the negotiating record of the ABM Treaty.<sup>32</sup> The

<sup>29</sup>U.S. Congress. Senate. Committee on Foreign Relations. Genocide Convention. S. Exec. Rept. 99-2, July 18, 1985. p. 15.

<sup>30</sup>See, for example, the 33 resolutions of ratification to which the Senate gave its advice and consent on October 18, 2000. 146 Congressional Record, October 18, 2000, pp. S10658-S10667 (daily ed.).

<sup>31</sup>For exposition of the administration's legal justifications, see Sofaer, Abraham, "The ABM Treaty and the Strategic Defense Initiative," 99 Harvard Law Review 1972 (1986) and the testimonies of Abraham Sofaer, Legal Adviser to the State Department, and Richard Perle, Assistant Secretary of Defense for International Security Policy, Joint Hearings on the ABM Treaty and the Constitution Before the Senate Committee on Foreign Relations and the Senate Committee on the Judiciary (1987), at 119-170 and 351-375.

<sup>32</sup>Under an access agreement concluded in February, 1988, the State Department supplied the documents, and the Senate created an Arms Control Treaty Review Support Office to house and provide a system for using the documents. After extended study, Senator Nunn, in detailed commentaries on the Senate floor, asserted that this record as well as the Senate's ratification hearings and debates and the subsequent practices of the parties belied the administration's claim. See 133 Congressional Record 5296-5302 (March 11, 1987), 5582-5587 (March 12, 1987), 5688-5690 (March 13, 1987), and 13143-13163 (May 20, 1987).

Foreign Relations Committee and the Judiciary Committee held extensive hearings<sup>33</sup>; and Senator Biden submitted, and the Foreign Relations Committee reported, a resolution to constrain the administration's ability to reinterpret the ABM Treaty.<sup>34</sup>

These actions served as precursors to a condition regarding treaty interpretation that was added in 1988 to the resolution of ratification on the INF Treaty.<sup>35</sup> That condition articulated what it said were the constitutional principles that would govern the future interpretation of the treaty. The Foreign Relations Committee explained:

Both domestic and international law give primacy in treaty interpretation to the text of the treaty. International law requires that a treaty be interpreted in accordance with the ordinary meaning to be given the treaty's terms in light of their context and in light of the treaty's object and purpose. Domestic law does not differ, and is also premised on the assumption that the Executive and the Senate, as co-makers of the treaty for the United States, will share a common understanding of a treaty's text. As a matter of record, that common understanding of the text will be reflected in the Executive's formal presentation of the treaty to the Senate: in formal presentation documents, in prepared testimony, and in verbal and written intercourse regarding the treaty's meaning and effect.<sup>36</sup>

The "Biden condition," as subsequently modified on the Senate floor by amendments by Senators Byrd and Cohen and approved by the Senate on May 26, 1988,<sup>37</sup> became the first condition to the INF Treaty and stated as follows:

Provided that the Senate's advice and consent to ratification of the INF Treaty is subject to the condition, based on the treaty clauses of the Constitution, that:

- (1) the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave advice and consent to ratification;
- (2) such common understanding is based on:
  - (i) first, the text of the Treaty and the provisions of this resolution of ratification; and
  - (ii) second, the authoritative representations that were provided by the President, and his representatives to the Senate and its Committees, in seeking

<sup>33</sup> Joint Hearings on the ABM Treaty and the Constitution Before the Senate Committee on Foreign Relations and the Senate Committee on the Judiciary (1987).

<sup>34</sup> S. Res. 167, 100th Cong., 1st Sess. (1987), the "ABM Treaty Interpretation Resolution," and S. Rept. 100-164, 100th Cong., 1st Sess. (1987).

<sup>35</sup> Because of the administration's claims that the negotiating record of the ABM Treaty gave a more accurate indication of its meaning than administration testimony to the Senate, the Senate also sought and gained access to the negotiating record of the INF Treaty. But in its report on the INF Treaty, the Foreign Relations Committee took the position that Senate review of negotiating records should not become an institutionalized procedure, although reference to the record on a case-by-case basis sometimes might be useful. In the committee's view, "a systematic expectation of Senate perusal of every key treaty's negotiating record" might inhibit candor during future negotiations and impose on the Senate "a considerable task with no clear purpose." U.S. Congress. Senate. Committee on Foreign Relations. The INF Treaty. Report. S. Exec. Rept. 100-15, 100th Cong., 2d Sess., April 14, 1988, p. 100.

<sup>36</sup> *Id.*, p. 97. See also the discussion of the Byrd-Biden condition in Chapter VIII.

<sup>37</sup> The Senate approved the modified Byrd-Biden condition by a vote of 72-27 and the resolution of ratification by a vote of 93-5. 134 Congressional Record 12655 (May 26, 1988) and 12849 (May 27, 1988), respectively.

Senate consent to ratification, insofar as such representations were directed to the meaning and legal effect of the text of the Treaty; and

(3) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute; and

(4) if, subsequent to ratification of the Treaty, a question arises as to the interpretation of a provision of the Treaty on which no common understanding was reached in accordance with paragraph (2), that provision shall be interpreted in accordance with applicable United States law.<sup>38</sup>

President Reagan protested the inclusion of this condition in the Senate's resolution of ratification but, nonetheless, proceeded to complete the ratification of the INF Treaty.<sup>39</sup>

In the following decade, the Senate incorporated the Byrd-Biden condition to the INF Treaty by reference in its resolutions of ratification on all of the major arms control agreements: the CFE Treaty in 1991, START I in 1992, the Open Skies Treaties in 1993, the START II Treaty in 1996, and the Chemical Weapons Convention and the Flank Document Agreement to the CFE Treaty in 1997.<sup>40</sup> In each instance, however, it broadened the condition by affirming its applicability not just to the treaty under consideration, as it had with the INF Treaty, but to all treaties.

The Senate added another dimension to the Byrd-Biden condition when it gave its advice and consent to the Flank Document Agreement to the CFE Treaty in 1997. The Clinton Administration had initially wanted to submit the Flank Document to both the House and the Senate and to have it approved by majority vote in both bodies as a congressionally-authorized executive agreement. A legal memorandum from the Justice Department had concluded that method of approving an amendment to a treaty was lawful, and its argument was based in part on subsection (1)(C) of the Byrd-Biden condition.<sup>41</sup> The Senate insisted on its prerogatives, however, and

<sup>38</sup> 134 Congressional Record 12849 (May 27, 1988).

<sup>39</sup> Id. 14261 (June 13, 1988) (Message from the President—Comments with Respect to Senate Positions on the INF Treaty). It might be noted that both the Bush and Clinton Administrations subsequently expressed their acceptance of the principles stated in the Byrd-Biden condition. See START Treaty, S. Hrg. 102-607, Pt. 1, pp. 506-507; Open Skies Treaty, Exec. Rept. 103-5, p. 18.

<sup>40</sup> CFE Treaty, Exec. Rept. 102-22, p. 81; START Treaty, Exec. Rept. 102-53, pp. 96, 101-102; Open Skies Treaty, Exec. Rept. 103-5, p. 16; START II, Exec. Rept. 104-10, p. 46; Chemical Weapons Convention, 143 Congressional Record, April 24, 1997, p. S3656 (daily ed.); and Flank Document Agreement, Exec. Rept. 105-1, pp. 22-24.

<sup>41</sup> Office of Legal Counsel, Department of Justice, "Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty" (November 25, 1996). The memorandum stated in part:

Finally, in its Resolution of Advice and Consent of 27 May 1988 to the U.S.-U.S.S.R. Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty), the Senate adopted the "Biden condition," which provides that "the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification," and that "the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, *or the enactment of a statute.*" 134 Congressional Record 12,849 (1988) (emphasis added). The Senate affirmed "the applicability to all treaties of the constitutionally-based principles" in this condition. Resolution of Advice and Consent of 25 November 1991 to the Treaty on Conventional Armed Forces in Europe (CFE Treaty), 137 Congressional Record, November 23, 1991, pp. S17,845, S17,846 (daily ed.), adopted *id.* at S18,038 (daily ed. Nov. 25, 1991). Because the Senate took the view that such "common understandings" of a treaty had the same binding effect as express provisions of the treaty for purposes of U.S. law, the Biden condition logically sup-

the administration eventually submitted the Flank Document to the Senate for its advice and consent. But to forestall any similar construction of the Byrd-Biden condition in the future, the Senate, upon the recommendation of the Foreign Relations Committee, added the following language to the condition in its resolution of ratification on the Flank Document:

(8) Nothing in condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, shall be construed as authorizing the President to obtain legislative approval for modifications or amendments to treaties through majority approval of both Houses.<sup>42</sup>

Subsequent to that dispute, the Senate has included the Byrd-Biden condition, as modified, as a declaration not only in its resolutions of ratification on arms control agreements but also those on every other treaty it has considered, regardless of its subject matter. The condition now is commonly worded as follows:

DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding upon the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

#### CONDITION REGARDING SUPREMACY OF THE CONSTITUTION

Since the beginning of the 105th Congress in 1997, the Senate has routinely included a second condition as well in all of its resolutions of ratification. That condition, commonly in the form of a proviso, states as follows:

SUPREMACY OF THE CONSTITUTION.—Nothing in this Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

This condition was first included in the Senate's resolution of ratification on the Genocide Convention in 1986. In subsequent Congresses the Senate gradually extended its use of the condition, first to other human rights treaties and then to treaties on narcotics, mutual legal assistance, and extradition. In its current form, the proviso sometimes states that it is "binding on the President," and sometimes that it is "not [to] be included in the instrument of ratification to be signed by the President." Sometimes the proviso includes both phrases, and sometimes it includes neither.

Both the merits and the form of the condition have been matters of controversy in the Senate. On May 21, 1985, the Foreign Relations Committee approved the condition for the first time, 9–8, as

ports the proposition that the President may be authorized to accept changes in treaty obligations either by further Senate advice and consent or by statutory enactment.  
<sup>42</sup> 143 Congressional Record, May 14, 1997, p. S4477 (daily ed).



one of several conditions proposed by Senators Helms and Lugar to the Genocide Convention.<sup>43</sup> The committee's report explained that the condition, at that time in the form of a reservation to the convention, was desirable as a matter of prudence because of ambiguities in some of the provisions of the Genocide Convention. It noted that the Supreme Court had held the Constitution to be supreme over treaties as a matter of domestic law<sup>44</sup>; but, it said, international law did not allow "internal law" to justify a failure to perform the obligations imposed by a treaty. Thus, the committee stated, "[if] a conflict were to arise between the requirements of the Constitution and those of the Convention, the United States might be found to be in default of its international obligation."<sup>45</sup> Two ambiguities in the convention were of particular concern, it said. First, it stated, it was not clear whether the language directing parties to enact legislation to implement the convention "in accordance with their respective Constitutions" was solely procedural or applied to the substance of the legislation as well. Second, the committee report commented that there was a possible conflict between the free speech clause of the first amendment and the convention's requirement that "direct and public incitement to commit genocide" be punished. The committee concluded:

The Committee reservation may never be invoked. Article V may be interpreted to apply to substance as well as form. The other articles may never be construed in a way inconsistent with the U.S. Constitution. Nonetheless, the Committee believes that prudence, as well as due regard for the obligations imposed by international law, recommends the reservation.<sup>46</sup>

Eight Senators filed "additional views" criticizing the inclusion of this reservation, however.<sup>47</sup> First, they asserted, "36 years of detailed legal analysis" of the convention had produced no "credible contention" that it was, or could be, in conflict with the Constitution. Second, they noted that the Supreme Court had repeatedly held the Constitution to be supreme over a treaty. Third, they said, it created a lack of certitude about the intent of the United States to fulfil its obligations under the convention and was "disturbing to our allies who have undertaken an unqualified acceptance of the treaty's obligations." Fourth, they stated that the self-serving nature of the reservation suggested that the United States "was not ratifying the \*\*\* Convention in good faith." Fifth, they claimed, it invited other nations "that can easily change their constitutions" to adopt a similar reservation and thus could create major problems in enforcing the treaty's obligations. The eight Senators concluded:

This reservation \*\*\* will seriously compromise the political and moral prestige the United States can otherwise attain in the world community by unqualified ratification of the Genocide Convention. It will hand our adversaries a propaganda tool to use against the United States and invite other nations to attach similar self-judging reservations that could be used to undermine treaty commitments.

<sup>43</sup> S. Exec. Rept. 99-2, 99th Cong., 1st Sess. (July 18, 1985), at 4.

<sup>44</sup> *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>45</sup> S. Exec. Rept. 99-2, supra, at 20.

<sup>46</sup> Id. at 21.

<sup>47</sup> Id. at 28-31.

Nonetheless, the reservation remained part of the resolution of ratification as approved by the Senate, 83–11, on February 19, 1986.

In the 101st Congress the Senate attached the condition not only to its resolution of ratification on another human rights treaty but also to six mutual legal assistance treaties (MLATs) as well as a narcotics convention. The merits of the condition continued to be debated, but a consensus gradually developed around its form.

Initially, the Committee on Foreign Relations rejected, by votes of 2–15, Senator Helms' proposal to include a constitutional supremacy condition as a reservation in the resolutions of ratification on six mutual legal assistance treaties.<sup>48</sup> The committee majority and Senator Helms articulated their conflicting views on the merits of the condition in the committee's reports on the treaties.<sup>49</sup> But on the floor the Senate agreed to a compromise. The compromise deleted the words "as interpreted by the United States" and provided that the condition would be included in the instruments of ratification on each treaty as an understanding rather than as a reservation. This meant that the other parties to the treaties would not have to expressly accept the condition in their own ratification processes. As modified, the Senate approved the condition by voice vote and then, after one other modification, approved the resolutions of ratification on the six treaties by votes of 99–0.<sup>50</sup>

In the following month, the Foreign Relations Committee reported, and the Senate approved, a resolution of ratification on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>51</sup> One article of the convention obligated the parties to provide mutual legal assistance with respect to certain narcotics offenses. Senator Helms, as a consequence, proposed that the same understanding be added as was added to the previously adopted MLATs. But his proposal altered the form of the condition in one respect; it specified that the understanding not

<sup>48</sup>The treaties were with Great Britain (with respect to the Cayman Islands), Mexico, Canada, Belgium, the Bahamas, and Thailand See Treaty Docs. 100–8 (Aug. 4, 1987), 100–13 (Feb. 16, 1988), 100–14 (Feb. 22, 1988), 100–16 (March 29, 1988), 100–17 (April 13, 1988), 100–18 (April 25, 1988), respectively.

<sup>49</sup>See S. Exec. Repts. 101–9, 101–10, 101–11, 101–12, 101–13, and 101–8, respectively, all reported on July 31, 1989. (The committee also had reported the treaties late in the second session of the 100th Congress and had, similarly, rejected Senator Helms' proposal at that time. See S. Exec. Rept. 100–26 (Sept. 30, 1988).) In each report the majority asserted that the reservation was "unnecessary" both because the Supreme Court had repeatedly held the Constitution to be supreme over treaties and because none of the MLATs authorized or required legislation or other action prohibited by the Constitution; that such a reservation might lead some "treaty partners" to reject the treaties or to insist on a reciprocal reservation that could "limit the usefulness of the treaty"; that it would invite defendants and targets of investigation "to interpose specious challenges to MLAT requests" by claiming that their government's investigative methods did not comport with our constitutional requirements; that a decade of experience under several existing MLATs had not exposed any conflicts with our Constitution; and that, unlike the Genocide Convention, the MLATs addressed only procedural matters and not the substance of crimes for which U.S. citizens might be tried. In "Additional Views" in each report, Senator Helms argued in response that "the essential reason for such a proviso is the still unanswered question of whether the Constitution supersedes a treaty or whether a treaty can be held to be of equal force to the Constitution with respect to its provisions." Court decisions concerning the supremacy of the Constitution over treaties, he contended, remained ambiguous and inconclusive. Senator Helms also asserted that without the reservation the MLATs would allow foreign governments, "some of which are corrupt," to obtain evidence on U.S. citizens in the U.S. without necessarily abiding by the constitutional requirements that apply to U.S. investigations and "to seek U.S. evidence relating to persons in their own countries just to see how much we know"; that the administration's arguments to the contrary lacked cogency; and that the MLATs without the reservation threatened "a full scale assault against American liberties."

<sup>50</sup>135 Congressional Record 25633 and 25637 (October 24, 1989).

<sup>51</sup>Treaty Doc. 101–4 (May 20, 1989).

be included in the instruments of ratification on the convention. The committee adopted his proposal, along with two other understandings<sup>52</sup>; and the Senate approved the resolution of ratification on November 21, 1989.<sup>53</sup>

Finally, the Senate in the 101st Congress further modified the form of the constitutional supremacy condition in its resolution of ratification on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>54</sup> The condition was not formally offered during the deliberations of the Senate Committee on Foreign Relations, because the minority members were all absent. Nonetheless, the committee report articulated the majority's objections to such a condition, while the minority members vigorously protested their exclusion from the committee's deliberations.<sup>55</sup> Once again, however, a compromise was developed that forestalled a contentious floor debate. Although still objecting to the condition as unnecessary, the Bush Administration, the chair of the committee, Senator Pell, and Senator Helms agreed to add four conditions to the resolution of ratification. In this compromise the constitutional supremacy condition was stated to be a "proviso, which shall not be included in the instrument of ratification to be deposited by the President" but which would be notified to the other parties. It was worded as follows:

The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

During the floor debate Senator Pell observed that the condition was not a reservation and, thus, neither altered the obligations of the United States under the convention nor allowed other parties to invoke it on a reciprocal basis as a means of limiting their own obligations. Senator Helms, terming the condition a "sovereignty proviso," reiterated his concern that "other countries be put on notice that our Constitution is the supreme law of the land, a law which can never be invalidated or modified in any degree by an international obligation." Although several other Senators expressed objections to the proviso, the Senate approved the package of conditions and the convention by division votes.<sup>56</sup>

In the 102d Congress the proviso gained its current form. During the Senate Foreign Relations Committee's consideration of another human rights treaty, the International Covenant on Civil and Political Rights,<sup>57</sup> Senator Helms proposed that the constitutional su-

<sup>52</sup> S. Exec. Rept. 101-15 (Nov. 14, 1989), pp. 10-11 and 115.

<sup>53</sup> 135 Congressional Record 31383 (Nov. 21, 1989).

<sup>54</sup> Tr. Doc. 100-20, 100th Cong., 2d Sess. (May 23, 1988).

<sup>55</sup> S. Exec. Rept. 101-30, 101st Cong., 2d Sess. (Aug. 30, 1990), pp. 4-5. Most of the majority's arguments reiterated the concerns that had been expressed previously. But the report also asserted that the inclusion of the condition in the instruments of ratification on the Genocide Convention and the six MLATs had proven "problematic." Twelve Western European nations, it said, had filed written objections to the reservation on the Genocide Convention, and four of the six states with which the MLATs had been negotiated, it stated, had "voiced strong concerns about the proviso and/or have taken similar reciprocal provisos."

<sup>56</sup> 136 Congressional Record 36196 and 36198 (October 27, 1990).

<sup>57</sup> Ex. E, 95-2, 95th Cong., 2d Sess. (Feb. 23, 1978).

premacry condition be included as a proviso to the resolution of ratification and that it state that it “shall not be included in the instrument of ratification to be deposited by the President.” The committee adopted the proposal by voice vote and explained the proviso in its report as follows:

The substantive language of the proviso reflects the Administration’s position on the relationship between treaties and the Constitution. Since this relationship is a matter of domestic U.S. law, the proviso is not included in the instrument of ratification. This approach eliminates the potential for confusion at the international level about the nature of the U.S. ratification.<sup>58</sup>

The proviso elicited no comment in the brief Senate floor debate, and the Senate approved the resolution of ratification on the covenant by division vote on April 2, 1992.<sup>59</sup>

At Senator Helms’ initiative, the committee also approved the addition of the same proviso to the resolutions of ratification on four mutual legal assistance treaties during the 102d Congress<sup>60</sup>; and the Senate, without comment on the proviso, approved the resolutions.<sup>61</sup> In the 103d Congress the committee accepted the same proviso as part of the resolution of ratification on another human rights treaty, the International Convention on the Elimination of All Forms of Racial Discrimination<sup>62</sup>; and the Senate, on June 24, 1994, again concurred.<sup>63</sup> In the 104th Congress, the Senate included the proviso in its resolutions of ratification on six additional MLATs<sup>64</sup> and also extended its use by applying it to seven resolutions relating to extradition treaties.<sup>65</sup> With party control of the Senate having changed, the proviso was included in the resolutions of ratification recommended by the Foreign Relations Committee without the necessity of amendment, either in committee or on the floor. Neither the committee’s reports or the brief floor debates on either the MLATs or the extradition treaties offered any novel comments on, or objections to, the proviso.<sup>66</sup>

<sup>58</sup>Id. at 5.

<sup>59</sup>138 Congressional Record 8071 (April 2, 1992).

<sup>60</sup>The MLATs were with Jamaica, Argentina, Uruguay, and Spain. See Treaty Docs. 102–16 (Oct. 25, 1991), 102–18 (Oct. 31, 1991), 102–19 (Nov. 13, 1991), and 102–21 (Jan. 22, 1992), respectively. The committee’s reports on these MLATs stated, incorrectly, that the proviso was “identical to understandings approved by the Senate” with respect to the MLATs with the Bahamas, Belgium, Canada, and Mexico in 1989. See Exec. Repts. 102–32 (May 21, 1992), at 4; 102–33 (May 21, 1992), at 3–4; 102–34 (May 21, 1992), at 4; and 102–35 (May 21, 1992), at 3–4.

<sup>61</sup>138 Congressional Record 17964–65 (July 2, 1992).

<sup>62</sup>Exec. C. 95–2, 95th Cong., 2d Sess. (Feb. 23, 1978). In its report the committee reiterated the comment it had made previously with respect to the International Covenant on Civil and Political Rights: “The substantive language of the proviso reflects the Administration’s position on the relationship between treaties and the U.S. Constitution. Since this relationship is a matter of domestic U.S. law, the proviso will not be included in the instrument of ratification. The Committee agrees with the Administration that this approach eliminates the potential for confusion at the international level about the nature of the U.S. ratification.” See S. Exec. Rept. 103–29, 103d Cong., 2d Sess. (June 2, 1994), at 4.

<sup>63</sup>140 Congressional Record, June 24, 1994, p. S7634 (daily ed.).

<sup>64</sup>The MLATs were with Panama, Austria, Hungary, the Philippines, Great Britain, and Korea. See Treaty Docs. 102–15 (Oct. 24, 1991), 104–21 (Sept. 7, 1995), 104–20 (Sept. 6, 1995), 104–18 (Sept. 5, 1995), 104–2 (July 30, 1996), and 104–22 (July 30, 1996), respectively.

<sup>65</sup>The extradition treaties were with Malaysia, Bolivia, the Philippines, Switzerland, Belgium (both a treaty and a supplemental treaty), and Hungary. See Treaty Docs. 104–26 (May 17, 1996), 104–22 (Oct. 10, 1995), 104–16 (Sept. 5, 1995), 104–9 (June 12, 1995), 104–7 and 104–8 (July 12, 1995), and 104–5, respectively.

<sup>66</sup>The reports on the MLATs were, respectively, for Panama, S. Exec. Rept. 104–3 (May 5, 1995); for Austria, S. Exec. Rept. 104–24 (July 30, 1996); for Hungary, S. Exec. Rept. 104–25

Continued

As noted above, since the beginning of the 105th Congress, the committee and the Senate have included the condition as a proviso in its resolutions of ratification on virtually all treaties.<sup>67</sup>

#### D. RESOLUTION OF RATIFICATION

When the committee reports a treaty to the Senate, it does so with a proposed resolution of ratification. Proposed conditions usually are incorporated as provisions of this resolution. By contrast, any amendments to the text of the treaty, which seldom are proposed, are reported as freestanding proposals for the Senate to consider. Technically, neither the committee nor the Senate actually amends the text of a treaty; rather, the Senate identifies those amendments that would be necessary to gain its favorable advice and consent. However, the committee initially and the Senate subsequently can amend the resolution of ratification. A hypothetical resolution of ratification containing each type of condition described above would take the following form:

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of [official treaty title], subject to the following:

- (1) reservation that \* \* \*
- (2) understanding that \* \* \*
- (3) declaration that \* \* \*

and provided that:

- (a) \* \* \*
- (b) \* \* \*

The conditions included in the last clause are those referred to as provisos.

#### E. SENATE FLOOR PROCEDURE

##### EXECUTIVE SESSION

Once a treaty is reported from the Foreign Relations Committee and placed on the Senate's Executive Calendar, it must lie over for 1 calendar day before second reading and Senate consideration, unless the Senate agrees by unanimous consent to waive this requirement. The Majority Leader may begin the process of consideration by making a motion to go into executive session, as distinguished from legislative session, to consider a particular treaty. This motion

(July 30, 1996); for the Philippines, S. Exec. Rept. 104-26 (July 30, 1996); for Great Britain, S. Exec. Rept. 104-23 (July 30, 1996) and for Korea, S. Exec. Rept. 104-22 (July 30, 1996). The reports on the extradition treaties, all of which were issued on July 30, 1996, were, for Malaysia, S. Exec. Rept. 104-30; for Bolivia, S. Exec. Rept. 104-31; for the Philippines, S. Exec. Rept. 104-29; for Switzerland, S. Exec. Rept. 104-32; for Belgium, S. Exec. Rept. 104-28; and for Hungary, S. Exec. Rept. 104-27. The Senate approved the Panama MLAT on May 16, 1995 (141 Congressional Record S 6764) and the rest of the MLATs and all of the extradition treaties as a package on August 2, 1996 (142 Congressional Record S 9661-62) by division votes, without substantive debate. With the exception of the committee's report on the MLAT with Panama, the reports all stated: "Bilateral (MLATs/extradition treaties) rely on relationships between sovereign countries with unique legal systems. In as much as U.S. law is based on the Constitution, this treaty may not require legislation prohibited by the Constitution."

<sup>67</sup>The 105th and 106th Congresses approved a total of 104 treaties on such diverse subjects as mutual legal assistance, extradition, child labor, taxes, copyright, airline liability, bribery, trademarks, plant patents, maritime boundaries, migratory birds, arms control, conservation, and adoption. The one treaty approved in the 106th Congress that did not include the proviso was the Convention on Nuclear Safety, Treaty Doc. 104-6 (May 11, 1995); S. Exec. Rept. 105-1 (March 24, 1999); 145 Congressional Record, March 25, 1999, pp. S3573-S3577 (daily ed.).

takes precedence over most other motions; it is neither amendable nor debatable, but it may be the subject of a roll call vote. However, the most common procedure in recent years is for the Majority Leader to obtain in advance a unanimous consent agreement providing for the Senate to begin consideration of a treaty in executive session at a particular day and time.

Until recently, the Senate's procedures encouraged it to consider treaties and nominations in the order in which they appeared on the Executive Calendar—that is, the order in which they were reported from committee. The Senate would agree to a motion that provided only that the Senate go into executive session. Once in executive session, the Senate was required to take up the first item on the Executive Calendar, whether it was a treaty or a nomination, unless it decided otherwise by unanimous consent or by motion. The motion to take up a treaty out of its order on the Executive Calendar was debatable in executive session, and therefore was subject to being filibustered. This procedural hurdle to taking up items of executive business out of their order on the calendar occasionally had consequences for the fate of various agreements. The Threshold Test Ban and Peaceful Nuclear Explosions Treaties, for example, were ordered reported by the Foreign Relations Committee in 1977 but then were recalled, in part so as not to be placed on the Executive Calendar ahead of the controversial Panama Canal Treaties.<sup>68</sup> In the following year, the Senate rejected an effort to reverse the order in which the Senate would consider the two Canal Treaties themselves.<sup>69</sup>

Since that time, however, the Senate has established the precedent that a non-debatable motion to go into executive session can provide for the Senate to proceed directly to the consideration of any particular item on the Executive Calendar. This precedent enables the Senate to agree to a motion, most likely made by the Majority Leader, to take up a specific treaty that is on the Executive Calendar and that has satisfied the layover requirement of Rule XXX.

#### NON-CONTROVERSIAL TREATIES

Once the Senate agrees to take up a treaty, its consideration is governed by Senate Rule XXX. The Senate's usual practice, however, has been to waive some of the procedural requirements of this rule, including the second reading of a treaty and consideration of amendments to the treaty itself. Instead, the Senate proceeds directly to consideration of the resolution of ratification as reported by the Foreign Relations Committee. To this end, the Majority Leader may ask and obtain unanimous consent that the treaty be considered as having passed through all the parliamentary stages up to and including presentation of the resolution of ratification. Alternatively, there first may be some debate on the treaty before the Presiding Officer proposes that the Senate turn to the resolution of ratification. The procedure followed may resemble the following:

<sup>68</sup>Confirmed in unpublished committee transcripts.

<sup>69</sup>On February 22, 1978, by a vote of 67–30, the Senate rejected a motion to reverse the order of consideration of the Canal Treaty and the Neutrality Treaty.

The PRESIDING OFFICER. The Clerk will report the treaty by title for the information of the Senate.

[After the Clerk reports the treaty by title, if no one seeks recognition, or after the debate of the treaty has been concluded, and if no one offers an amendment, the Chair takes the initiative and makes the following statement:]

The PRESIDING OFFICER. The treaty will be considered as having passed through its various parliamentary stages up to and including the presentation of the resolution of ratification, which the Clerk will report.

[After the Clerk reads the resolution, the Chair should properly state:]

The PRESIDING OFFICER. Reservations to the resolution of ratification are now in order. If there be no reservations or understandings to be offered to the resolution of ratification, the question is on the adoption of the resolution of ratification.

[If the yeas and nays have been ordered, the Chair states:]

The PRESIDING OFFICER. The yeas and nays have been ordered on this question and the Clerk will call the roll.

[After the roll call vote has been taken and the Clerk gives the tabulation to the Presiding Officer, the Chair states:]

The PRESIDING OFFICER. On this vote the yeas are \_\_\_\_\_; the nays are \_\_\_\_\_. Two-thirds of the Senators present (a quorum being present) having voted in the affirmative, the resolution of ratification is agreed to.

OR

On this vote the yeas are \_\_\_\_\_; the nays are \_\_\_\_\_. Two-thirds of the Senators present (a quorum being present) not having voted in the affirmative, the resolution of ratification is not agreed to.

[After the Chair announces the results on the resolution of ratification, the following action by unanimous consent usually occurs:]

A SENATOR (usually the Majority Leader or someone acting for him). Mr. President, I ask unanimous consent that the President be immediately notified of the Senate's consent (disapproval) to the resolution of ratification.

The PRESIDING OFFICER. Without objection, it is so ordered.<sup>70</sup>

#### CONTROVERSIAL TREATIES

The opponents of a treaty may object to setting aside the procedures of Rule XXX by unanimous consent and proceeding directly to consideration of the resolution of ratification. In 1978, for example, the late Senator James Allen, of Alabama, refused to agree to abbreviating the Senate's procedures for considering the Panama Canal Treaties. The procedures of Rule XXX govern the Senate unless there is unanimous consent to modify them or set them aside.

<sup>70</sup>Riddick, Floyd M. and Alan S. Frumin. *Riddick's Senate Procedure*. Sen. Doc. 101-28, 1992. pp. 1557-1558.

Before 1986 these procedures were more complicated than they are today because Rule XXX then required that the Senate first consider treaties on the floor “as in Committee of the Whole.”<sup>71</sup> In 1986, soon after approval of the Genocide Convention, Rule XXX was amended to eliminate this requirement.<sup>72</sup>

When the Senate begins considering a treaty under the current Rule XXX procedure, the treaty is to be read for a second time. This reading is to be in full and it can be waived only by unanimous consent. The text of the treaty itself then is open to amendment, although the first hours or days of consideration may be devoted to speeches only, either by informal arrangement or by a formal unanimous consent agreement. If the Foreign Relations Committee has recommended any amendments to the treaty, they are the first amendments to be considered, and each committee amendment is subject to second degree amendments while it is pending. Reservations, understandings, and other such statements may not be offered to the treaty, nor may they be offered to the resolution of ratification while the treaty itself is before the Senate.

A motion to consider the treaty in secret (“with closed doors”) may be made at any time by any Senator and requires only a second. Once this motion is made and seconded, in accordance with Senate Rule XXI, the Presiding Officer directs the galleries to be cleared and the Senate continues its business behind closed doors. “A closed session, under Rule XXI, can be invoked simply by a motion and a second, and the question is not debatable. Once the Senate goes into closed session, it may then determine whether it stays in closed session \* \* \*. When in closed session, a motion to return to open session is in order and not debatable.”<sup>73</sup> On March 29, 1988, for example, the Senate went into closed session to discuss issues raised by the INF Treaty on the day before it was ordered reported by the Foreign Relations Committee.<sup>74</sup>

The INF Treaty is an example of a treaty considered under the Rule XXX procedures since the rule was amended in 1986. In considering that treaty, Majority Leader Robert Byrd, on May 17, 1988, secured unanimous consent that the second reading proceed through the signatures of the parties, at which time the Senate would dispense with the reading temporarily. After debate, Senator Jesse Helms asked unanimous consent that further reading of the attached protocols be suspended, subject to the demand of any Senator that the reading of them be resumed. Later, further reading was dispensed with.<sup>75</sup> The Senate then voted on and tabled (rejected) an amendment to the treaty itself that was offered by Senator Steve Symms; other proposed amendments to the treaty were tabled or withdrawn. After the Senate proceeded to the consideration of the resolution of ratification, it adopted various amendments to the resolution as proposed by the Foreign Relations Com-

<sup>71</sup>The Committee of the Whole is a parliamentary device by which the entire membership of a legislative body sits as a single committee to consider a matter and then makes its recommendations to the body in the same way that a standing committee would.

<sup>72</sup>Rule XXX was amended as part of S. Res. 28, 99th Cong., 2d Sess., February 27, 1986.

<sup>73</sup>Riddick, Floyd M. and Alan S. Frumin, *Riddick's Senate Procedure*. Sen. Doc. 101-28, 1992. pp. 278, 280.

<sup>74</sup>Congressional Record, March 29, 1988, p. S3204 (daily ed.).

<sup>75</sup>Congressional Record, May 18, 1988, p. S6084 (daily ed.).



mittee, and then agreed to the resolution, as amended, by the required two-thirds majority.

It is unusual today for Senators to propose amendments to the text of a treaty. Instead, they typically formulate their proposals in the form of conditions that they offer as amendments to the resolution of ratification. Under Rule XXX, after debate on the treaty itself, the next step is for the Senate to consider this resolution. If the Senate has agreed to any amendments to the text of the treaty, they are incorporated in the resolution of ratification, not in the treaty itself. The resolution states, in effect, that the Senate gives its advice and consent to the ratification of the treaty on the condition that the parties to the treaty accept the amendments proposed by the Senate and listed in the resolution. Once the resolution of ratification is laid before the Senate, no further amendments to the text of the treaty may be proposed, except by unanimous consent.

Under Rule XXX, the Senate is not to begin considering the resolution of ratification on the same day it completes debate on the treaty itself and disposes of any amendments to it, unless the Senate by unanimous consent determines otherwise. The resolution is prepared by the Executive Clerk and, when presented to the Senate, includes any amendments to the text of the treaty that the Senate has adopted as well as the texts of any conditions recommended by the Committee on Foreign Relations. As noted above, the committee now routinely proposes at least two conditions, but at times it also has recommended multiple conditions of different types. In March 1999, for example, the committee reported protocols to the 1980 Conventional Weapons Convention with 1 reservation, 9 understandings, and 13 conditions. In July 2000, it reported the Inter-American Convention on Sea Turtles with three understandings, five declarations, and two provisos.

The conditions recommended by the Committee on Foreign Relations are the first to be considered when the Senate takes up the resolution of ratification. Each condition that the committee has proposed is debatable and amendable. After the Senate acts on the committee's recommended conditions, individual Senators can propose their own conditions, which are also debatable and amendable.

The resolution of ratification, like a bill the Senate considers in legislative session, is subject to amendment in two degrees. Each condition that the committee recommends or that a Senator offers is a first degree amendment to the resolution and is amendable in the second degree, subject to the Senate's established precedents governing the amendment process on the floor. It also is in order to offer an amendment in the nature of a substitute that proposes to replace the entire text of the resolution. Such a complete substitute can propose that the Senate withhold its advice and consent. During consideration of the resolution of ratification for the second Panama Canal Treaty, for example, the Senate considered and rejected a substitute proposing that the treaty be returned to the President with the advice that negotiations be re-opened with the Government of Panama. If the Senate had agreed to this substitute, it would have nullified the proposed amendments to the treaty to which the Senate already had agreed.

At any time that the resolution of ratification is before the Senate, a motion to recommit the resolution to committee may be offered. As with any motion to recommit, the motion may be coupled with instructions directing the committee, and those instructions (such as instructions directing the committee to hold additional hearings) are amendable.

If the Senate agrees to any conditions, they are attached to the resolution following any proposed amendments, to which the Senate had agreed earlier, to the text of the treaty. After action on any proposed reservations, etc., the Senate finally votes on a resolution of ratification that may contain both amendments proposed to the treaty and amendments (in the form of conditions) to the resolution itself. Approving the resolution, as it may have been amended, requires a vote of at least two-thirds of the Senators present and voting.

#### CONSIDERATION OF TREATIES UNDER CLOTURE

The cloture provisions of Senate Rule XXII can be applied to the consideration of treaties. In the absence of cloture, the treaty and its resolution of ratification, and amendments to them, are debatable at length, and amendments need not be germane. At any time during the Senate's consideration of a treaty or resolution, a cloture motion may be filed. To be successful, a cloture motion requires the affirmative votes of at least "three-fifths of the Senators duly chosen and sworn." Cloture, if invoked, applies to floor action on both the treaty and the resolution of ratification. The Senate does not have to invoke cloture separately on the treaty and then on the resolution.

If cloture is invoked, there is then a total of 30 additional hours permitted for consideration of the treaty and the resolution of ratification, and all amendments to them. The time consumed by votes and quorum calls as well as by debate in connection with the treaty and the resolution all is included within the 30-hour limitation. However, any time that the Senate devotes to considering legislative business or other executive business does not count against the 30 hours. During these 30 hours for post-cloture consideration, each Senator is limited to 1 hour of speaking time, except that any Senator who has not spoken for, or yielded, at least 10 minutes during the 30-hour period is permitted up to 10 minutes for debate after the 30 hours elapse. Under cloture, a germaneness rule governing amendments is in effect, and no Senator may call up more than two amendments until every other Senator has had an opportunity to do likewise. After the 30 hours expire, Senators may not offer additional amendments to either the treaty or the resolution of ratification.

The Senate invoked cloture in 1992 during consideration of START I and its related protocol. The Bush Administration wanted to obtain the Senate's advice and consent before the 102d Congress adjourned in October of that year. Senate leaders feared a filibuster by opponents, or at least a lengthy debate that would delay other business and adjournment. On September 26, 1992, Senate Majority Leader George Mitchell submitted a cloture motion that

the Senate adopted on September 29 by a vote of 87–6, putting the treaty under the 30-hour limitation for post-cloture consideration.<sup>76</sup>

In some cases, filing cloture motions appears to have expedited Senate consideration of treaties even though cloture was not invoked on them. After a week of debate on the INF Treaty, for example, Senate Majority Leader Robert Byrd submitted a cloture motion on May 24, 1988, with a vote scheduled for May 26. With debate on amendments moving expeditiously, the vote was deferred on May 26, and on May 27 Senator Byrd received unanimous consent to set a schedule of votes on pending amendments and to vitiate the cloture motion.<sup>77</sup>

#### FINAL VOTE

The final vote on agreeing to the resolution of ratification requires a two-thirds majority of those present and voting for approval. Almost all other treaty-related questions—amendments and procedural matters, for example—are decided by simple majority votes. (The one exception is a motion to postpone a treaty indefinitely, a rarely offered motion, that also requires a two-thirds vote for approval.) The Constitution does not require that any treaty-related votes be decided by calling the roll. Nevertheless, the Senate frequently conducts final treaty votes by roll call at times convenient for most Senators, although it sometimes acts on non-controversial treaties by division votes instead. Increased use of roll call votes developed as a result of adverse publicity in the early 1950s when the Senate approved consular conventions with Ireland and the United Kingdom with only two Senators present.<sup>78</sup>

In recent years, with the proliferation of roll call votes and the increasing number of treaties concluded by the United States, the Senate frequently has approved two or more treaties en bloc, with a single roll call vote covering all of them. As noted, on occasion it also has used the alternative procedure of approving treaties by division vote. In those instances the Presiding Officer asks the Senators present to indicate their position by standing to be counted, and then announces his conclusion that at least two-thirds of those present have voted in favor of the resolution of ratification. On October 18, 2000, for instance, the Senate approved 33 treaties on diverse subjects by division votes.<sup>79</sup>

When time pressures are severe and the treaties to be considered are non-controversial, the Senate may agree, by unanimous consent, to consider multiple treaties en bloc and to dispense with all the Senate's regular procedures for considering them. On October 21, 1998, for example, during the closing minutes of the 105th Congress, the Senate cast 1 division vote by which it gave its advice and consent to the ratification of 30 treaties. The Senate acted under the terms of the following unanimous consent agreement propounded by Senator DeWine on behalf of the Majority Leader:

<sup>76</sup>Treaty Docs. 102–20 and 102–32. Congressional Record, September 26, 1992, p. S15336 and September 29, 1992, p. S15504 (daily ed.).

<sup>77</sup>Congressional Record, May 27, 1988, p. S12785 (daily ed.).

<sup>78</sup>See the account of this incident in Carl Marcy, A Note on Treaty Ratification. *American Political Science Review* 47:4, December 1953, p. 1130.

<sup>79</sup>Congressional Record, October 18, 2000, pp. S10658–S10667 (daily ed.).

Mr. DE WINE. Mr. President, on behalf of the Majority Leader of the Senate, I ask unanimous consent that the Senate proceed to executive session to consider the following treaties on today's Executive Calendar: Numbers 24 through 54.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DE WINE. Mr. President, I further ask unanimous consent that the treaties be considered as having passed through their various parliamentary stages up to and including the presentation of the resolution of ratification, that all committee provisos, reservations, understandings, and declarations be considered agreed to.

I further ask unanimous consent that two technical amendments that are at the desk to treaty documents 105-34 and 104-40 be considered as agreed to, that any statements be inserted in the Congressional Record as if read.

I further ask that there be one vote to count as individual votes on each of the treaties, and further, when the resolutions of ratification are voted upon, the motions to reconsider be laid upon the table, that the President then be notified of the Senate's action, and following the disposition of the treaties, the Senate return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.<sup>80</sup>

Once approved, the treaty, with the resolution of ratification as agreed to by the Senate and signed by the Secretary of the Senate, is transmitted by the Senate's Executive Clerk to the White House. The White House then sends it to the Department of State where the instruments of ratification are prepared for the President's signature. Once a resolution of ratification has been transmitted to the White House, the Senate is unable to reconsider its actions with respect to the treaty unless the President should consent or desire to resubmit the treaty for that purpose.<sup>81</sup>

#### FAILURE TO RECEIVE TWO-THIRDS MAJORITY

If a treaty fails to receive the two-thirds vote necessary for Senate advice and consent, the Executive Clerk normally prepares a resolution for Senate approval reporting that fact to the President. Unless the Senate acts affirmatively by resolution to return a rejected treaty to the President, however, that treaty is returned to the Senate's Executive Calendar. Then, in accordance with paragraph 2 of Rule XXX, it automatically is referred back to the Foreign Relations Committee at the conclusion of the Congress.

The last time that the Senate rejected a treaty and returned it to the President was in 2000. The Montreal Protocol No. 3 would have modified the liability limits of the Warsaw Convention for personal injury and death resulting from airline accidents. Only four other treaties were defeated and returned in the 20th century,

<sup>80</sup> Congressional Record, October 21, 1998, pp. S12972-S12973 (daily ed.).

<sup>81</sup> Resolutions of ratification, like bills, are subject to motions to reconsider. If the Senate votes to reconsider the vote by which it agreed to a resolution of ratification, there could be another vote on the same question in the same Congress. However, the Senate cannot reconsider its vote on any matter unless it still has custody of it.

the Versailles Peace Treaty of 1919 being the most significant of these.<sup>82</sup>

The Senate has considered some treaties without casting final votes on giving its advice and consent to their ratification. In such cases, the treaties ultimately are returned to the Committee on Foreign Relations where they can remain indefinitely on the committee's calendar. In 1972, for instance, the Senate debated an international convention on civil liability for oil pollution damage. However, the Senate did not reach a final vote on the convention, so it was returned to the committee at the end of the Congress. Similarly, in 1980, the committee reported and the Senate debated, but did not vote on, separate maritime boundary agreements with Mexico and Cuba. At the final adjournment of the Congress later that year, both agreements were returned to the committee. The committee took no further action on the agreement with Cuba. In 1997, however, the committee again reported, and the Senate gave its approval to, the agreement with Mexico.

Some treaties have been voted on and failed to receive the required two-thirds majority, but then were returned to the Foreign Relations Committee, leaving open the possibility that the committee and the Senate could vote on them again. In some cases, no further action has been taken. The Optional Dispute Settlement Protocol to the Geneva Law of the Sea Treaties failed on May 26, 1960. At the end of the Congress, the protocol was re-referred to the committee and placed on its calendar. (Ex. N, 86-1), where it remained for more than 40 years.<sup>83</sup>

In other cases, further action did take place. On March 8, 1983, Ex. B, 95-1, Two Related Protocols to the Warsaw Convention on Airline Liability, Concluded at Montreal, failed to receive the necessary two-thirds vote and were returned to the Foreign Relations Committee calendar. The committee reported both protocols again in 1990 and then once again in 1991; but the Senate took no action. In 1998, because of intervening actions resulting in the acceptance by the airline industry of higher liability limits for personal injury and death, the committee reported Montreal Protocol No. 4 favorably but recommended that Montreal Protocol No. 3 be returned to the President. Protocol No. 4 concerned liability limits for baggage and cargo and had never been particularly controversial; it had failed of adoption because it was linked with Protocol No. 3, which concerned the controversial issue of liability for personal injury and death. Once the political situation permitted the two protocols to be separated, Montreal Protocol No. 4 was readily approved by the Senate and Protocol No. 3 was returned to the President.<sup>84</sup>

In at least one instance, the Senate has approved a treaty after rejecting it and then agreeing to a motion to reconsider that decision. By a vote of 49-32, the Senate rejected a tax convention with

<sup>82</sup>U.S. Congress. Senate Committee on Foreign Relations. Background Information on the Committee on Foreign Relations, United States Senate (5th revised edition, June 9, 1982), Document No. 97-30, 97th Cong., 2d Sess., p. 11.

<sup>83</sup>A summary of Senate action on this issue appears in Comment, *Laws and Contemporary Problems* 46:2, p. 19.

<sup>84</sup>Ex. B, 95-1, submitted January 14, 1977. Exec. Rept. 97-45, December 16, 1981. Exec. Rept. 98-1, February 10, 1983; Congressional Record, March 8, 1983, p. S2279 (daily ed.); Exec. Rept. 101-21, June 28, 1990; Exec. Rept. 102-1, February 5, 1991; Congressional Record, June 28, 1991, p. S9216 (daily ed.); August 1, 1991, p. S11711; November 5, 1991, p. S15875; Exec. Rept. 105-20, August 25, 1998; Congressional Record, September 28, 1998, p. S11059 (daily ed.).

the United Kingdom on June 23, 1978. The Senate then agreed to reconsider that vote and, 4 days later, approved the convention by a vote of 82–5.<sup>85</sup>

#### F. RETURN OR WITHDRAWAL

More often than being disapproved by Senate vote, treaties lacking adequate support simply are not reported by the Foreign Relations Committee or, if reported, are never voted on by the Senate. These treaties may remain pending on the calendar of the committee or they may be returned to the President.

The normal practice for returning treaties has been for the committee to report out, and for the Senate to adopt, a Senate resolution directing the Secretary of the Senate to return a particular treaty or treaties to the President. This procedure was used several times in 1981: once to return a pending fishing treaty with Canada that lacked Senate support, and on two other occasions to return obsolete tax treaties.<sup>86</sup> In 1991, the Senate adopted a resolution to return 1979 and 1983 Amendments to the 1966 International Convention on Load Lines.<sup>87</sup> President Bush had requested the return of the amendments when he submitted the 1988 Protocols Relating to the Safety of Life at Sea Convention and the Load Lines Convention, which replaced the earlier amendments.<sup>88</sup> Most recently, the Foreign Relations Committee reported S. Res. 267 on March 9, 2000, proposing that the Secretary of the Senate be directed to return to the President a total of 18 treaties, including the Law of the Sea Protocol, mentioned earlier, that the Senate had received in September 1959, more than 40 years earlier.<sup>89</sup> On October 12, 2000, after deleting one treaty from the list, the Senate approved the resolution.<sup>90</sup>

The initiative for returning a treaty may come from the Foreign Relations Committee itself or the Senate leadership, or it may take the form of a request from the President.<sup>91</sup> The President does not have the formal authority to withdraw a treaty from Senate consideration without the Senate's concurrence. In practice, however, a President can render any pending treaty effectively moot, at least for the duration of his time in office, simply by declaring his unwillingness to ratify it, regardless of whatever action the Senate might take. The decision to return one or more treaties usually reflects a mutual agreement between the Senate and the President, and often is primarily a housecleaning decision to remove obsolete or superseded treaties from the committee calendar. As discussed earlier, the Senate also can approve a resolution, without prior action on it by the Foreign Relations Committee, in order to return to the President a treaty that failed to obtain the necessary two-thirds vote of approval.

<sup>85</sup> Ex. K, 94–2; Ex. Q, 94–2; Ex. J, 95–1.

<sup>86</sup> The vehicle for returning these treaties was an executive resolution. Now, however, regular Senate resolutions are employed for this purpose.

<sup>87</sup> S. Exec. Res. 104, reported April 23, 1991, and agreed to June 11, 1991. The amendments withdrawn were Treaty Docs. 97–14 and 100–12.

<sup>88</sup> Treaty Doc. 102–2, submitted March 19, 1991.

<sup>89</sup> Congressional Record, March 9, 2000, pp. S1423–S1424 (daily ed.).

<sup>90</sup> *Id.*, October 12, 2000, p. S10499 (daily ed.).

<sup>91</sup> A Presidential message asking for the return of a treaty is transmitted by the Senate Parliamentarian to the Executive Clerk, who delivers it to the Foreign Relations Committee.



## VII. PRESIDENTIAL OPTIONS ON TREATIES AFTER SENATE ACTION<sup>1</sup>

When a treaty to which the Senate has advised and consented in either qualified or unqualified form is returned to the President, a number of procedural options are available to him.<sup>2</sup> He may ratify the treaty; resubmit the treaty for further consideration at a later date; or simply decide not to ratify the treaty.<sup>3</sup> If he resubmits the treaty, he may do so in its original form, or he may do so in a form which has been modified as a result of further negotiations. If he decides not to ratify the treaty, he may so indicate in a formal announcement, or he may do nothing. The President may also request withdrawal of a treaty from Senate consideration.<sup>4</sup>

This chapter discusses the options available to the President when a treaty is returned to him together with the Senate's resolution of advice and consent to ratification. It also briefly examines options available to the President if other nations (after Senate consideration) subsequently attach conditions to a treaty which may affect its meaning.

### A. RATIFICATION

#### RATIFICATION OF THE TREATY

When the Senate gives its advice on and consent to a treaty and returns the treaty to the White House, the President is then free to ratify the treaty if he so chooses. Ratification is a formal act on the instrumental plane expressing the consent of a state to be bound by a treaty.<sup>5</sup> There is no legal obligation for a nation to ratify a treaty signed on its behalf.<sup>6</sup>

A nation generally confirms its willingness to be bound in a formal document. Such documents are generally referred to as instruments of ratification. However, when the treaty so provides, they may take the form of instruments of acceptance, instruments of approval, or instruments of accession.<sup>7</sup>

<sup>1</sup> Prepared by Raphael F. Perl, Specialist in International Affairs.

<sup>2</sup> In some instances the Senate has also rejected a treaty. See Collier, E., U.S. Senate Rejection of Treaties, a Brief Survey of Past Instances. March 30, 1987, Congressional Research Service Report 87-305F. The Comprehensive Nuclear Test-Ban Treaty is the most recent example. Senate Treaty Doc. 105-28.

<sup>3</sup> See Whiteman, M., Digest of International Law, Washington, D.C., U.S. Government Printing Office, 1970, v. 14, p. 61 and Crandall, Treaties, Their Making and Enforcement, pp. 98-101. (2d ed. 1916).

<sup>4</sup> Presidential withdrawal of a treaty while that treaty is under consideration by the Senate is discussed in Chapter VI.

<sup>5</sup> cf. Whiteman, M., Digest of International Law, v. 14, pp. 45-48.

<sup>6</sup> Ibid., p. 50.

<sup>7</sup> Vienna Convention on the Law of Treaties, S. Exec. Doc. L, Article 16. S. Exec. Doc. L, 92d Cong., 1st Sess. (1971). See Appendix 5 (hereafter cited as Vienna Convention).



A treaty may specifically provide that it is to be ratified by the President by and with the advice and consent of the Senate.<sup>8</sup> However, this full formulation is not required. A treaty may provide language, in more general terms, to the effect that “consent \* \* \* shall be expressed by means of ratification,” or that it is signed “subject to ratification,” or “subject to ratification by signatory States in accordance with their respective constitutional procedures.”<sup>9</sup> The more neutral language is usually used to indicate that a treaty is not binding.

Ratification itself is a national act.<sup>10</sup> In order for a nation to be bound internationally, treaties generally require international action such as the exchange or deposit of instruments of ratification.<sup>11</sup> It is this international exchange or deposit of instruments of ratification which is ordinarily associated with the entry into force of a treaty.<sup>12</sup> Bilateral treaties commonly specify entry into force upon exchange of instruments of ratification, or a certain time after such an exchange; multilateral treaties sometimes require that a certain number of instruments of ratification be deposited in order for the treaty to enter into force, either upon deposit of the requisite number or a certain time thereafter.

As ratification is a national process, it is determined by domestic procedures and requirements that differ between nations. For example, one state’s law may require approval by the national legislature as a step in the ratification process while another’s may not.<sup>13</sup> In U.S. practice, after the Senate gives its advice and consent to ratification of a treaty, the Secretary of the Senate attests to the resolution of advice and consent, and transmits it together with the treaty to the White House for transmittal to the Secretary of State. The Secretary then prepares an instrument of ratification for the President’s signature.<sup>14</sup>

The instrument of ratification includes the title of the treaty and the date of signature. It also contains a summary of action taken by the Senate together with conditions or amendments proposed by the Senate.<sup>15</sup> The instrument will include a recitation of any reservations by the Senate, and may also include understandings or declarations contained in the Senate’s resolution of advice and consent. Sometimes the Senate specifies or the Department of State determines that a proviso or statement need not be included in the instrument of ratification, particularly if its substance relates only

<sup>8</sup>Treaty of Amity, Commerce, and Navigation. (Jay Treaty with Great Britain) signed November 19, 1794. TS105; 12 Bevens 13. Ratification advised by the Senate with amendment, June 24, 1795.

<sup>9</sup>Article 14 of the Vienna Convention discusses consent to be bound expressed by ratification, but does not address the issue of whether ratification is required if an agreement is silent on this topic. Modern treaties generally do not fail to address this matter. See Restatement (Third) of the Foreign Relations Law of the United States, sec. 312, Reporters’ Note 2.

<sup>10</sup>Whiteman, Digest of International Law, v. 14, p. 62.

<sup>11</sup>Article 2 of the Vienna Convention defines “ratification,” “acceptance,” “approval,” and “accession” as “international acts whereby a state establishes on the international plane its consent to be bound by a treaty.”

<sup>12</sup>Whiteman, Digest of International Law, v. 14, p. 62.

<sup>13</sup>In the case of a bilateral executive agreement between the United States and another country, the law of the other country might require ratification there even though U.S. procedure might not include ratification in such a case.

<sup>14</sup>Whiteman, Digest of International Law, v. 14, pp. 46–47.

<sup>15</sup>The President may also include in the instrument a statement or understanding which reflects the Senate’s understanding of a treaty, even if the Senate did not choose to reduce its interpretation to a formal reservation or understanding. In such instances the record would reflect that the Senate attached a particular meaning to the treaty.

to domestic affairs. The instrument of ratification is normally prepared in duplicate: one original is deposited or exchanged, the other is stored for the archival record along with the original treaty or, in the case of a multilateral treaty, a certified copy provided by the depositary.

Once prepared, the instrument of ratification, in duplicate, is sent to the President for signature. The President signs both duplicates of the instrument and returns both to the Secretary of State who, in attestation of the President's ratification, countersigns them and affixes to them the official Seal of the United States. At this point, ratification is complete on the national level and the instrument of ratification is ready for international exchange or deposit.<sup>16</sup>

EXCHANGE OR DEPOSIT OF INSTRUMENTS OF RATIFICATION (ENTRY INTO FORCE)

Treaties generally require the parties to take international action before an agreement formally enters into force. Thus, once a President has ratified a treaty, he would normally direct that the United States take the action necessary to effect the treaty's entry into force. In the case of bilateral treaties this action most often involves an exchange of instruments of ratification. Hence, a bilateral treaty usually enters into force upon such exchange or at a time after such an exchange, as provided in the treaty. In the case of multilateral treaties, such agreements generally enter into force after the deposit of a specified number of instruments of ratification at a specified location. Exchange or deposit, therefore, has been characterized as "the key to entry into force."<sup>17</sup>

In the case of the Chemical Weapons Convention (CWC), for example, the Senate's resolution of advice and consent required the President to issue a certification before the U.S. instrument of ratification could be deposited.

The Panama Canal Treaty<sup>18</sup> and the Vienna Convention on the Law of Treaties<sup>19</sup> are illustrative of requirements for expressing consent to be bound to bilateral and multilateral treaties, respectively. The Panama Canal Treaty provided that:

This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama \* \* \*<sup>20</sup>

Similarly, the Vienna Convention on the Law of Treaties reads:

<sup>16</sup>U.S. Department of State, *Digest of United States Practice in International Law*, 1974, p. 217. For an example of an instrument of ratification, see Appendix 9.

<sup>17</sup>Whiteman, *Digest of International Law*, v. 14, p. 62, and *Digest of United States Practice in International Law*, 1976, p. 217. A detailed examination of exchange procedures may be found in Volume 11 of the Department of State's *Foreign-Affairs Manual* [Circular 175] at secs. 734 and 746, text reproduced in Appendix 4. International exchange or deposit of instruments of ratification is not always necessary in order for an international agreement to enter into force. For example, an executive agreement may provide that it comes into effect upon signature, or that its entry into force is dependent on a specified event.

<sup>18</sup>Panama Canal Treaty Between the United States of America and Panama, signed at Washington, September 7, 1977, TIAS 10030, Article II, Sec. 1. The treaty terminated by its terms December 31, 1999.

<sup>19</sup>Articles 82-84.

<sup>20</sup>Article II, Sec. 1.

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.<sup>21</sup>

When the necessary exchange or deposit of instruments of ratification of a treaty has been completed and the treaty has entered into force, the treaty text is prepared for publication by the Department of State in United States Treaties and Other International Acts Series,<sup>22</sup> and registration for publication with the U.N. Secretariat pursuant to Article 102 of the U.N. Charter.<sup>23</sup> The United States no longer has a practice of proclaiming treaties unless specific circumstances require proclamation.<sup>24</sup>

#### B. RESUBMISSION OF THE TREATY OR SUBMISSION OF PROTOCOL

The President may also resubmit a rejected or modified treaty to the Senate for reconsideration at any time prior to its ratification although the general practice is to submit a protocol or supplemental agreement setting out amendments. The option of resubmitting the entire treaty permits the flexibility of delaying ratification of a treaty if, for example, the President expects an imminent change in the fundamental circumstances which gave rise to the agreement. It also permits him, in instances in which the Senate has rejected a treaty or attached reservations he opposed to a treaty, to wait for more favorable circumstances and resubmit the treaty.<sup>25</sup> The President may also resubmit a treaty in a renegotiated form should a Senate understanding, declaration, or reservation alter or restrict its meaning to such a degree that it was unacceptable to him or to the other party to the agreement.

Generally, renegotiation of a treaty will be achieved by negotiation of a protocol or supplement to the original agreement.<sup>26</sup> A common motive for such Presidential action is to enable the Senate to give advice and consent to ratification without reservations, or to avoid outright Senate rejection of a treaty. In such circumstances, the executive branch usually attempts to negotiate a protocol or supplement to the treaty which eliminates objections

<sup>21</sup> Vienna Convention, Article 84.

<sup>22</sup> 1 U.S.C. § 112(a). Slip or pamphlet treaty texts are published in the Treaties and Other International Acts Series (TIAS). See 1 U.S.C. § 113. See also Chapter X and section, Guide to Resources on Treaties, in the annotated bibliography contained in Appendix 1.

<sup>23</sup> Although Article 102 of the U.N. Charter specifies that a treaty must be registered before it can be invoked before any organ of the United Nations, this provision has not always been followed in practice.

<sup>24</sup> The proclamation of a treaty is a national act by which the text of a ratified treaty is publicized. Whiteman, *Digest of International Law*, v. 14, p. 113. For an example of a proclamation, see Appendix 9. There are no constitutional or statutory provisions in the United States which require proclamation of a treaty as such. However, if a treaty changes tariffs, the tariffs must be proclaimed. Most agreements do not specifically require proclamation, and because proclamation is a national act, the absence of a proclamation does not affect the international obligation of a treaty. Whiteman, *Digest of International Law*, v. 14, p. 114.

<sup>25</sup> For example, the Senate might be more receptive to unqualified advice and consent to a multilateral treaty which is resubmitted after 100 other signatories have ratified it, instead of just a few at the time it was originally submitted.

<sup>26</sup> For example, the U.S.-U.K. Supplementary Treaty to the Extradition Treaty of June 8, 1972, with annex. TIAS 12050.

raised or clarifies provisions questioned by the Senate.<sup>27</sup> Any such instrument is then submitted to the Senate for consideration together with the original treaty. Such was the case, for example, with the United Nations Convention on the Law of the Sea, which was done in 1982. The United States did not sign the convention at that time because of flaws in the convention's seabed mining regime. An Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea was transmitted to the Senate in 1994, along with the original convention. The Letter of Submittal from the Secretary of State states that the agreement "contains legally binding changes to that part of the Convention dealing with the mining of the seabed \* \* \* and is to be applied and interpreted together with the Convention as a single instrument."<sup>28</sup> The agreement itself deals principally with the renegotiated seabed mining provisions; by correcting those defects in the chief convention, however, it "promotes universal adherence to the Convention by removing obstacles to acceptance of the Convention by \* \* \* the United States."<sup>29</sup>

However, in instances where a clarification is sought, the executive branch may be able to satisfy the Senate with assurances that specified provisions of a treaty will be administered in a certain way. In such instances, negotiation of a protocol would not be necessary.<sup>30</sup>

Another variant is presented by the 1974 Threshold Test Ban and 1976 Peaceful Nuclear Explosion Treaties. It was not until protocols relating to verification of both treaties were concluded in 1990 that the Senate gave advice and consent to ratification of the two treaties and their related protocols. The most recent example of close linkage between a treaty and a protocol to it is the Inter-American Convention on Mutual Assistance in Criminal Matters, done in 1992, and its optional protocol, done in 1993, which were transmitted and treated by the Senate as a single package; the Senate gave its advice and consent to ratification of both instruments on October 18, 2000.<sup>31</sup>

A treaty may also be formally resubmitted to the Senate, after full advice and consent have been granted, but before the treaty has been ratified by the President or entered into force. Such instances may occur when restrictive provisions added in order to obtain the Senate's advice and consent are not accepted by the other signatory(s) to the treaty. With the passage of time, the Executive may believe the Senate will be less inclined to impose restrictions, or the other government may be more receptive to accepting the wishes of the Senate.

An often cited historical example of such a situation involves a naturalization convention between the United States and Turkey concluded at Constantinople, August 11, 1874. The Senate, on January 22, 1875, granted advice and consent to this agreement with amendments which were not fully accepted by the Turkish Government, and the treaty was not ratified by the President. Fourteen

<sup>27</sup> Whiteman, *Digest of International Law*, v. 14, p. 58.

<sup>28</sup> Senate Treaty Doc. 103-39, p. v.

<sup>29</sup> *Ibid.*

<sup>30</sup> Whiteman, *Digest of International Law*, v. 14, p. 58.

<sup>31</sup> Senate Treaty Doc. 105-25, S. Exec. Rept. 106-24.

years later, the Turkish Government decided to accept the agreement as amended, but because of the passage of time, President Cleveland again gave the Senate the opportunity to act. The Senate, by a resolution dated February 28, 1889, advised the President to ratify but added a new understanding as a condition. A new agreement which incorporated all of the Senate amendments was finally negotiated and signed by the President in 1908. This agreement was then submitted to the Senate and subsequently ratified.<sup>32</sup>

### C. INACTION OR REFUSAL TO RATIFY

U.S. law does not impose any legal obligation on the President to ratify a treaty after the Senate has given its advice and consent.<sup>33</sup>

It is also generally conceded that international law does not require a state to ratify a treaty until it chooses to become a party to the treaty by the means specified in the treaty.<sup>34</sup> The President therefore, is free to ratify, or not to ratify a treaty as he sees fit.

As ratification requires an affirmative act on the part of a President, a failure of the President to ratify means that a treaty cannot enter into force for the United States. In most cases, Presidential delay of ratification is because implementing legislation for the treaty has not yet been enacted by the Congress. Presidential inaction is usually temporary, as was the case with ratification of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>35</sup> The Senate granted its advice and consent to ratification of this convention in 1968, but implementing legislation (Public Law 91-360) was not approved until July 1970. The President then ratified the convention in September 1970.<sup>36</sup>

Numerous historical examples of Presidential non-ratification have been cited by scholarly sources.<sup>37</sup> One was a treaty of amity, commerce, and extradition with Venezuela signed July 10, 1856. The Senate gave advice and consent to ratification of the treaty with an amendment, but the President decided not to ratify the treaty and instead renegotiated it in order to effect other changes. The re-negotiated treaty was eventually signed, submitted to the Senate, and ratified.<sup>38</sup>

<sup>32</sup> Crandall, *Treaties, Their Making and Enforcement*, pp. 101-102. However, once the Senate has given advice and consent to a treaty, it does not appear that the President is under any constitutional obligation to resubmit the treaty as was done in the above cited example. *Ibid.*, p. 101.

<sup>33</sup> Restatement (Third) of the Foreign Relations Law of the United States, sec. 303, Comment d and Reporters' Note 3. This power, although not expressly given to the President by the Constitution, has been characterized as a "power which inheres in the executive power conferred upon him to conduct our foreign relations." See Statement of John C. Spooner before the U.S. Senate of January 23, 1906. Congressional Record, 59th Cong., 1st Sess., p. 1419.

<sup>34</sup> Whiteman, *Digest of International Law*, v. 14, p. 50.

<sup>35</sup> 21 U.S.T. 2517, TIAS 6997, 330 UNTS 38.

<sup>36</sup> Another more recent example is the treaty with Mexico on the Execution of Penal Sentences [28 U.S.T. 7399, TIAS 8718]. The treaty was signed on November 25, 1976. Senate advice and consent was given on July 21, 1977, and implementing legislation (Public Law 95-144) was approved on October 28, 1977. Instruments of ratification were exchanged with Mexico 3 days later on October 31, 1977. See also Restatement (Third) of the Foreign Relations Law of the United States, sec. 303, Reporters' Note 3.

<sup>37</sup> See Crandall, *Treaties, Their Making and Enforcement*, pp. 97-99.

<sup>38</sup> *Ibid.*, p. 98. For a list of 38 treaties that were approved by the Senate with reservations, but which did not enter into force as a result of the reservations, see Collier, E., U.S. Senate Rejection of Treaties [Congressional Research Service Multilith 79-149 F.] (July 16, 1979.) This

Non-ratification, after Senate advice and consent is given to a treaty, serves as a final option for a President who does not want to ratify a particular treaty. In practice, however, Presidential dissatisfaction will be expressed at earlier stages of the treaty's consideration, and as Presidents and their policies may differ, one President may be reluctant to ratify a treaty signed under a previous administration.

For example, the Eisenhower Administration took the formal position that the "United States will not \* \* \* become a party to the covenants on human rights, the convention on the political rights of women and certain other proposed multilateral agreements."<sup>39</sup> Presumably, this statement included the Genocide Convention, signed by a previous administration on December 11, 1948, but which had been awaiting the advice and consent of the Senate since 1949.<sup>40</sup> Eisenhower's policy was reversed by the Kennedy Administration which sent to the Senate human rights conventions on slavery, forced labor, and political rights of women,<sup>41</sup> and by the Nixon Administration which renewed the earlier request for Senate advice and consent to the Genocide Convention.<sup>42</sup>

Another more recent example, albeit involving administration opposition to ratification prior to a formal vote by the full Senate, is found in the Vienna Convention on the Law of Treaties. The Foreign Relations Committee ordered reported out a resolution of advice and consent to the treaty on September 7, 1972, that contained an understanding and interpretation which the executive branch [through the Department of State] opposed. As a result of negotiations between the executive branch and the Senate, the convention was not voted upon by the full Senate and has since remained in committee, thereby relieving the President of the possibility of being presented with an "advised and consented" treaty in a form not acceptable to him.<sup>43</sup>

#### PROCEDURE WHEN OTHER NATIONS ATTACH NEW CONDITIONS

Unless prohibited by the agreement itself, a state may attach conditions to an agreement only at signature or ratification. If such expressions are attached to the treaty as formal statements which limit or modify its substance, they are known as "reservations."<sup>44</sup> A reservation is a formal declaration by a state that excludes or modifies the legal effect of certain treaty provisions as between that state and other parties.<sup>45</sup> If a foreign state, or in the case of the United States, a President, adds a reservation to a bilateral treaty after the Senate has given advice and consent, the President

list, however, does not distinguish treaties unratified because Senate reservations were unacceptable to the President, from those not ratified because reservations were unacceptable to other parties.

<sup>39</sup> U.S. Department of State Bulletin, vol. 32, p. 822 (1955).

<sup>40</sup> See Henkin, *Foreign Affairs and the Constitution* (1972), p. 394 n. 71.

<sup>41</sup> 113 Congressional Record 8332 (1967).

<sup>42</sup> S. Exec. Rept. 92-6, 92d Cong., 1st Sess. (1971).

<sup>43</sup> See *Digest of United States Practice in International Law*, 1974, pp. 195-198. For further discussion of Senate action on the Vienna Convention, see Chapter III. For subsequent consideration, see Nash (Leich), *Cumulative Digest of United States Practice in International Law 1981-1988*, pp. 1228-1239.

<sup>44</sup> Whiteman, *Digest of International Law*, v. 14, p. 137.

<sup>45</sup> *Ibid.* Cf. also Vienna Convention on the Law of Treaties, Article 2(1)(d).

must submit the new reservation to the Senate for its advice and consent prior to his ratification of the treaty.<sup>46</sup>

As a practical matter, however, reservations to multilateral treaties made by other nations after Senate advice and consent are generally not submitted to the Senate. This is often the case with multilateral agreements where the executive branch has developed a practice of dealing with new reservations of other states, after Senate advice and consent to a multilateral treaty, without seeking Senate advice and consent on the new reservation. This development owes its origin in large part to the greatly accelerated pace and increased volume of U.S. treaty-making that has been the rule following the Second World War, and which has prompted the Department of State, since then, not to refer to the Senate for advice and consent new reservations made by other states to multilateral treaties previously approved by the Senate.<sup>47</sup>

The rationale for such State Department action has been characterized by some sources as apparently being based on a doctrine of implied or tacit consent by the Senate to such reservations,<sup>48</sup> and a Department of State letter on this issue<sup>49</sup> maintains that the "reservations made during this period have been such that they were not regarded as requiring Senate consideration." The letter cited a number of factors leading to this conclusion including the existence of "reservations" which were not true reservations (that is, reservations by title only and not by substance), repetition by states of reservations identical to, or patterned on those of other states to which the Senate had originally consented, and policies unique to some multilateral agreements which permit reservations without referral to other states, or which make them subject to majority approval by the other nations—a process to which the Senate had originally given its advice and consent.<sup>50</sup>

States may also issue clarifications or explanations which do not substantively modify a treaty. Such statements may be titled "declaration," "understanding," or any other descriptive term a party desires. However, whether in fact a particular statement is a reservation or merely a non-substantive addition to an agreement is determined by its content and not by its title. This distinction between reservations and other non-substantive conditions is important because non-substantive understandings, declarations, and statements made by other states after Senate advice and consent

<sup>46</sup> Henkin, *Foreign Affairs and the Constitution* (1972), p. 379. However, in the case of multilateral treaties this is generally not the practice followed. See discussion which follows.

<sup>47</sup> A letter of March 1, 1966, on file in the Office of the Legal Adviser, Department of State, addressed U.S. practice in this regard over the preceding 20 years. The text of the letter is reproduced in the *American Journal of International Law*, v. 60 (1966) p. 563.

<sup>48</sup> Restatement (Third) of the Foreign Relations Law of the United States, sec. 314, Comment c. See also discussion of tacit amendment in section on amendments in Chapter IX.

<sup>49</sup> Letter of March 1, 1966, *American Journal of International Law*, v. 60 (1966), p. 563.

<sup>50</sup> The letter cites the 1954 Convention concerning Customs Facilities for Touring [TIAS 3879] as an example of an agreement requiring majority approval of reservations. It has been suggested that in such cases \*\*\* "perhaps \*\*\* the Executive concluded that, knowing the practice, the Senate had waived the need for its consent. Or that he could accept these modifications on his own authority." Henkin, *Foreign Affairs and the Constitution*, p. 379, n. 21. Note that the practice of attaching reservations to multilateral treaties which are not formally renegotiated, is often a controversial one. It, in effect, permits a state to depart from the terms of the treaty in contrast to the general agreement of the parties to be equally bound by the terms of the document. Thus, the practice of permitting reservations to multilateral treaties has the effect of making it attractive for states to express objections to a document, and at the same time, to become parties to it. The end result, however, is often a less homogenous document.

to ratification of a treaty are considered by the Department of State not to require new advice and consent.<sup>51</sup>

The issue of whether or not a particular statement was indeed a non-substantive statement, not a reservation, was raised in regard to a communique issued by the Foreign Ministry of Panama on April 25, 1978.<sup>52</sup> The communique in question concerned the Senate's reservations to the Panama Canal Treaty, and Senator Jesse Helms, in a letter to President Carter, stated that the Panamanian interpretation either rejected or repudiated "key" Senate changes.<sup>53</sup> The response from the White House was that the communique in question had no legal effect as it merely contained a point-by-point description of items of Senate action together with a commentary thereon. The response stressed the State Department's view that the formal instruments of ratification of both the United States and Panama would contain the full texts of the amendments, conditions, reservations, and understandings which the Senate had approved along with the Panama Canal Treaties and that these items would be contained in the formal protocol of exchange. These were, it noted, the documents by which the parties would be bound.<sup>54</sup>

The White House position was, therefore, that because the Panamanian communique did not constitute a reservation in the opinion of the executive branch, the President was not required to submit it to the Senate for advice and consent. The Panama Canal Treaty subsequently entered into force on October 1, 1979, without Presidential submittal of the Panamanian communique to the Senate for its advice and consent.<sup>55</sup>

The issue of whether or not certain statements of the Panamanian Government were reservations or not was again raised in hearings before the Senate Judiciary Committee's Subcommittee on Separation of Powers in June 1983.<sup>56</sup> In the words of committee witness Dr. Charles H. Brecher:

[The] Panama Canal treaties have not—I repeat, not been ratified in international law, and they therefore did not go into effect on the 1st of October 1979, and are not in effect now.

The reason is very simple. In their respective instruments of ratification, the United States and Panama did not agree to the same text of the treaties. Instead, Panama first agreed to the treaties as the President of the United States had ratified

<sup>51</sup>Such statements may be regarded as nothing more than a clarifying statement. See *Whitman, Digest of International Law*, v. 14, p. 188.

<sup>52</sup>See *Digest of United States Practice in International Law*, 1978, pp. 729–731. The U.S. Senate adopted a resolution of advice and consent to the treaty with amendments, reservations and understandings earlier on March 16, 1978.

<sup>53</sup>*Ibid.*, p. 729. For a text of the lengthy Panamanian communique, see *Congressional Record*, vol. 124, pt. 12 (June 4, 1978), pp. S16156–S16163. It is interesting to note that a Panamanian plebiscite, held in accordance with that country's constitution, approved the treaty as formulated prior to the issuance of this communique, just as the United States had.

<sup>54</sup>Letter of June 14, 1979, from Assistant Secretary of State for Congressional Relations Douglas J. Bennett, Jr., text partially reproduced in *Digest of United States Practice in International Law*, 1978, p. 730.

<sup>55</sup>*Ibid.*, See also U.S. Department of State, *Treaties in Force*, p. 225 (2000). Note that the day before ratification of the treaty, Panama inserted three new paragraphs in its ratification provision and the issue of whether these were non-substantive statements was again raised. See *Congressional Record* of June 15, 1978, v. 124, pt. 14, pp. 17790–17793 for objections raised and the administration's response.

<sup>56</sup>U.S. Congress, Senate, Committee on the Judiciary, *Hearings before the Subcommittee on Separation of Powers. The Panama Canal Treaty—Constitutional and Legal Aspects of the Ratification Process*, 98th Cong., 1st Sess., June 23, 1983.



them, pursuant to Senate advice and consent, and then added in both its instruments of ratification, unilaterally, something they called an understanding, on which Panama made its agreement to the treaties contingent.

This Panamanian understanding—in reality, a counter-reservation to both treaties, three paragraphs long—would, had it been accepted by the United States, have nullified the so-called DeConcini reservation under which the United States has permanently \*\*\* the right to use independently \*\*\* without Panamanian consent, or even against Panamanian opposition, military force in Panama to keep the Canal open and operating. Since the United States has not accepted this Panamanian so-called understanding, there are no treaties in international law.<sup>57</sup>

As part of his response to these assertions, Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs at the Department of State, expressed the following viewpoint:

It is indeed true that an amendment or reservation added to a treaty after Senate ratification may require Senate approval. This is based on the notion that the constitutional mandate of Senate advice and consent to a treaty should not be undercut by subsequent changes to the document which the Senate has approved. However, the flaw in the application of these principles to the three-paragraph Panamanian statement is that the Panamanian statement is not an amendment or reservation either in form or substance.

\* \* \*

In the present case, the first two Panamanian paragraphs are quite clearly labeled “understandings,” and the third is a “declaration.” On their face, then, they are not statements that would seem to require submission to the Senate. Of course, the definition in the Vienna Convention says, quite rightly, that the label is not necessarily controlling; it is the substance which determines whether a statement is a true reservation. An analysis of the three Panamanian paragraphs makes clear that they are what they are labeled. None purports to exclude or modify the DeConcini condition or any other provision of the treaties, as advised and consented to by the Senate. None is a true reservation.<sup>58</sup>

It must be stressed, in conclusion, that the issue of seemingly non-substantive statements raises an important question for the Senate. U.S. practice is such that when a treaty has once been sent to the Senate for advice and consent, it is the executive branch that determines whether a subsequent statement is a substantive modification or not. It is therefore up to the executive branch, in exercising its discretion not to submit such a statement to the Senate for its advice and consent, to proceed in a manner that does not trammel the Senate’s constitutional role in the treaty-making process.

<sup>57</sup> *Ibid.*, pp. 4–5.

<sup>58</sup> *Ibid.*, pp. 102–103.

## VIII. DISPUTE SETTLEMENT, RULES OF INTERPRETATION, AND OBLIGATION TO IMPLEMENT<sup>1</sup>

Once a treaty has entered into force, states may differ in the interpretation of their obligations and disputes may arise. Most disputes are settled by consultation or negotiation. However, when these measures fail, states may resort to more formal dispute settlement procedures. This chapter examines the formal procedural options available to states that want to resolve treaty disputes peacefully when negotiations have failed. The most frequently used options are conciliation, arbitration, and judicial settlement. In the past, the U.S. Senate has sometimes attached conditions to its acceptance of compulsory judicial settlement procedures of the International Court of Justice in treaty disputes. As certain dispute settlement procedures in the Vienna Convention are similar to those previously approved with conditions—or in the case of the Law of the Sea Treaty Optional Protocol—rejected by the Senate<sup>2</sup>—particular attention is given to those procedures in the Vienna Convention which mandate compulsory jurisdiction of the International Court.

International law applies to disputes between nations. The rules of international law on treaty interpretation as specified in the Vienna Convention on the Law of Treaties parallel the traditional international rules of treaty interpretation. However, the rules governing treaty interpretation set forth by the Vienna Convention differ in some important respects from the rules of treaty interpretation applied by U.S. courts in determining a treaty's effect as domestic law. This chapter examines briefly the criteria for a treaty interpretation applied by these two systems. Finally, as disputes generally arise out of questions relating to a party's implementation of a treaty, the question of the obligation of Congress to implement an international agreement is also discussed.

### A. DISPUTE SETTLEMENT

If a dispute arises between states concerning a treaty's implementation, it may be possible for the parties involved to consult and negotiate a mutually acceptable solution. If negotiation does not resolve the dispute, the parties may resort to more formal remedies such as conciliation, arbitration and judicial settlement.

<sup>1</sup> Prepared by Jeanne J. Grimmett, Legislative Attorney.

<sup>2</sup> Ex. N, 86-1, rejected May 27, 1960; motion to reconsider entered but not taken up. The Optional Protocol was returned to the President by S. Res. 267, 106th Cong., 2d Sess., adopted October 12, 2000. 146 Congressional Record, October 12, 2000, p. S10499 (daily ed.).

## CONCILIATION

Conciliation is a non-binding process whereby the parties to a dispute submit to the efforts of an international body or commission of persons to bring about a friendly settlement of a dispute. The Vienna Convention provides that in certain disputes, if not otherwise settled<sup>3</sup> within 12 months, a party to the dispute may request the Secretary General of the United Nations to set into motion an advisory conciliation procedure. Under this procedure, the Secretary General shall maintain a list of conciliators consisting of qualified jurists for prospective appointment to a commission which “\* \* \* shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.”<sup>4</sup> The Commission is initially composed of an even number of members. Each state party to the dispute has 60 days to designate one commission member from the list who is not of its nationality, and one additional member—not necessarily from the list—of its own nationality. The four conciliators then have an additional 60 days to choose a fifth conciliator as chairperson, but if they cannot agree within that time, the Secretary General chooses that person.<sup>5</sup>

The commission may only hear a narrow range of disputes relating to validity, termination, withdrawal from or suspension of the operation of a treaty.<sup>6</sup> It may not hear disputes relating to implementation, and it may not hear disputes relating to *jus cogens* (superior law). Any party to the convention, however, may submit a *jus cogens* dispute to the International Courts.<sup>7</sup>

Numerous bilateral agreements also provide for the establishment of conciliation commissions or boards. The Agreement Between the United States and Poland Regarding Fisheries in the Western Region of the Middle Atlantic Ocean<sup>8</sup> is an example of a bilateral agreement of this type. Article 10 of the agreement provides for the creation of a conciliation board composed of four members, two appointed by each government. The governments undertake to encourage settlement of claims in accordance with the board’s findings, but the parties involved are not bound to do so. If one of the parties refuses to settle in accordance with the board’s findings, the board is to encourage the parties to submit to binding arbitration.

During two periods, 1913–1915 and 1928–1930, the United States entered into more than 40 bilateral conciliation treaties.<sup>9</sup>

<sup>3</sup>Or submitted to the International Court of Justice or to arbitration.

<sup>4</sup>Vienna Convention, Annex, Secs. 1, 5. Note that conciliation is also accorded recognition in article 33 of U.N. Charter to which the United States is a party.

<sup>5</sup>Ibid., Sec. 2.

<sup>6</sup>Vienna Convention, Arts. 65–66.

<sup>7</sup>Vienna Convention, Art. 66(a). For a discussion of *jus cogens* see Chapter III, Section D, supra. *Jus cogens* refers to the existence of a superior law or peremptory norm of international law which holds a special status internationally and which cannot be violated by a treaty. A dispute relating to *jus cogens* would center on the issue of whether a particular international rule is so universally accepted and exalted by the international community that no derogation is permitted from it. Parties to a treaty would not be legally permitted, even by choice, to violate such a rule. An example of such an agreement would be an aggression pact by two nations against a third. Such an agreement would violate the U.N. Charter prohibition against the use of force for the settlement of disputes, which is often cited as an example of *jus cogens*.

<sup>8</sup>Entered into force July 1, 1975, 26 U.S.T. 1117, Treaties and Other International Acts (TIAS) 8099.

<sup>9</sup>The so-called “Bryan” Treaties and “Kellogg Conciliation Treaties.” See Whiteman, Marjorie, Digest of International Law, v. 12, 1971, pp. 948–950 (hereafter cited as Whiteman), for a list

The earlier of these treaties, the "Bryan" Treaties, provided for the establishment of commissions of inquiry on a permanent basis. Recourse to these commissions is binding, although the commission's reports are not binding on the parties. Senate consent, in these instances, was limited to the original treaties, the terms of which did not require subsequent Senate consent to specific appointments to the commission, or to the choice of its rules of procedure.<sup>10</sup>

#### ARBITRATION

Arbitration is "the settlement of disputes between states by judges of their own choice, and on the basis of respect for law."<sup>11</sup> Arbitration is procedurally similar to non-binding conciliation but differs from conciliation in that parties to arbitral proceedings agree to accept and to carry out the award of the tribunal in good faith. Individual treaties frequently contain an arbitration clause by which the parties agree to create special tribunals and to submit to them any disputes regarding the treaty's application or interpretation.<sup>12</sup> Thus, the Treaty of Peace with Italy of February 10, 1947 provided that:

Any disputes which may arise in giving effect to \*\*\* the present Treaty shall be referred to a Conciliation Commission consisting of one representative of the Government of the United Nation concerned and one representative of the Government of Italy, having equal status.

[Provisions for appointment of a third member omitted]

\*\*\* The decision of the majority of the members of the Commission \*\*\* shall be accepted by the parties as definitive and binding.<sup>13</sup>

During the period 1928–1930, the United States concluded a series of at least 25 bilateral arbitration treaties with foreign nations. The text of these treaties generally specified that special agreements would provide for the organization of special tribunals, define their powers, state questions at issue, and settle the terms of reference, and that the special agreements would require the advice and consent of the Senate.<sup>14</sup> On the other hand, there have

---

of countries and citations. The United States also signed a conciliation treaty with Liberia on August 21, 1939 (T.S. 968) and a multilateral Inter-American Convention on Conciliation in 1933 (T.S. 887).

<sup>10</sup>See, for example, the Treaty with Bolivia of Jan. 22, 1914, 38 Stat. 1868, 5 Bevans 740.

<sup>11</sup>Schwarzenberger, G. A Manual of International Law. 1967, p. 241 (hereafter cited as Schwarzenberger). Arbitration is accorded special recognition by the Vienna Convention, which provides that a dispute relating to a *jus cogens* (superior law) not otherwise settled within 12 months, may be submitted to arbitration by consent of the parties instead of to the International Court of Justice. Vienna Convention, Art. 66(a).

<sup>12</sup>A treaty provision which grants a tribunal automatic jurisdiction over disputes regarding the application or interpretation of a treaty is known as a "compromissory clause." Bishop, William W., Jr. International Law. 3d ed. 1971, pp. 68–69. Under international law a state may not be compelled to enter into third-party dispute settlement and must thus consent to its use. A compromissory clause is a means of giving such consent. American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States. 1987, §902, Comment e (hereafter cited as Rest. 3d). For a discussion of U.S. treaty practice involving compromissory clauses, see Noyes, John E. The Functions of Compromissory Clauses in U.S. Treaties. Virginia Journal of International Law, v. 34, 1994, p. 831 (hereafter cited as Noyes).

<sup>13</sup>Treaty of Peace with Italy, signed Feb. 10, 1947, Art. 83, Sec. 6, TIAS 1648, 4 Bevans 311. Details of augmented Commission membership and procedures in the event the initial two members are unable to agree have been omitted.

<sup>14</sup>See, for example, the Arbitration Agreement with Norway of Feb. 20, 1929, 46 Stat. 2278, 10 Bevans 488. A list of 25 countries with citations to U.S. Arbitration treaties with them is provided in Whiteman, v. 12, 1970, pp. 1044 and 1045.

been numerous instances in which the Senate has approved treaties providing for submission of specific matters to arbitration and has left it to the President to manage appointment of the arbitrators and to determine the scope and form of the arbitration.<sup>15</sup>

In addition, a recent program of bilateral investment treaties has included an investor-state disputes mechanism that gives U.S. investors the right to binding arbitration against a host state without involvement of the U.S. Government, through the International Center for the Settlement of Investment Disputes.<sup>16</sup> Binding investor-state arbitration is also provided for in the investment chapter of the trilateral North American Free Trade Agreement (NAFTA).<sup>17</sup>

The World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes,<sup>18</sup> which provides for the resolution of disputes arising under WTO agreements<sup>19</sup> and operates through a system of ad hoc panels,<sup>20</sup> incorporates binding arbitration at two points in the dispute process. In the understanding, WTO Members agree to submit to binding arbitration in the following situations: (1) to determine the length of time within which a Member must comply with an adopted panel (and any Appellate Body) report, in the event the time period proposed by the Member is unacceptable and the disputing parties cannot otherwise agree on a deadline, and (2) to determine the level of trade retaliation, in the event a defending party has not complied with its obligations with the agreed-upon compliance period, the WTO has authorized the prevailing party to retaliate, and the defending party objects to the level of suspension of trade concessions or obligations proposed by the prevailing party or claims that certain principles and procedures in the Dispute Settlement

<sup>15</sup> For a list of 39 such instances, see Willoughby, W. *The Constitutional Law of the United States*, 2d ed. 1929, p. 543. Note also that the United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, TIAS 6997. The Senate gave its advice and consent to this agreement with declarations on Oct. 4, 1968.

<sup>16</sup> For a discussion of investment treaties, see Chapter XI.

<sup>17</sup> North American Free Trade Agreement, entered into force Jan. 1, 1994, Arts. 1115–1138, H.R. Doc. 103–159, v. 1, 103d Cong., 1st Sess., 1993, pp. 1109–1121.

<sup>18</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), entered into force Jan. 1, 1995, H.R. Doc. 103–316, v. 1, 103d Cong., 2d Sess., 1994, pp. 1654–1678. Congress approved the Dispute Settlement Understanding in sec. 101 of the Uruguay Round Agreements Act, Public Law 103–365, 108 Stat. 4814.

<sup>19</sup> All WTO Members must be a party to the Dispute Settlement Understanding and are under an obligation "to have recourse to, and abide by, the rules and procedures" of the Understanding when they seek redress of WTO violations and other nullification and impairment of benefits, and not to take certain unilateral measures in WTO-related trade disputes. Dispute Settlement Understanding, Arts. 1:1, 23. WTO Members "recognize that [the Understanding] \* \* \* serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." *Ibid.*, Art. 3:2. See generally Noyes, at 883–890.

<sup>20</sup> A panel is to issue a report on the disputed measure, which is subject to appeal by a disputing party to a standing Appellate Body. Once the panel, and any Appellate Body report is adopted by the WTO Members, the losing party must present a compliance plan to the WTO and is expected to comply with its obligations within a reasonable period of time; if the losing party does not do so, it is required to enter into negotiations over compensation with the prevailing party, if the latter so requests, or it may be subject to retaliation. The Understanding contains a negative consensus rule for certain decisions made by the WTO during a dispute proceeding aimed at strengthening the process and facilitating compliance with WTO obligations. The rule applies to the establishment of panels, the adoption of panel and Appellate Body Reports, and where compliance with adopted reports is not forthcoming and, if requested by the prevailing party in the dispute, authorization for that party to retaliate (that is, withdraw a WTO-covered trade concession or obligation owed the defending party). Under the rule, the WTO will take the proposed action unless all WTO Members present the meeting at which it is being considered vote not to do so. *Ibid.*, Arts. 6, 12, 16–17, 21–22.

Understanding were not followed.<sup>21</sup> In the latter proceeding, the arbitrator is to determine whether the level of the suspended WTO concessions or other obligations is equivalent to the level of nullification or impairment of WTO benefits. The Dispute Settlement Understanding also allows WTO Members to submit a dispute to arbitration upon mutual agreement of the disputing parties.<sup>22</sup>

#### JUDICIAL SETTLEMENT

Judicial settlement, as a mechanism for settling treaty disputes, differs from arbitration in the method of selecting the members of the judicial organ involved. In arbitration proceedings, the panel of judges is chosen by agreement of the parties, while "judicial settlement presupposes the existence of a standing tribunal with its own bench of judges and its own rules of procedure which parties to a dispute must accept."<sup>23</sup>

An example of a U.S. decision to submit a dispute to binding judicial settlement is found in the 1979 United States-Canadian Maritime Boundary Dispute Settlement Agreement.<sup>24</sup> Under the terms of this treaty, the parties agreed to submit their boundary dispute over delimitation of the Gulf of Maine Area to a chamber of the International Court of Justice pursuant to Article 40 of the Statute of the Court. The Senate granted its advice and consent to this agreement with amendments, and the treaty was proclaimed by President Reagan on February 15, 1982. The dispute was then submitted, and the chamber rendered a decision on October 12, 1984.

The Vienna Convention on the Law of Treaties provides for recourse to judicial settlement in treaty disputes relating to whether or not a particular norm of international law is superior or peremptory in character (*jus cogens*). If resolution of such disputes is not reached within 12 months after formal notification of the dispute to the other party, any party may invoke the jurisdiction of the International Court of Justice unless the parties agree to submit to arbitration.<sup>25</sup> If the Court subsequently reaches a decision, the parties are required by the U.N. Charter<sup>26</sup> to comply with it. However, the ability of the Court to have its decisions enforced is limited to enforcement by the Security Council.<sup>27</sup> The U.N. Charter leaves enforcement of the Court's decisions in such instances to a political decision of the council, which is subject to veto by any of the five permanent members, including the United States.<sup>28</sup>

Nations may also agree to submit disputes relating to treaty interpretation to the jurisdiction of the International Court of Justice before specific disputes actually arise. The Statute of the International Court (to which the United States became a party *ipso facto* when it became a member of the United Nations) provides that states may at any time declare, under Article 36(2) of the Statute, that they recognize the compulsory jurisdiction of the court

<sup>21</sup> *Ibid.*, Arts. 21:3(c), 22:6.

<sup>22</sup> *Ibid.*, Art. 25.

<sup>23</sup> Schwarzenberger, p. 241.

<sup>24</sup> United States-Canada Maritime Boundary Dispute Settlement Treaty with Agreements, signed March 29, 1979, 33 U.S.T. 2797, TIAS 10204.

<sup>25</sup> Vienna Convention, Art. 66(a).

<sup>26</sup> U.N. Charter, Art. 94.

<sup>27</sup> *Ibid.*, Arts. 39-52.

<sup>28</sup> *Ibid.*, Arts. 39-52, 23, 27.

in legal disputes in a variety of areas including “the interpretation of a treaty.” In practice, numerous treaties to which the United States is a party and to which the Senate has consented contain provisions for submission of disputes to the International Court of Justice.<sup>29</sup> In addition, prior to 1985, when the United States terminated its Article 36(2)(b) declaration,<sup>30</sup> the United States subscribed to the Court’s compulsory jurisdiction subject to a Senate reservation known as the “Connally amendment.” The Connally amendment exempted from the Court’s compulsory jurisdiction any matter “essentially within the domestic jurisdiction of the United States of America as determined by the United States of America.”<sup>31</sup>

The Connally amendment further qualified U.S. acceptance of the Court’s compulsory jurisdiction in certain instances when disputes involving multilateral treaties were involved. Under the provisions of the amendment, U.S. unqualified acceptance of the Court’s compulsory jurisdiction did not apply to:

- (c) Disputes arising under a multilateral treaty, unless, (1) all Parties to the treaty, affected by the decision are also parties to the case before the Court, or (2) the United States of America specifically agrees to jurisdiction.<sup>32</sup>

This Senate condition of ratification may be important in relation to the Vienna Convention because the convention provides that disputes involving peremptory norms of international law be submitted to the compulsory jurisdiction of the International Court. In contrast, the Connally amendment specifically reserved for the United States the option of not submitting treaty interpretation disputes to the International Court insofar as such disputes might involve matters essentially within the domestic jurisdiction of the United States as determined by the United States.

The Vienna Convention has not yet been ratified by the United States and remains pending before the Senate Foreign Relations Committee. But should the Senate give its advice and consent, unqualified Senate approval of its dispute settlement mechanisms would thus appear to broaden significantly U.S. acceptance of the Court’s jurisdiction. Some might consider this to be contrary to the

<sup>29</sup>Examples include the 1969 Consular Convention with Belgium (Art. 46), 25 U.S.T. 41, TIAS 7775, and the 1971 Convention on Psychotropic Substances (Art. 31), which entered into force for the United States on July 15, 1980, TIAS 9725. As of April 8, 1992, the Senate had approved 42 multilateral treaties containing provisions for submission of disputes to the International Court of Justice. U.S. Senate, *Consular Conventions, Extradition Treaties, and Treaties Relating to Mutual Legal Assistance in Criminal Matters (MLATS)*, April 8, 1992, S. Hrg. 102-674, p. 17. In some cases, the Senate has added a condition concerning submissions of disputes to the International Court. As noted by one commentator, however, the United States “is party to very few treaties entering into force for the United States since 1980 that contain compromissory clauses referring disputes to the ICJ.” Noyes, p. 869, n. 170.

<sup>30</sup>The United States withdrew its declaration accepting the Court’s compulsory jurisdiction on October 7, 1985, in response to the Court’s decision to adjudicate Nicaragua’s suit against the United States. Letter from Secretary of State George P. Shultz to U.N. Secretary, October 7, 1985, *International Legal Materials*, v. 24, 1985, p. 1742.

<sup>31</sup>The Connally amendment is a condition of ratification to U.S. acceptance of the International Court’s compulsory jurisdiction. It is contained in the Senate’s resolution of advice and consent on the U.S. declaration of adherence to the Court’s jurisdiction. See S. Res. 196, 79th Cong., 2d Sess., *Congressional Record*, v. 92, Aug. 1-2, 1946, pp. 10621, 10692, 10705-10706, for the text of S. Res. 196 as finally adopted. For the text of the Presidential declaration incorporating S. Res. 196, of Aug. 2, 1946, see 61 Stat. 1218, TIAS No. 1598 (1946). S. Res. 196 was agreed to by a vote of 60 yeas, 2 nays and 34 not voting.

<sup>32</sup>S. Res. 196, supra note 30. This is referred to as the “Vandenberg amendment,” but it is generally included when the term “Connally amendment” is used.

spirit of the Connally Reservation which specifically attempted to preserve for the United States the option of disputes concerning “the interpretation of a treaty” insofar involve “matters which are essentially within the domestic jurisdiction in any further consideration of the Vienna Convention.”<sup>33</sup>

In giving its advice and consent to the Genocide Convention providing for the submission of disputes to the International Court of Justice, the Senate added a condition requiring the specific consent of the United States. The condition specified:

(1) That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.<sup>34</sup>

#### B. RULES OF INTERPRETATION

The dispute settlement procedures established by the Vienna Convention also raise another issue of importance to the Senate, namely, that the Vienna Convention provides rules for treaty interpretation which differ from those traditionally applied by the U.S. courts. This may be important to the extent that the Connally Reservation may have been intended not only to qualify compulsory U.S. submission to an international tribunal (that is, to foreign judges), but also to avoid compulsory submission to that tribunal’s law.<sup>35</sup>

The Vienna Convention codifies existing international rules of treaty interpretation,<sup>36</sup> which differ from the rules of treaty interpretation as applied by U.S. courts.<sup>37</sup> In essence, the convention stresses “the dominant position of the text itself in the interpretative process,”<sup>38</sup> whereas U.S. courts are more apt to permit supplementary means of interpretation if necessary.<sup>39</sup>

The Vienna Convention provides that a treaty be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object

<sup>33</sup>The Connally amendment has been the subject of much controversy. On May 20, 1974, the Senate passed a sense of the Senate resolution which bears on the Connally amendment. The resolution, advisory in nature, expressed the sense of the Senate that the President should undertake negotiations with other countries that have qualified their acceptance of the compulsory jurisdiction of the International Court to have each party agree to accept the Court’s jurisdiction without reservation. See Rague, M. The Reservation of Power and the Connally Amendment. *New York University Journal of International Law and Politics*, v. 11, 1978, pp. 350–355. The executive branch position on the Connally Reservation has been that “[t]he Department of State is on record that the Reservation does not provide the United States with any substantial benefit, and every Administration since that of President Eisenhower has urged its repeal.” U.S. Department of State. *Reform and Restructuring of the U.N. System, Selected Documents No. 8*, 1978, pp. 13–16, and U.S. Department of State. *Digest of United States Practice in International Law 1978. 1980*, p. 1567.

<sup>34</sup>Congressional Record, v. 132, Feb. 19, 1986, p. 2349.

<sup>35</sup>Note that the issue of whether or not to submit to foreign law, as well as to foreign judges, was one of the main issues in contentions against repeal of the Connally amendment. See Stromberg, Ruth, and Zafren, Daniel Hill. *The Connally Amendment: The United States’ Self-Judging Reservation to the Compulsory Jurisdiction of the International Court of Justice*. Library of Congress, Legislative Reference Service, Oct. 31, 1968, p. 8.

<sup>36</sup>Vienna Convention, Arts. 31–32.

<sup>37</sup>Rest. 3d, § 325, Comment g.

<sup>38</sup>Rosenne, Shabtai. *Interpretation of Treaties in the Restatement and the International Law Commission’s Draft Articles: A Comparison*. *Columbia Journal of Transnational Law*, v. 5, 1966, p. 221.

<sup>39</sup>Rest. 3d, § 325, Comment g and Reporters’ Note 1.



and purpose.”<sup>40</sup> The context of the treaty for interpretation purposes is generally limited to preambles, annexes, agreements relating to the agreement, and subsequent agreements which relate to the interpretation of the treaty, or subsequent practice which establishes agreement of the parties regarding interpretations.<sup>41</sup> Supplementary means of interpretation (such as the preparatory work of the treaty) are not allowed under the convention unless application of the earlier rule would lead to a manifestly absurd or unreasonable result.<sup>42</sup> Thus, except for unusual circumstances, the convention would exclude as aids to interpretation such items as the preparatory work of the treaty and the circumstances of its conclusion.<sup>43</sup>

In contrast, current U.S. application of international law in treaty interpretation aims at ascertaining the meaning intended by the parties in the light of all relevant factors. Consequently, U.S. courts have not been hesitant to react to travaux préparatoires.<sup>44</sup>

Relevant factors may include the ordinary meaning of words in context, the title of the agreement and statements of purpose, the circumstances of negotiation, negotiating history, unilateral statements of understanding, subsequent practice, change of circumstances, compatibility with international law and general principles of law, and differences between languages.<sup>45</sup>

Furthermore, when interpreting a treaty under domestic law, U.S. courts include as relevant matters indications of U.S. intent in making the agreement,<sup>46</sup> as well as the executive branch’s interpretation of the agreement’s meaning.<sup>47</sup> U.S. courts generally assign “great weight” to such executive branch interpretation of an international agreement.<sup>48</sup> Thus, for example, in 1933, the U.S. Supreme Court in deciding whether a particular offense was extraditable under the Extradition Convention with Great Britain of 1899, noted the treaty’s construction by the executive branch as a factor to be considered in reaching its decision to extradite the appellant.<sup>49</sup> The U.S. Supreme Court noted, similarly, in 1961 that “while courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”<sup>50</sup>

The issue of treaty re-interpretation by the executive branch after Senate advice and consent and subsequent ratification by the parties has been an item of recent interest to the Senate. The Anti-ballistic Missile (ABM) Treaty between the United States and the former Soviet Union was approved by the Senate in 1972 and sub-

<sup>40</sup> Vienna Convention, Art. 31.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., Art. 32.

<sup>43</sup> See Kearney, Richard D. and Dalton, Robert E. The Treaty on Treaties. American Journal of International Law, v. 64, 1970, p. 520.

<sup>44</sup> Rest. 3d, § 325, Reporters’ Note 1.

<sup>45</sup> Ibid., Sec. 325, Comments and Reporters’ Notes.

<sup>46</sup> For example, the legislative history of a Senate reservation to a treaty might be considered in ascertaining its intent.

<sup>47</sup> Rest. 3d, § 326(2).

<sup>48</sup> Ibid., Sec. 326(2), Reporters’ Note 4.

<sup>49</sup> *Factor v. Laubenheimer*, 290 U.S. 276, 294–295 (1933).

<sup>50</sup> *Kolovrat v. Oregon*, 336 U.S. 187 (1961). For recent examples of judicial treaty interpretation, see *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167–174 (1999); *Zicherman v. Korean Air Lines Co. Ltd.*, 516 U.S. 217, 226–228 (1996); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177–188 (1993); *Itel Containers International Corp. v. Huddleston*, 507 U.S. 60, 64–69 (1993), and *United States v. Stuart*, 489 U.S. 353 (1989).

sequently ratified. The treaty restricted the parties' use of ABM systems. Subsequently, in 1985, the Reagan Administration sought to "reinterpret" the treaty to permit the development of mobile space-based antiballistic systems.<sup>51</sup> The Senate Foreign Relations Committee responded by proposing S. Res. 167, the ABM Treaty Interpretation Resolution.<sup>52</sup> Although never acted on by the Senate, the resolution focused attention on the problem of reinterpretation. In effect, it concluded that the only interpretation of a treaty that is valid and constitutional is that understood by the Senate at the time of its formal approval. Specifically, Section (2) of the Resolution provided as follows:

(2) Under the United States Constitution—

(A) a treaty is properly interpreted in good faith in accordance with the ordinary meaning to be given its terms in light of their context and in light of its object and purpose;

(B) the meaning is to be determined in light of what the Senate understands the treaty to mean when it gives its advice and consent;

(C) the understanding of the Senate is manifested by any formal expression of understanding by the Senate, as well as by other evidence of what the Senate understood the treaty to mean, including Senate approval or acceptance of, or Senate acquiescence in, interpretations of the treaty by the Executive branch communicated to the Senate;

(D) the Senate's understanding of a treaty cannot be informed by other matters of which it is not aware, such as private statements made during the negotiations that were not communicated to the Senate; and

(E) any subsequent practice between the Parties in the application of the treaty is to be taken into account in interpreting the treaty.

Subsequently, in a 1988 move designed to preempt any future administration reinterpretation of the INF Treaty,<sup>53</sup> the Senate attached conditions to the resolution of ratification designed to bind the President to the interpretation understood by the Senate of the provisions of the treaty at the time of its consent. The text of the relevant condition stated:

(1) Provided, that the Senate's advice and consent to ratification of the INF Treaty is subject to the condition, based on the Treaty Clauses of the Constitution, that—

(A) the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification;

<sup>51</sup>The Clinton Administration announced in 1993 that it had returned to the traditional interpretation that the ABM Treaty prohibits the development, testing, and deployment of sea-based, space-based, and mobile land-based ABM systems and components without regard for technology utilized. Letter of July 13, 1993, from Thomas Graham, Jr., Acting Director of the U.S. Arms Control and Disarmament Agency, to Senator Pell. See Appendix 10.

<sup>52</sup>See U.S. Senate. Committee on Foreign Relations. The ABM Interpretation Resolution. S. Rept. 100-164, 100th Cong., 1st Sess., 1987.

<sup>53</sup>Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Intermediate-Range and Shorter-Range Missiles, Treaty Doc. 100-11.

(B) such common understanding is based on:

(i) first, the text of the Treaty and the provisions of this resolution of ratification, and

(ii) second, the authoritative representations which were provided by the President and his representatives to the Senate and its Committees, in seeking Senate consent to ratification, insofar as such representations were directed to the meaning and legal effect of the text of the Treaty; and

(C) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute; and

(D) if, subsequent to ratification of the Treaty, a question arises as to the interpretation of a provision of the Treaty on which no common understanding was reached in accordance with paragraph (2), that provision shall be interpreted in accordance with applicable United States law.<sup>54</sup>

The Senate affirmed “the applicability to all treaties of the constitutionally-based principles of treaty interpretation set forth in condition (1) in the resolution of ratification approved by the Senate on May 27, 1988, with respect to the INF Treaty” in declarations in the Resolutions of Ratification of the Treaty on Conventional Armed Forces in Europe (CFE) in 1991, the START I Treaty in 1992, the Open Skies Treaty in 1993, the Start II Treaty in 1996, and the Chemical Weapons Convention and the Flank Document Agreement to the CFE Treaty in 1997.<sup>55</sup> Since 1997, the Senate has added a modified version of this condition to its resolution of ratification on all treaties that have come before it.<sup>56</sup>

### C. OBLIGATION TO IMPLEMENT

Disputes involving treaties commonly center on questions relating to a party’s implementation of its obligations. A question that may be raised under U.S. law is whether or not Congress has a duty to implement a treaty which is in force internationally, but which requires additional legislation or implementation or an appropriation of funds to give effect to obligations assumed internationally by the United States.

When implementation of a treaty requires domestic legislation or an appropriation of funds, only the Congress can provide them.<sup>57</sup> The issue of the extent of the obligation of Congress to appropriate money arose with debate on the Jay Treaty, the first treaty concluded under the Constitution. In the 1796 debates on appropriations for the treaty, Treasury Secretary Hamilton argued that as treaties are the law of the land, Congress was obligated to appro-

<sup>54</sup> Congressional Record, v. 134, May 27, 1988, p. 12849. See also discussion of treaty interpretation in Chapter VI.

<sup>55</sup> CFE Treaty, Exec. Rept. 102–22, p. 81; START I Treaty, Exec. Rept. 102–53, pp. 96, 101–102; Open Skies Treaty, Exec. Rept. 103–5, p. 16; START II Treaty, Exec. Rept. 104–10, p. 46; Chemical Weapons Convention, 143 Congressional Record, April 24, 1997, p. S3656 (daily ed.); and Flank Document Agreement, Exec Rept. 105–1, pp. 22–24.

<sup>56</sup> For further discussion, see Chapter VI, under “Condition Regarding Treaty Interpretation.”

<sup>57</sup> Article I, Section 9 of the U.S. Constitution provides that “no money shall be drawn from the Treasury, but in consequence of appropriations made by law.”

appropriate the money to implement them. Members of Congress, notably James Madison, maintained that the House was free to decide whether or not to approve appropriations regardless of any treaty obligations. The House eventually approved the request for funds, but appended to its approval a stipulation that it was free not to approve such requests in the future.<sup>58</sup> The House manual notes subsequent occasions when the House maintained the position that a treaty must depend on a law for its execution of stipulations that relate to subjects constitutionally entrusted to Congress.<sup>59</sup>

Although the Congress has usually insisted on the right of choice not to appropriate funds to implement a perfected treaty, historically the funds have generally been forthcoming. Exceptions do exist, however, notably past congressional reluctance to appropriate the full amounts of money assessed for U.S. contributions to the United Nations.<sup>60</sup>

The extent of congressional obligation to implement a treaty under U.S. law has not been resolved in principle.<sup>61</sup> According to an often-cited authority, Congress has generally responded “to a sense of duty to carry out what the treaty-makers promised, to a reluctance to defy and confront the President (especially after he can no longer retreat), to an unwillingness to make the U.S. system appear undependable, even ludicrous. But the independence of the legislative power (subject only to the Presidential veto as provided in the constitution) has given Congress opportunities to interpret the need for implementation and to shape and limit it in important details; Congress has not always given the President exactly the laws he asked for or as much money as he said a treaty required.”<sup>62</sup>

With regard to funding U.S. international obligations, Congress, since 1971, has made a number of cuts in appropriations for the multilateral development banks. In 1971, the administration requested \$912.85 million and received only \$455 million. Although the level of such cuts has varied, they have occurred consistently on an annual basis. For fiscal year 1993, the administration requested \$1,785.5 million, the Congress appropriated only \$1,583.5 million.<sup>63</sup> This included contributions which were less than the administration had requested for some multilateral programs and more than the administration had requested for others.<sup>64</sup>

<sup>58</sup> Byrd, Elbert M. Jr. *Treaties and Executive Agreements in the United States: Their Separate Roles and Limitations*. 1960, pp. 35–39.

<sup>59</sup> U.S. Congress. House. Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States. H.R. Doc. 104–272, § 596, 104th Cong., 2d Sess.

<sup>60</sup> See generally Bite, Vita. U.S. Withholding and Arrearages to the United Nations Regular Budget: Issues for Congress. Congressional Research Service Report 91–515F, June 19, 1991; and Bite, Vita. U.N. System Funding: Congressional Issues. Congressional Research Service Issue Brief for Congress IB86116 (updated December 14, 2000).

<sup>61</sup> Henkin, Louis. *Foreign Affairs and the United States Constitution*. 2d ed. 1996, p. 205 (hereafter cited as Henkin). However, failure to implement an internationally perfected treaty would constitute a violation of obligations assumed by the United States under international law. See Memorandum of April 12, 1976, by Monroe Leigh, Legal Adviser, Department of State, as quoted in U.S. Department of State. *Digest of U.S. Practice in International Law* 1976. 1977, p. 221.

<sup>62</sup> Henkin, pp. 205–206.

<sup>63</sup> Public Law 102–266, signed April 2, 1992. For a table and breakdown of the cuts see Sanford, Jonathan E. *U.S. Foreign Policy and Multilateral Development Banks*. 1982, pp. 126–129 (hereafter cited as Sanford 1982).

<sup>64</sup> See Sanford, Jonathan E. *Multilateral Development Banks: U.S. Contributions FY 1990–2001*. CRS Report for Congress RS 20792.

Among other things, these events may be seen as evidence of the Congress' desire to make clear its right and power to specify commitment levels and to make appropriations cuts even after approving international agreements.<sup>65</sup> For example, in 1974 Congress enacted legislation authorizing the Secretary of the Treasury "to pledge on behalf of the United States to pay" \$1.5 billion in four equal annual installments, as the U.S. share of the fourth replenishment to the International Development Association. In a letter to Treasury Secretary William Simon, however, the Senate Appropriations Committee stressed that Congress "was not committed to any given funding level until that figure is actually appropriated." After the administration nonetheless filed papers with the World Bank formally committing the United States to an agreement to pay this amount,<sup>66</sup> Congress responded by cutting by \$55 million the first U.S. payment to the International Development Association in what reportedly was an attempt by Congress to make clear its dissatisfaction over the commitment issue.<sup>67</sup> Beginning in 1977, Congress had stipulated in its authorization acts that the U.S. Government could not make any formal commitment until the necessary appropriations legislation was enacted. As a recent example, Congress in 1997 required the Secretary of the Treasury to obtain the appropriation prior to making final commitment for the contribution to the financial institution for its eleventh replenishment on behalf of the United States.<sup>68</sup>

The Senate may also use its advice and consent to a treaty as an opportunity to make clear that appropriation of funds will be made subject to the appropriations process on a year-to-year schedule. In the case of the Treaty of Friendship and Cooperation Between the United States and Spain,<sup>69</sup> the President had promised security assistance to Spain over a 5-year period in exchange for U.S. base rights. The Senate, however, conditioned its advice and consent to the treaty on a declaration intended to emphasize that appropriation of the promised funds could only be done by statutory authorization and not by treaty alone.<sup>70</sup> The pertinent language of the Senate declaration involved reads:

<sup>65</sup> For a discussion of the commitment issue generally, see Sanford 1982, pp. 152-179.

<sup>66</sup> Sanford 1982, p. 171. For the text of the Appropriations Committee letter, see U.S. Senate, Foreign Assistance and Related Programs Appropriation Bill, 1976. S. Rept. 94-704, 94th Cong., 2d Sess., 1976, pp. 165-167.

<sup>67</sup> U.S. Congress, House, Foreign Assistance and Related Programs Appropriations Bill, 1976, H. Rept. 94-857, 94th Cong., 2d Sess., 1976, pp. 50-51. The last portion of the \$55 million was ultimately restored in fiscal year 1981, well after the schedule provided for in the original commitment.

<sup>68</sup> Public Law 105-118, Sec. 560(a), 111 Stat. 2425, 22 U.S.C. § 284s note (Supp. IV 1999). In 1999, however, Congress, without using the appropriations condition employed in earlier years, authorized the Secretary of the Treasury, in order "to fulfill commitments of the United States \*\*\* [to] contribute on behalf of the United States \*\*\* to the twelfth replenishment of the International Development Association"; at the same time, Congress authorized an appropriation of \$2.41 billion for this purpose. Public Law 106-113, Appendix B—H.R. 3422, Sec. 594, 113 Stat. 1501A-122. In 1998, Congress added an appropriations condition to authority granted to the United States Governor of the International Monetary Fund to consent to an increase in the U.S. quota in the Fund equivalent to 10,622,500,000 Special Drawing Rights. 22 U.S.C. § 286e-1m (Supp. IV 1999), as added by Public Law 105-277, Div. A, § 101(d) [title VI, § 608], 112 Stat. 2681-224.

<sup>69</sup> Treaty of Friendship and Cooperation between the United States and Spain, signed Jan. 24, 1976, entered into force Sept. 21, 1976, 27 U.S.T. 3005, TIAS 8360.

<sup>70</sup> U.S. Congress, Senate, Treaty of Friendship and Cooperation with Spain, S. Exec. Rept. 94-25, 94th Cong., 2d Sess., p. 7. The language in this report specified that the committee intends "to make it clear that funds will be made available to carry out the Treaty from year to year through the normal appropriations process, including prior authorizations procedures" and \*\*\* "intends to deal with funding of the Treaty commitments for foreign assistance and military

the sums referred to in \* \* \* the Treaty, shall be made available for obligation through the normal procedures of the Congress, including the process of prior authorization, and annual appropriations shall be provided to Spain in accordance with the provisions of foreign assistance and related legislation.<sup>71</sup>

Congress, in the exercise of its appropriation power, can also earmark funds for a specific purpose, thereby preventing their use for other purposes. The record suggests, however, that this has often been held impermissible under the rules of multilateral agencies. One example involving funds to implement a treaty is found in the 1975 fiscal year appropriations for the Inter-American Development Bank. In that year, Congress earmarked \$50 million of the bank's concessional aid specifically for loans to cooperative institutions. The bank, however, refused to accept the funds on the ground that its charter prohibits acceptance of conditional contributions to its regular loan accounts. Congress subsequently rescinded the earmarking requirements in its 1976 fiscal year appropriations legislation.<sup>72</sup> In another instance, legislation in October 1978 prohibited the use of U.S. assessed contributions to the United Nations for financing of technical assistance to other countries.<sup>73</sup> President Carter, when signing the bill into law, voiced a strong opposition to those restrictions saying that "if allowed to stand, this [congressional] action would cause the United States to violate its treaty obligations to support the organizations of the United Nations system."<sup>74</sup>

Another method by which Congress has attempted to use the appropriations power to influence treaty implementation is through sense of the Congress resolutions. Congress has used such resolutions to indicate its views about reasonable funding required to give effect to a treaty. In 1977 and 1978, Congress passed legislation specifying the U.S. share in future multilateral development bank funding plans.<sup>75</sup> In such instances, by specifying in advance the limits of its intent to commit funds, the Congress hoped to reduce the possibility of future congressional-executive branch friction over the issue.

More recently, Congress has called for legislative-executive consultation prior to and during international negotiations leading up

sales in the regular foreign assistance authorization and appropriation and legislation." Excerpts from the committee report are also found in U.S. Department of State. *Digest of United States Practice in International Law* 1976. 1977, pp. 232-233.

<sup>71</sup> See S. Exec. Rept. 94-25, and *Digest of United States Practice in International Law* 1976. 1977, p. 232.

<sup>72</sup> U.S. Congress. Senate. Foreign Assistance and Related Agencies Appropriations Bill, 1975. S. Rept. 94-39, 94th Cong., 1st Sess., 1975, pp. 151-155 and U.S. Congress. Senate, Foreign Assistance and Related Agencies Appropriations Bill, 1976. S. Rept. 94-704, 94th Cong., 2d Sess. 1976, pp. 161-162. See also Sanford, Jonathan. U.S. Policy toward the Multilateral Development Banks: The Role of Congress. *George Washington Journal of International Law and Economics*, v. 22, 1988, pp. 49-57.

<sup>73</sup> The Department of State, Justice and Commerce, the Judiciary, and Related Agencies Appropriations Act, 1979, Public Law 95-431, 92 Stat. 1021.

<sup>74</sup> For the text of the President's statements, see U.S. Department of State. *Digest of United States Practice in International Law* 1978. pp. 136-137.

<sup>75</sup> See Foreign Assistance and Related Programs Appropriations Act, 1978, Public Law 95-148, 91 Stat. 1238, for the sense of the Senate on future U.S. contributions to the international financial institutions. (22 U.S.C. 262c note). See Foreign Assistance and Related Programs Appropriations Act, 1979, Public Law 95-481, 92 Stat. 1591, for the sense of the Congress on such funding. Note that it is not unusual for the executive branch to negotiate and sign agreements "subject to the availability of funds."

to agreements involving funds. In 1981, Congress added Title XII to the International Financial Institutions Act, which states:

Title XII—Congressional Consultations<sup>76</sup>

Sec. 1201. The Secretary of the Treasury or his designee shall consult with the Chairman and the Ranking Minority Member of—

(1) the Committee on Banking, Finance, and Urban Affairs of the House of Representatives, the Committee on Appropriations of the House of Representatives, and the appropriate subcommittee of each such committee, and

(2) the Committee on Foreign Relations of the Senate, the Committee on Appropriations of the Senate, and the appropriate subcommittee of each such committee, for the purpose of discussing the position of the executive branch and the views of the Congress with respect to any international negotiations being held to consider future replenishments or capital expansions of any multilateral development bank which may involve an increased contribution or subscription by the United States. Such consultation shall be made (A) not later than 30 days before the initiation of such international negotiations, (B) during the period in which such negotiations are being held, in a frequent and timely manner, and (C) before a session of such negotiations is held at which the United States representatives may agree to such a replenishment or capital expansion.

Similarly, the Foreign Operations Appropriation Act for Fiscal Year 1993 called for consultation prior to negotiations of agreements on funding multilateral financial institutions, stating the following:

Prior Consultations on IFI Replenishments<sup>77</sup>

Sec. 537. Prior to entering into formal negotiations on any replenishment for any international financial institution or multilateral development bank, the Secretary of the Treasury shall consult with the Committees on Appropriations and appropriate authorizing committees on the United States position entering those negotiations.

<sup>76</sup> 22 U.S.C. 262g-3. International Financial Institutions Act, Public Law 95-118, as amended. Title XII was added by sec. 1361(b) of Public Law 97-35.

<sup>77</sup> Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993, Public Law 102-391.

## IX. AMENDMENT OR MODIFICATION, EXTENSION, SUSPENSION, AND TERMINATION OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS <sup>1</sup>

### A. INTRODUCTION <sup>2</sup>

The Constitution in clear and unmistakable terms settles only three matters with respect to treaties:<sup>3</sup> it establishes the treaty power and identifies the treaty-making principals;<sup>4</sup> it provides that self-executing treaties together with the Constitution and Federal laws constitute the supreme law of the land;<sup>5</sup> and it withholds from the several states of the United States authority to enter into any treaty.<sup>6</sup> On a whole range of concerns affecting the subject of treaties, including amendment or modification, extension, suspension, and termination, the Constitution is silent. More than 200 years of practice and judicial decisions have filled some of the mentioned and other gaps,<sup>7</sup> but a number of treaty-related issues persist without definitive resolution.

<sup>1</sup> Prepared by David M. Ackerman, Legislative Attorney.

<sup>2</sup> In determining the legal framework governing the subjects of this chapter, considerable reliance has been placed on the Vienna Convention on the Law of Treaties and the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (1987). Some use has also been made of the edition of the Restatement published in 1965 and, on occasion, a tentative draft Restatement which contained the ALI's study drafts leading up to the revisions that appear in the Restatement (Third). Other major sources of information have been the various editions of the Department of State's Digest of International Law, notably the Hackworth, Whiteman, and Nash (Leich) editions, supplemented by the annual volumes that appeared from 1973–1980 and the post-1988 notes on the "Contemporary Practice of the United States Relating to International Law" that appear in the quarterly American Journal of International Law. Reference has also been made to such treatises as Butler, Charles Henry. *The Treaty-Making Power of the United States Senate*. New York: The Banks Law Publishing Company, 1902; Crandall, Samuel B. *Treaties: Their Making and Enforcement*. Washington, D.C., John Byrne & Company, 1916; and Henkin, Louis. *Foreign Affairs and the United States Constitution* (2d ed.). Oxford: Clarendon Press, 1996. The Senate Foreign Relations Committee's biennial reports of its legislative activities have in recent years also provided helpful information with respect to legislative, principally Senate, developments. For summaries of the committee's activities in the 101st, 102d, 103d, and 104th Congresses, see S. Rept. 102–30 (1991); S. Rept. 103–35 (1993); S. Rept. 104–21 (1995); and S. Rept. 105–8 (1997), respectively.

<sup>3</sup> International law does not distinguish between agreements designated as treaties and other international agreements; all such agreements are denominated as treaties. In domestic law, however, the word "treaty" means an international agreement made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring. Other international agreements, also from a purely domestic perspective, include executive agreements pursuant to treaty, congressionally-authorized executive agreements, and sole executive agreements or executive agreements more or less exclusively based on Presidential powers. See Chapters III and IV.

<sup>4</sup> Article II, sec. 2, Clause 2.

<sup>5</sup> Article VI, sec. 2.

<sup>6</sup> Article I, sec. 10, Clause 1.

<sup>7</sup> For example, a treaty may not appropriate funds. *Turner v. American Baptist Missionary Union*, 24 F. Cas. 344 (No. 14, 251) (C.C. Mich. 1852). A treaty may not enact criminal law. Compare *United States v. Hudson & Goodwin*, 7 Cranch (11 U.S.) 32 (1812); *United States v. Coolidge*, 1 Wheat. (14 U.S.) 415 (1816); cf. *The Estrella*, 4 Wheat. (17 U.S.) 298 (1819).



Neither the records of the Proceedings at the Constitutional Convention<sup>8</sup> nor those of the ratifying conventions in the states<sup>9</sup> indicate the reasons for these glaring omissions. It may be, as one commentator has suggested in discussing treaty termination, that “perhaps the Framers were concerned only to check the President in ‘entangling’ the United States; ‘disentangling’ is less risky and may have to be done quickly, and is often done piecemeal, or ad hoc, by various means and acts.”<sup>10</sup>

The constitutional treatment of other kinds of international agreements, designated executive agreements, is even more sparse than that of treaties. The Constitution does not expressly authorize the making of international agreements other than treaties, but executive agreements on a variety of subjects and of varying degrees of importance have been common from the earliest of times under the Constitution.<sup>11</sup>

Although these domestic legal matters are of more than passing interest, they have not prevented the United States from amending or modifying, extending, suspending, and terminating international agreements. As a state in the international community of states, the United States is subject to international law, the law that governs relations between states.<sup>12</sup> Accordingly, the United States, constitutional silence notwithstanding, is invested with powers which belong to all independent nations. In a celebrated passage from a landmark Supreme Court decision, this idea was expressed as follows:

It results that 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. \* \* \* 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 other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation \* \* \*, the power to expel undesirable aliens \* \* \*, *the power to make such international agreements as do not constitute treaties in the constitutional sense* \* \* \*, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and \* \* \* found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.<sup>13</sup>

<sup>8</sup> See, generally, Farrand, Max. *The Records of Convention of 1787* (4 vols.), Yale University Press (1966).

<sup>9</sup> See, generally, Elliot, Jonathan. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (5 vols.), Burt Franklin, New York (1888 ed.).

<sup>10</sup> Henkin, Louis. *Foreign Affairs and the United States Constitution* (2d ed.), Clarendon Press (1996), p. 212 (hereafter cited as Henkin).

<sup>11</sup> See Chapters III and IV.

<sup>12</sup> American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, vol. 1, American Law Institute Publishers (1987), § 1 (hereafter cited as *Restatement (Third)* or *Rest. 3d*).

<sup>13</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (emphasis added).

As a general rule, international law and domestic law regarding the amendment or modification, extension, suspension, and termination of treaties and other international agreements are in substantial harmony. International law recognizes the power to accomplish each of these ends in the proper circumstances and allows and accommodates adherence to domestic legal procedures relating to the manner of their execution. However, as the fundamental rule of treaties is that they are to be observed,<sup>14</sup> provisions of internal law are generally not available as a justification for the failure of a party to carry out a treaty.<sup>15</sup>

It can be argued that amendment or modification, extension, suspension, and termination of a treaty are essentially the forging of new agreements and that, therefore, each is subject to the same rules as apply to the making of a treaty, that is, conjoint action by the President and the Senate. However, that conclusion is not established by an unbroken line of consistent practice. By and large the participation of the Senate with respect to amendment or modification and extension of treaties seems fairly well established; suspension seems largely left to Presidential determination; termination has happened in such a variety of ways that it has been said that “[n]o settled rule or procedure has been followed.”<sup>16</sup> But even the supposed iron-clad domestic rule that the amendment or modification of a treaty has to be accomplished by an instrument of equal dignity which is subject to Senate approval has been departed from on at least a pair of notable occasions. “For example, both the Italian and Japanese peace treaties have been altered by executive agreements not subject to Senate approval.”<sup>17</sup> Moreover, to the extent that congressionally-authorized executive agreements have become the legal equivalent of treaties,<sup>18</sup> it can be contended that the amendment or modification and extension of a treaty could be accomplished by such an executive agreement, although this does not appear to have happened in practice.

Judged as a purely domestic legal matter, the amendment or modification, extension, suspension, and termination of an executive agreement concluded by the President can be accomplished by the President alone.<sup>19</sup> This conclusion seems to be invariably true in the case of executive agreements concluded by virtue of exclusive Presidential authority and frequently but not always true with re-

<sup>14</sup> *Pacta sunt servanda* or “agreements must be kept” is a fundamental rule of international law. Article 26 of the Vienna Convention on the Law of Treaties, Senate. Ex. L, 92d Cong., 1st Sess. (April 24, 1970), states the rule as follows: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

<sup>15</sup> With regard to internal law and the observance of treaties, Article 27 of the Vienna Convention on the Law of Treaties provides, in part, as follows: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” However, an exception is allowed under Article 46 of the Convention in one specific circumstance, namely, where the violation of internal law “was manifest and concerned a rule of \*\*\* internal law of fundamental importance.”

<sup>16</sup> Whiteman, Marjorie. *Digest of International Law*, 1970. v. 14, 460 (hereafter cited as 14 Whiteman). Compare S. Rept. 97, 34th Cong., 1st Sess. See, generally, U.S. Congress. Senate. Committee on Foreign Relations. *Termination of Treaties: The Constitutional Allocation of Power*. Committee Print. 95th Cong., 2d Sess. (1978).

<sup>17</sup> U.S. Congress. Senate. Committee on Foreign Relations. *International Agreements: An Analysis of Executive Regulations and Practices*. Committee Print. 95th Cong., 1st Sess., 10, n. 16 (1977).

<sup>18</sup> Rest. 3d, *supra*, note 12, §303, Comment e, p. 161: “The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”

<sup>19</sup> *Ibid.*, § 339, Reporters’ Note 2.

spect to executive agreements authorized by statute or treaty.<sup>20</sup> In the two last mentioned circumstances, the authorizing statute or treaty may conceivably condition amendment or modification, extension, suspension, and termination on senatorial or congressional approval.<sup>21</sup>

Finally, treaties and executive agreements generally may both be superseded by an act of Congress in so far as their domestic consequences are concerned.<sup>22</sup> However, legislation alone does not affect the international obligation of the United States under a treaty or executive agreement.

Several post-World War II developments have impacted the Senate's role with respect to international agreements. One of these developments has been the shift to executive agreements and away from treaties, a subject documented elsewhere in this volume. That shift, arguably, has diminished the role of the Senate and given greater prominence to Presidential initiative and, in the case of congressionally-authorized executive agreements, to the House of Representatives. As previously noted, executive agreements have been used in at least two instances to modify treaties.

The emergence and growth in multiparty or multilateral international agreements seems also to have had a decided impact on Senate consideration of amendments and modifications. For instance, in discussing other countries' reservations to treaties with the United States at a time when bilateral treaties were the norm, the Solicitor of the Department of State wrote some years ago that "[i]f after the ratification of an international treaty, by the United States, this Government should be asked to agree to reservations on the part of some other nation, I think that the Executive could not give such agreement without the consent of the Senate."<sup>23</sup> But that does not appear to be the case with respect to reservations to multilateral agreements. "[I]n 1966, the Office of the Legal Adviser to the Department of State asserted flatly that since 1946 not a single reservation to a multilateral treaty had been submitted to the Senate for approval."<sup>24</sup> The Restatement (Third) similarly observes:

If another party formulates a reservation to a treaty to which the United States is a party, the reservation cannot become effective as to the United States, through acceptance or failure to object, unless the Senate has given its consent. In multilateral agreements, however, the Executive Branch has developed the practice of accepting or acquiescing in reserva-

<sup>20</sup>"No one has questioned the President's authority to terminate sole executive agreements. Where the Constitution lodges the power to terminate \*\*\* a congressional-executive agreement has been an issue at various times in the history of the United States. Practice has varied, the President sometimes terminating an agreement on his own authority, sometimes when requested to do so by Congress or by the Senate alone." *Ibid.* See also Hackworth, Green Haywood, *Digest of International Law*, 1927, v. V, p. 429 (hereafter cited as V Hackworth).

<sup>21</sup>"Congress could impose such a condition in authorizing the President to conclude an agreement that depended on Congressional authority." *Restatement of the Law: Foreign Relations Law of the United States (Revised) (Tentative Draft No. 1, 1980)*, p. 193 (hereafter cited as *Draft Restatement*).

<sup>22</sup>*Head Money Cases*, 112 U.S. 580 (1884); *Whitney v. Robertson*, 124 U.S. 581 (1888); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). The fact that this results in a violation of international law by the United States does not appear to be of any constitutional significance. Henkin, *supra*, note 2, p. 485, note 130.

<sup>23</sup>Wildhaber, Luzius. *Treaty-Making Power and the Constitution*. Basel and Stuttgart, Helbing & Lichtenhahn, 1971, p. 67.

<sup>24</sup>*Ibid.*

tions by another state, entered after United States adherence to the treaty, without seeking Senate consent \* \* \*.<sup>25</sup>

This practice is due, perhaps, to the large number of signatories frequently involved in multilateral agreements and the sometimes technical and complex nature of their subject matter.

A related practice that has begun to occur with increasing frequency is the inclusion in some multilateral agreements of provisions barring reservations.<sup>26</sup> The Senate Committee on Foreign Relations has protested that no-reservations clauses intrude on the Senate's constitutional prerogatives but, nonetheless, has given its advice and consent to a number of such treaties.<sup>27</sup>

Another development that has had implications for the Senate's role with respect to multilateral agreements is the evolving practice of tacit amendment. The practice takes various forms—Presidential acquiescence, nonsubmission of reservations by other parties, implementing bodies with the authority to make changes, and amendment by fewer than all of the parties—and has not escaped the Senate Foreign Relations Committee's attention. The committee has at times sought to establish some rough ground rules to ensure committee oversight of such practices (as distinguished from formal Senate approval by two-thirds vote) while not unduly delaying the

<sup>25</sup> Rest. 3d, *supra*, note 12, § 314, Comment c.

<sup>26</sup> See, for example, Article 24 of the United Nations Framework Convention on Climate Change, TIAS \_\_\_\_\_ (1994); Article 24 of the Protocol on Environmental Protection to the Antarctic Treaty, TIAS \_\_\_\_\_ (1998); Article 25 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, FCCC/CP/L.7/Add.1 (1997) (not yet submitted to the Senate); Article 18 of the Vienna Convention for the Protection of the Ozone Layer, TIAS 11097 (1988); Article 309 of the United Nations Convention on the Law of the Sea, Tr. Doc. 103–39 (submitted to the Senate on October 7, 1994); Article 10 of the South Pacific Regional Environment Programme Agreement, Tr. Doc. 105–32 (November 7, 1997); United Nations Convention To Combat Desertification in Countries Experiencing Drought, Particularly in Africa, With Annexes, Tr. Doc. 104–29 (approved by the Senate on October 18, 2000); and Article 23 of the Inter-American Convention on Sea Turtles, Tr. Doc. 105–48 (approved by the Senate on September 20, 2000).

<sup>27</sup> The Senate Committee on Foreign Relations has generally voiced its objection to no-reservations clauses in its reports on the treaties which contain them. Typical is its report recommending Senate advice and consent to the Protocol on Environmental Protection to the Antarctic Treaty, which stated as follows: “\* \* \* [T]he Senate's approval of these treaties should not be construed as a precedent for such clauses in future agreements with other nations requiring the Senate's advice and consent \* \* \*. The President's agreement to such a prohibition can not constrain the Senate's advice and consent to a treaty subject to any reservation it might determine is required by the national interest.” S. Exec. Rept. 102–54 (September 22, 1992), at 7.

More recently, however, the committee has expressed its objection in the form of declarations included in the Senate's resolutions of ratification. A declaration in the resolution of ratification on the Inter-American Convention on Sea Turtles, which was approved by the Senate on September 20, 2000, stated as follows: “\* \* \* [I]t is the sense of the Senate that this 'no reservations' provision has the effect of inhibiting the Senate in its exercise of its constitutional duty to give advice and consent to ratification of a treaty, and the Senate's approval of these treaties should not be construed as a precedent for acquiescence to future treaties containing such provisions.” S. Exec. Rept. 106–18 (September 5, 2000), at 5.

The Senate had previously included a similar declaration in its resolution of ratification on the United Nations Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks when it gave its advice and consent to the convention on June 27, 1996. See 142 Congressional Record, June 27, 1996, p. S7210 (daily ed.). The Senate also included a sense of the Senate declaration in its resolution of ratification on the CWC, approved on April 24, 1997, which stated as follows: “SENSE OF THE SENATE.—It is the sense of the Senate that—(i) the advice and consent given by the Senate in the past to ratification of treaties containing provisions which prohibit amendments or reservations should not be construed as a precedent for such provisions in future treaties; (ii) United States negotiators to a treaty should not agree to any provision that has the effect of inhibiting the Senate from attaching reservations or offering amendments to the treaty; and (iii) the Senate should not consent in the future to any article or other provision of any treaty that would prohibit the Senate from giving its advice and consent to ratification of the treaty subject to amendment or reservation.” 143 Congressional Record, April 24, 1997, p. S3656 (daily ed.).

amending process.<sup>28</sup> But the practice developed under these ground rules and committee experience associated with them apparently have not been rigorously analyzed.

Thus, theory and past practice regarding the necessity for joint action by the President and the Senate on treaty-related matters are not always clear or consistent. As the Senate Committee on Foreign Relations indicated in 1979, these developments are largely the result of expediency and the press of time and circumstances.<sup>29</sup> They also illustrate once again that

The actual art of governing under our Constitution does not and cannot conform to \*\*\* definitions \*\*\* based on isolated clauses or even single Articles torn from context.<sup>30</sup> \*\*\* [I]t is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed.<sup>31</sup>

## B. AMENDMENT AND MODIFICATION<sup>32</sup>

### TREATIES

The amendment of a binding international agreement may be accomplished in a variety of ways including, among others, in accordance with provisions included for that purpose in the agreement, by the consent of the parties, and by entry into force of a new, subsequent agreement on the same subject involving the same parties.

The inclusion in international agreements of provisions for their modification is a fairly common practice. It reflects the common-sense view that the conditions which prevail at the time the parties negotiate an agreement may change and that a procedure to adjust to new conditions is the height of prudence and wisdom.

Amendment or modification of an international agreement by consent of the parties is recognition of the fact that consent is the foundation of international agreements. Accordingly, the parties are at liberty to change an international agreement regardless of its terms. For similar reasons a later agreement on the same subject involving the same parties that expressly or by implication modifies an earlier agreement will be regarded as effecting the resulting change.

The Vienna Convention on the Law of Treaties embraces these broad principles in Article 39 of Part IV, captioned "General rule regarding the amendment of treaties." It provides that

[a] treaty may be amended by agreement between the parties. The rules laid down in Part II [relating, among other things, to the conclusion of treaties] apply to such an agreement except in so far as the treaty may otherwise provide.

<sup>28</sup> S. Exec. Rept. 96-36, 96th Cong., 2d Sess. (1980), p. 2. See also discussion of tacit acceptance of reservations in Chapter VII.

<sup>29</sup> S. Rept. 96-119, 96th Cong., 1st Sess. (1979), p. 5.

<sup>30</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>31</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981).

<sup>32</sup> The Vienna Convention on the Law of Treaties uses the word "amendment" to denote changes in an international agreement applicable to all of the parties and the word "modification" to refer to changes in an international agreement applicable to only some of the parties. Arts. 40 and 41. The distinction has implications only with respect to multilateral agreements, not bilateral ones.

This general principle applies to the amendment of bilateral and multilateral treaties alike.

Article 40, in turn, sets out both procedural and substantive rules for the amendment of a multilateral treaty in the strict Vienna Convention sense of a revision that applies to all of the parties. Article 40 provides that, unless the treaty in question provides otherwise, the following four considerations apply to an amendment:

(1) Notice of any proposal to amend a multilateral treaty as between all the parties has to be communicated to every party, and each party has the right to take part in the decision as to the action in regard to the proposal and to take part in the negotiation and conclusion of any agreement to amend the treaty.

(2) Every state entitled to become a party to the treaty is also entitled to become a party to the treaty as amended.

(3) An amending agreement does not bind a party to the treaty which does not become a party to the amending agreement; the unamended treaty continues to govern the mutual rights and obligations as between parties one of which is not and one of which is bound by the amending agreement.<sup>33</sup>

(4) In the absence of an expression to the contrary, a state which becomes a party after the amending agreement has come into force is to be considered as (a) a party to the treaty as amended and (b) a party also to the unamended treaty in its relations with any party which is not bound by the amending agreement.

Finally, Article 41 deals with the modification of a multilateral treaty in the strict Vienna Convention sense of a change that is intended to apply to fewer than all of the parties to an international agreement. It provides that two or more parties to a multilateral treaty *inter se* may modify it and bind themselves if the treaty allows such a modification. If the treaty does not specifically allow such a modification but does not prohibit it, Article 41 states that a modification of this nature is still permitted provided that the modification does not affect the enjoyment of the rights or the performance of obligations of the other parties to the treaty and does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. Unless the *inter se* agreement is one provided for by the treaty, the parties to it must notify the other parties of their intention to conclude the agreement and of the modifications for which it provides.

The Restatement (Third) states a rule for the conduct of the United States with respect to amendment or modification of an international agreement that is generally in conformity with the just described international law on the subject. Section 334, thus, provides that:

(1) An international agreement may be amended by agreement between the parties.

<sup>33</sup> Article 40 references Article 30(4)(b), which provides that in instances when one state is a party to both an original treaty and a subsequent treaty that alters the first and another state is a party only to the first treaty, their mutual rights and obligations are governed by the treaty to which they both are parties.

(2) Unless it provides otherwise, a multilateral agreement may be amended, with effect as between those states that become parties to the amending agreement, if all the contracting states were given an opportunity to take part in the negotiations and to become parties to the agreement as amended.

(3) Two or more of the parties to a multilateral agreement may agree to modify the agreement as between themselves alone if such modification is provided for by the agreement or it is not prohibited by it and would not be incompatible with the rights of the other parties to the agreement or with its object and purpose.<sup>34</sup>

As previously indicated, amendments or modifications to a treaty or international agreement generally have entailed the same procedure as the original agreement unless otherwise specified in the original agreement. Thus, the Hackworth edition of the Digest of International Law states that “the modification of [an] existing treaty \*\*\* involves the conjoint action of the treaty-making powers in a variety of circumstances,”<sup>35</sup> and the Whiteman edition reiterates that “it is a general rule that a treaty cannot be modified except by an instrument brought into force through the treaty processes.”<sup>36</sup> Consequently, the advice and consent of the Senate has generally been sought for amendments to treaties. The Whiteman edition of the Digest of International Law describes one such instance, as follows:

\*\*\* At the 29th session of the General Conference of the International Labor Organization (ILO), Montreal, October 9, 1946, there were adopted an instrument for the amendment of the ILO Constitution \*\*\* and a Final Articles Revision Convention, 1946 \*\*\* In transmitting to the Congress a draft of a joint resolution providing for acceptance of the United States of the revised Constitution, the following statement was made in a document accompanying the letter from the Secretary of State:

“The Final Articles Revision Convention, which is printed in the same document, is to be discussed in a separate memorandum. It is intended that this convention will be submitted to the Senate for its advice and consent inasmuch as its intended effect is to change the language of conventions which have been ratified with the advice and consent of the Senate or are pending before that body.”<sup>37</sup>

Similarly, the Senate on October 1, 1992, without fanfare or protracted debate, gave its advice and consent to Presidential ratification of the Strategic Arms Reduction Treaty (START) along with an amending protocol. START, a product of 10 years of frequently difficult negotiations between the United States and the former Soviet Union, reduced rather than simply placed a cap on weapons systems possessed by the rival Cold War superpowers. Signed July 31, 1991, by President Bush and then-Soviet President Mikhail S. Gorbachev, the treaty became caught up in the events that led to

<sup>34</sup> Rest. 3d, *supra*, § 334.

<sup>35</sup> V Hackworth, *supra*, p. 333.

<sup>36</sup> 14 Whiteman, *supra*, p. 441.

<sup>37</sup> *Ibid.*, pp. 59–60.

the dissolution of the Soviet Union and the emergence of more than a dozen new states on its territory. Accordingly, the Bush Administration negotiated an amendatory protocol providing that four of the new succeeding states which had strategic offensive weapons within their borders (Russia, Belarus, Ukraine and Kazakhstan) would assume the former Soviet Union's obligations under the treaty as originally drafted. The administration submitted the protocol to the Senate, and the Senate then approved both START and the amendatory protocol at the same time.<sup>38</sup>

More recently, the Senate has forcefully insisted on its right to advise and consent on amendments to treaties. One of the treaty issues that emerged in the aftermath of the dissolution of the Soviet Union concerned the definition of what states were to be deemed its successor states for purposes of allocating its rights and obligations under the Anti-Ballistic Missile (ABM) Treaty. After lengthy negotiations a Memorandum of Understanding on Succession (MOUS) was concluded in September 1997, which designated Belarus, Kazakhstan, Russia, and Ukraine as the successor parties to the treaty and allocated to them specified rights and obligations. The Clinton Administration had contended that the determination of the successor states did not constitute an amendment to the ABM Treaty but was an exercise of the President's constitutional prerogatives to determine state succession issues for purposes of treaty continuity.<sup>39</sup> But a number of Senators disagreed with that perspective; and prior to the signing of the MOUS the Senate included the following condition in its resolution of ratification on an unrelated agreement, the Conventional Forces in Europe Flank Document:<sup>40</sup>

(9) SENATE PREROGATIVES ON MULTILATERALIZATION OF THE ABM TREATY.—

(A) \* \* \*

(B) CERTIFICATION REQUIRED.—Prior to the deposit of the United States instrument of ratification, the President shall certify to the Senate that he will submit for Senate advice and consent to ratification any international agreement—

(i) that would add one or more countries as States Parties to the ABM Treaty, or otherwise convert the ABM Treaty from a bilateral treaty to a multilateral treaty; or

(ii) that would change the geographic scope or coverage of the ABM Treaty, or otherwise modify the meaning of the term "national territory" as used in Article VI and Article IX of the ABM Treaty.

<sup>38</sup>The protocol was submitted to the Senate on June 23, 1992. See Senate Treaty Doc. 102-32, 102d Cong., 2d Sess. (1992).

<sup>39</sup>See Letter from William C. Danvers, Special Assistant to the President, to Al Gore, President of the United States Senate transmitting the "Report on the Livingston ABM Amendment" (November 29, 1996), reported as filed in the Senate at 143 Congressional Record, January 7, 1997, p. S87 (daily ed.) (No. EC 175). The Livingston amendment, § 406 of the Department of State and Related Agencies Appropriations Act for Fiscal 1997, required the President to report to Congress on whether the MOUS and the Agreed Statement on Demarcation (ASD) constituted "substantive changes" to the ABM Treaty and whether they "require the advice and consent of the Senate."

<sup>40</sup>TIAS \_\_\_\_ (May 15, 1997).



(C) \* \* \* 41

President Clinton protested that this condition invaded “a matter reserved to the President under the Constitution” and was substantively unrelated to the CFE Flank Document but, nonetheless, certified that he would submit “any agreement concluded on ABM Treaty succession” to the Senate for its advice and consent.<sup>42</sup>

The Senate’s advice and consent on the CFE Flank Document was itself the result of Senate insistence on its prerogatives. The 1990 Treaty on Conventional Forces in Europe (CFE) was an arms control agreement between the 22 nations of the North Atlantic Treaty Organization (NATO) and the Warsaw Pact placing alliancewide, regional, and national ceilings on specific major categories of conventional military equipment. The purpose of the pact was to stabilize the military situation in Europe and to reduce tensions. But the dissolution of the Warsaw Pact and the breakup of the Soviet Union necessitated measures to adapt the provisions of the CFE to the changed circumstances. One of the resulting agreements was the CFE Flank Document, which allowed Russia to maintain a higher level of certain categories of military equipment in the Caucasus and Baltic regions of its territory than would otherwise have been allowed. The Clinton Administration initially sought to gain approval of the agreement by means of a statute to be adopted by the House and the Senate. But the Senate rebuffed that effort; and in negotiations on whether the Senate would take up the Chemical Weapons Convention (CWC), the Senate leadership obtained the administration’s commitment to submit the CFE Flank Document to the Senate for its advice and consent. The administration did so;<sup>43</sup> and, as noted above, the Senate gave its approval on May 14, 1997.

The Clinton Administration had also sought to have another agreement relating to the ABM Treaty approved by means of a statute rather than by submission to the Senate for its advice and consent. U.S. interest in developing a theater missile defense system led the administration to pursue negotiations with several of the successor states to the Soviet Union on a “clarification” of the ABM Treaty to establish a demarcation line between ballistic missile defense systems restricted by the treaty and theater missile defense systems that were allowable. Ultimately the negotiations succeeded in concluding an Agreed Statement Regarding Demarcation (ASD) in June 1996, which was subsequently elaborated and signed by the United States, Russia, Belarus, Kazakhstan, and the Ukraine in September 1997.<sup>44</sup> The administration agreed that the ASD constituted a “substantive modification of the obligations we would otherwise have under the Treaty,” but it contended that the change could be approved by Congress by statute and that it did not need to be submitted for the Senate’s advice and consent.<sup>45</sup>

<sup>41</sup> For the text of the Senate’s resolution of ratification on the CFE Flank Document, see 143 Congressional Record, May 14, 1997, p. S4477 (daily ed.).

<sup>42</sup> 143 Congressional Record, May 15, 1997, pp. S4587–S4588 (daily ed.) (Report on the CFE Flank Document—Message from the President).

<sup>43</sup> Treaty Doc. 105–5, 105th Cong., 1st Sess. (April 7, 1997).

<sup>44</sup> The texts of these agreements can be found on the State Department’s Web site at [www.state.gov/www/global/arms/bureau\\_ac/missile](http://www.state.gov/www/global/arms/bureau_ac/missile).

<sup>45</sup> See letter from William C. Danvers, Special Assistant to the President, to Al Gore, President of the United States Senate, *supra*, n. 39, and Office of Legal Counsel, Department of Jus-

Nonetheless, bargaining over the Senate's willingness to consider the CWC caused the administration to agree to submit the ASD to the Senate for its advice and consent.<sup>46</sup>

Senate advice and consent may not be required, however, when an agreement is effectively amended or modified by a later agreement or when an act of Congress affects a treaty in some vital regard. Thus, when the United States and another country were parties to a bilateral treaty but then became parties to a multilateral convention covering the same subject matter (in part), the convention was judicially declared to modify conflicting provisions in the bilateral agreement and to control the proceeding.<sup>47</sup> Similarly, when an earlier convention was merely suspended by the terms of a later agreement on the same subject, the expiration of the latter automatically caused the former to resume operation and effect "without further action of Congress."<sup>48</sup> Moreover, in an instance when an act of Congress authorized the President to suspend the exercise of judicial functions by American diplomatic and consular officials in Egypt, the President was advised by the State Department that he could give "practical effect" to a convention providing for termination of extraterritorial rights in Egypt granted by previous treaties pending formal ratification of the convention by the United States.<sup>49</sup> Likewise, when American consular officers were authorized to exercise judicial functions by virtue both of an act of Congress and a treaty, Secretary of State Lansing indicated that "the appropriate method under the American system of Government of divesting the Consuls of this authority is either by a repeal of the act or by conclusion of [another] treaty \* \* \*."<sup>50</sup>

Senate advice and consent may also not be required if treaties are amended by means of tacit agreement. While acknowledging that "[t]he President is \* \* \* without authority, except by and with the advice and consent of the Senate, to modify a treaty provision," Hackworth states that there have been "instances in which he [the President], acting through the Secretary of State, has tacitly acquiesced in actions by foreign Governments which had the effect of modifying stipulations in our treaties."<sup>51</sup> Examples of change in the strict terms of an international agreement by tacit acquiescence documented by Hackworth involved multilateral arrangements accepted by all the parties and temporary departures during periods of abnormal conditions such as war or pending action on a new treaty.<sup>52</sup>

Moreover, as previously noted, notwithstanding the general rule regarding the need for Senate approval, the Department of State in the post-World War II period has not been sending to the Senate reservations on the part of other nations to multilateral treaties

tice, "Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty" (November 25, 1996).

<sup>46</sup> As of November 2000, however, neither the ASD nor the MOUS had yet been sent to the Senate.

<sup>47</sup> *Fotochrome Inc. v. Copal Company Ltd.*, 517 F. 2d 512 (2d Cir. 1975), note 4.

<sup>48</sup> V Hackworth, *supra*, p. 338.

<sup>49</sup> *Ibid.*, at 341-342.

<sup>50</sup> *Ibid.*, at 334.

<sup>51</sup> *Ibid.*, at 340.

<sup>52</sup> *Ibid.*, at 339-341.

ratified by the United States.<sup>53</sup> The Restatement (Third) takes note of the practice and concludes with this observation:

Constitutionally, that practice must depend on an assumption that the Senate, aware of Executive practice and acquiescing in it, in giving consent to the treaty also tacitly gives its consent to later acceptance by the Executive of reservations by other states.<sup>54</sup>

The tacit amendment process may also occur pursuant to the explicit provisions of some treaties. Due, perhaps, to their complexity and technical specificity, a number of arms control and environmental agreements establish processes for their own modification which do not require further Senate involvement. The modifications allowed typically are described as not rising to the level of an amendment of the treaties; but, nonetheless, the processes permit the treaty regime to evolve in some respects without reference to the Senate. The INF Treaty, for instance, created a Special Verification Commission with the authority to modify the verification procedures used under the treaty and, in the case of the Inspections Protocol, to “agree upon such measures as may be necessary to improve the viability and effectiveness of this Protocol.”<sup>55</sup> The CFE Treaty, in turn, created a Joint Consultative Group with the authority to agree to improvements of a technical or administrative nature.<sup>56</sup> The START agreement includes a number of provisions that allow the Joint Compliance and Inspection Commission to “agree upon such additional measures as may be necessary to improve the viability and effectiveness of the Treaty.”<sup>57</sup> The United States-Japan Convention for the Protection of Migratory Birds allows the parties to modify the list of birds protected by diplomatic note.<sup>58</sup> The Montreal Protocol on Substances that Deplete the Ozone Layer allows the parties to restrict the production and consumption of substances specified in the annexes as depleting atmospheric ozone as well as the timetable by which such adjustments must be made.<sup>59</sup> Some agreements explicitly permit modifications to become effective for all parties even absent unanimous agreement. The Montreal Protocol on Substances that Deplete the Ozone Layer, for instance, encourages consensus but as a last resort allows decisions regarding the production and consumption of ozone-depleting substances which are binding on all parties to be made by a two-thirds majority vote.<sup>60</sup> The International Convention on Safety of Life at Sea permits amendments to enter into force automatically after a specified time period has elapsed, absent objection by a quorum of parties.<sup>61</sup> The U.N. Charter, in Article 108, provides that an amendment comes into force for all members if it is approved by two-thirds of the members of the General

<sup>53</sup> See note 23 and accompanying text.

<sup>54</sup> Rest. 3d, *supra*, § 314, Comment c.

<sup>55</sup> INF Treaty, TIAS \_\_\_\_\_, 27 ILM 84 (1988), Articles XI and XIII.

<sup>56</sup> CFE Treaty, TIAS \_\_\_\_\_, 30 ILM 1 (1991), Article XVI.

<sup>57</sup> START, TIAS \_\_\_\_\_ (1994). For a description and critical discussion of the tacit amendment processes in these and a number of other arms control agreements, see Koplou, David A. When Is an Amendment Not an Amendment: Modification of Arms Control Agreements Without the Senate. *University of Chicago Law Review*, v. 59, 1992, p. 981.

<sup>58</sup> 25 UST 3329 (1972).

<sup>59</sup> TIAS \_\_\_\_\_ (1987), Article 2(9).

<sup>60</sup> *Ibid.*

<sup>61</sup> 32 UST 47 (1980), Article VIII.

Assembly and ratified by two-thirds of the member states including all permanent members of the Security Council.

The Senate, in giving its advice and consent to the treaties which contain these various processes for modification, presumably has also given its consent in advance to the modifications adopted pursuant to those processes. Nonetheless, the tacit amendment process has given the Senate some concern, and it has at times requested or required the executive branch to advise the Senate of such amendments prior to their entry into force. In its report recommending the approval of the Convention on the Prevention of Maritime Pollution by Dumping of Wastes and other Matter as modified by a 1978 protocol,<sup>62</sup> the Senate Foreign Relations Committee tried to balance the need to prevent undue delay with its oversight responsibility. It said:

It should be noted that the 1973 parent convention contains a provision (Article 16) which provides for a tacit amendment process. The Committee recognizes the need for an expedited process for highly technical treaties of this nature. *However, the Committee will approve this procedure only on a case-by-case basis and only with respect to technical provisions.* The Committee expects the Administration to inform it of any proposed amendments subject to this procedure prior to the time for tacit acceptance. This will enable the Committee to voice an objection to tacit acceptance in appropriate cases, before the issue becomes moot.<sup>63</sup>

While the reasons behind the committee's attempt to bridge efficiency and presumed constitutional requirements in this manner are readily understood, the procedure raises various fundamental questions. Notably, whether the committee, on its own motion, may tacitly consent for two-thirds of the Senate or whether the Congress by law or the Senate by rule could authorize the committee to act in this manner are unresolved issues.<sup>64</sup>

#### EXECUTIVE AGREEMENTS

As "[t]he Constitution of the United States nowhere makes explicit provision for the President to conclude international agreements other than treaties,"<sup>65</sup> it follows that the Constitution offers no guidance regarding the amendment of executive agreements.<sup>66</sup> Furthermore, authoritative texts and secondary writings to all appearances fail to shed any significant light on the actual practice of amending executive agreements.

<sup>62</sup> 26 UST 2403; TIAS 8165.

<sup>63</sup> S. Exec. Rept. 96-36, 96th Cong., 2d Sess. (1980), p. 2 (emphasis added).

<sup>64</sup> See *INS v. Chadha*, 462 U.S. 919 (1983) (one house veto held unconstitutional); *Consumer Union v. FTC*, 691 F. 2d 575 (D.C. Cir. 1982), affd. sub nom, *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983) (two house veto held unconstitutional); *American Federation of Government Employees v. Pierce*, 697 F. 2d 303 (D.C. Cir. 1982) (committee veto held unconstitutional).

<sup>65</sup> 14 Whiteman, supra, p. 194. See Chapter IV.

<sup>66</sup> The power of the President to make executive agreements has been recognized by the Supreme Court, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *United States v. Pink*, 315 U.S. 203 (1942). "A treaty signifies 'a compact made between two or more independent nations with a view to the public welfare.' \*\*\* But an international compact 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 [assigning foreign assets] \*\*\* are illustrations." *United States v. Belmont*, 301 U.S. at 330-331.

As previously noted, the general rule is that the amendment or modification of an international agreement to which the United States is a party is subject to the same rules as apply to the making of an agreement. Accordingly, since agreements of this nature concluded by the President are not submitted to the Senate or Congress for approval, amendments to such agreements ordinarily do not require Senate or congressional approval. It seems clear that in the case of an executive agreement based on the sole authority of the President, modifications to such an agreement are a matter of Presidential discretion.<sup>67</sup> As a general matter, the same conclusion applies to modifications of executive agreements pursuant to either a treaty or an act of Congress.<sup>68</sup> It would appear that so long as the amendment of an executive agreement is consonant with the underlying treaty or law which authorized the agreement in the first instance, that is, the agreement carries out their purposes, the President would be within his rights to make such an amendment.

However, Congress may impose limitations on agreements it authorizes to be made.<sup>69</sup> Notably in the fields of international trade and nuclear energy Congress has authorized the President to conclude international agreements but has required him to submit them for congressional scrutiny and possible disapproval.<sup>70</sup> Moreover, the Senate may condition approval of a treaty which authorizes the conclusion of an agreement upon submission of the agreement for approval by the Senate or Congress.<sup>71</sup> Similarly, an act of Congress or treaty could require Senate or congressional approval of amendments or modifications to international agreements that they authorize the President to conclude.<sup>72</sup>

### C. EXTENSION

#### TREATIES

The Vienna Convention on the Law of Treaties deals implicitly rather than explicitly with the subject of treaty extension. Extension of an international agreement to all intents and purposes is

<sup>67</sup>See note 20. "\*\*\* the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution." Rest. 3d, supra, § 303(4).

<sup>68</sup>\*\*\* (2) the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution; (3) the President may make an international agreement as authorized by treaty of the United States." Ibid.

<sup>69</sup>Ibid., at 223.

<sup>70</sup>For example, Trade Act of 1974, 88 Stat. 1982 (1975); 19 U.S.C. 2112. Nuclear Non-Proliferation Act of 1978, 92 Stat. 120 (1978); 42 U.S.C. 2153(d), 2155(b), 2157(b), and 2160(f).

<sup>71</sup>"The treaty of inter-American arbitration signed at Washington, on January 5, 1929, was submitted to the Senate by President Coolidge on January 26, 1929. The Senate, on January 19, 1932, advised and consented to its ratification with reservations, which were regarded by the Executive as highly objectionable. In 1934, President Roosevelt resubmitted the treaty to the Senate, and, in 1935, it gave its advice and consent to ratification, without certain of the reservations previously insisted upon, although it did so with the understanding that the special agreements to arbitrate should, in each instance, be subject to approval by the Senate. The President ratified the treaty with this understanding, and the ratification was deposited on April 16, 1935." V Hackworth, supra, p. 93.

"The Senate often has given its consent subject to conditions \*\*\* The Senate may \*\*\* give its consent on conditions that do not require change in the treaty but relate to domestic application, e.g., \*\*\* that agreements \*\*\* made in implementation of the treaty shall require the Senate's advice and consent." Rest. 3d, supra, § 303, Comment d.

<sup>72</sup>For example, Section 33 of the Arms Control and Disarmament Act, 75 Stat. 634 (1961); 22 U.S.C. 2573, provides that no "action" shall be taken that obligates the United States to disarm or reduce or limit the Armed Forces of the United States unless pursuant to treaty or unless authorized by legislation.

the execution of a new agreement (or re-execution) and, therefore, is subject to the convention's overall requirements for treaties, including conclusion, amendment and modification, suspension, and termination.

As an agreement to extend a treaty for many, if not most, purposes is considered a treaty modification, general U.S. practice is to submit an extension to the Senate for its advice and consent. Accordingly, when France gave 6-months' notice of termination as provided in Article VII of the Commercial Convention of 1822 but requested tacit extension for 3-month periods after the termination date until it was replaced by a new treaty, the Department of State replied:

\*\*\* [T]he Government of the United States is not in a position to agree to the proposals \*\*\*. The suggestion of the French government amounts \*\*\* in my opinion to a proposal to modify the terms of the treaty, a proposal which is not susceptible of execution on the part of the Government in the manner suggested.<sup>73</sup>

Instead, the Department proposed a new treaty modifying Article VII to allow for termination upon 3-months' notice as the best means of complying with the French request. The latter accepted this suggestion and after the new agreement went into effect, the United States and France, in an exchange of notes, agreed that the new treaty amounted to a withdrawal of the French notice of termination.<sup>74</sup> Similar replies were given to requests for postponement of termination of treaties made by Norway, Spain, and Greece.<sup>75</sup>

Similarly, when Italy proposed that commissioners acting under a treaty serve indefinite terms rather than the 5-year term established in the treaty, the Department of State replied that this change could not be made by an exchange of notes but would require a new treaty.<sup>76</sup> In like manner, when the United States and Canada agreed to depart from a 1909 treaty concerning the diversion of boundary waters in the Niagara River to permit an additional diversion for power purposes, the exchange of notes stated that the agreement would be effective "when approved by the Senate."<sup>77</sup> "The Senate of the United States advised ratification on June 2, 1941, and the President 'approved' the arrangement on June 13."<sup>78</sup>

The extension of commodity agreements—agreements establishing the framework for international cooperation in wheat, coffee, tin, and sugar—are routinely submitted to the Senate. The International Wheat Agreement of 1971, which was replaced in 1988 by a 1986 successor, was extended on more than half a dozen occasions.<sup>79</sup> In 1981 the Senate gave its advice and consent to an 8-month extension of the rights, duties, and obligations of the parties under the Treaty of Friendship and Cooperation of January 24,

<sup>73</sup>V Hackworth, *supra*, p. 334.

<sup>74</sup>*Ibid.*, p. 335.

<sup>75</sup>*Ibid.*

<sup>76</sup>*Ibid.*

<sup>77</sup>*Ibid.*

<sup>78</sup>*Ibid.*, p. 336.

<sup>79</sup>Treaty Doc. 97-9, p. v (1981); S. Exec. Rept. 100-10, 100th Cong., 1st Sess. (1987), p. 12. The 1986 agreement provided for 2-year extensions on the basis of the mutual consent of the participating countries without resort to formal ratification procedures. *Ibid.*, p. 20.

1976, between the United States and Spain. The temporary extension, among other things, preserved in force U.S. access to and use of military facilities in Spain pending negotiation of a successor agreement to the 1976 treaty and Spain's accession to the North Atlantic Treaty.<sup>80</sup>

However, the extension of times for the organization of commissions called for by various treaties was in one instance accomplished by an exchange of notes and in another by agreement of the members of the commission.<sup>81</sup>

The role of the Senate with respect to the extension or enlargement of a treaty in terms of geographic scope and parties eligible to adhere seems to depend on the nature of the treaty. In the case of treaties providing for regional or collective self defense arrangements, the Senate has been insistent that its approval is required for the addition of new members. Whiteman provides the following relevant illustrations:

The Senate Committee on Foreign Relations, in its report of June 6, 1949, recommending advice and consent to ratification of the [North Atlantic] Treaty commented:

Inasmuch as the admission of new members might radically alter our obligations under the pact, the committee examined article 10 very carefully. The question arose whether an United States decision respecting new members would be based solely on Presidential action or would require Senate approval. Consequently, the committee was fully satisfied by the commitment of the President, delivered by the Secretary of State, that he would consider the admission of a new member to the pact as the conclusion of a new treaty with that member and would seek the advice and consent of the Senate to each such admission. The committee considers this is an obligation binding upon the Presidential office.<sup>82</sup>

The report of the Foreign Relations Committee recommending ratification of the [Southeast Asia Collective Defense] Treaty stated:

Provision is made in three articles of the treaty for modification of its terms by unanimous agreement. Thus, article IV, paragraph 1, as well as article VII, contemplates that the treaty area may be extended by the parties to any state or territory 'which the parties by unanimous agreement may hereafter designate.' Article VII refers to the accession of additional states 'by unanimous agreement of the parties.' To avoid the possibility of any misunderstanding on the significance of this clause, the President informed the Senate \* \* \* that the provisions with respect to designation of new territories and membership are to be construed as requiring the Senate's advice and consent. In other words, it is not enough that the executive branch should acquiesce in the addition of new members or in the

<sup>80</sup>Treaty Doc. 97-20, 97th Cong., 1st Sess. (1981), p. 1.

<sup>81</sup>V Hackworth, *supra*, p. 337.

<sup>82</sup>14 Whiteman, *supra*, p. 100, quoting S. Exec. Rept. 8, 81st Cong., 1st Sess. (1949), p. 18.

modification of the treaty area, but these matters must also be brought before the Senate.<sup>83</sup>

In contrast, the Senate has generally not sought or reserved to itself any role with respect to state participation in most other multilateral conventions, including those establishing international organizations. The admission of new states to the United Nations, for instance, is effected by decision of the General Assembly upon the recommendation of the Security Council.<sup>84</sup> No review or approval by the Senate is required.<sup>85</sup>

#### EXECUTIVE AGREEMENTS

In the case of an international agreement in the form of an executive agreement, extension does not involve the Senate or Congress if the agreement is based on the President's exclusive constitutional authority. But if the executive agreement is pursuant to treaty or congressional authorization, the Senate's consent to the treaty or Congress' authorization may specify conditions on its extension and reserve a role for the Senate or Congress. In the Magnuson Fishery Conservation and Management Act of 1976, for instance, Congress directed the Secretary of State to negotiate "governing international fishery agreements" (other than treaties), specified the conditions that they had to meet, and directed that no such agreements be "renewed, extended, or amended" unless they met the specified conditions.<sup>86</sup> Subsequently, Congress by statute approved the extension of several such agreements.<sup>87</sup>

#### D. SUSPENSION<sup>88</sup>

##### TREATIES

The provisions in the Vienna Convention on the Law of Treaties regarding the suspension of the operation of a treaty parallel the provisions of the convention relating to the termination of a treaty. Briefly, the operation of a treaty as to all of the parties or as to a particular party may be suspended in conformity with its provisions or by consent of all of the parties.<sup>89</sup>

Two or more parties to a treaty may agree to suspend the operation of its provisions temporarily and as between themselves alone in accordance with relevant treaty provisions. In the absence of relevant provisions, parties in these circumstances may agree to suspend the operation of treaty provisions under two conditions. The first is that the suspension does not affect the enjoyment by other

<sup>83</sup> *Ibid.*, p. 101, quoting S. Exec. Rept. 11, 84th Cong., 1st Sess. (1957), pp. 11-12.

<sup>84</sup> U.N. Charter, Article 4; 59 Stat. 1031; 3 Bevens 1153.

<sup>85</sup> See S. Exec. Rept. F, 79th Cong., 1st Sess. (1945).

<sup>86</sup> 16 U.S.C. 1822(c); Public Law 94-265, Title II, § 202 (April 13, 1976); 90 Stat. 331, 340.

<sup>87</sup> See, for example, Public Law 98-364, Title I, § 106 (July 17, 1984) (approving the extension of the Governing International Fishery Agreement with the European Economic Community) and Public Law 100-66, § 1 (July 10, 1987) (approving the extension of the Governing International Fishery Agreement with South Korea).

<sup>88</sup> "Suspension is distinguished from termination \*\*\* principally in that suspension can be revoked or terminated informally and no new agreement is necessary to restore the agreement to full effect. Unilateral suspension can be revoked and the agreement reactivated unilaterally by the suspending party; suspension by agreement of the parties can be ended and the agreement restored by agreement of the parties informally." Rest. 3d, *supra*, § 333, Comment a. "Suspension of an agreement is relatively rare." *Ibid.*, Reporters' Note 3.

<sup>89</sup> Vienna Convention on the Law of Treaties, *supra*, Article 57.



parties of their rights under the treaty or the performance of their obligations. The second is that the suspension cannot be incompatible with the object and purpose of the treaty. Unless suspension is allowed by the treaty, the suspending parties are required to give notice of their intention to suspend to the other parties.<sup>90</sup>

Generally speaking, where parties, without expressly terminating an earlier treaty, enter into another and incompatible treaty on the same subject, the former is deemed terminated. However, a treaty in these circumstances is not considered to have been terminated if it appears from the later treaty or it is otherwise established that the parties intended only to suspend its operation.<sup>91</sup>

A material breach of a bilateral treaty by one party entitles the other party to invoke the breach as a ground for terminating the treaty or suspending its operation, in whole or in part. In the case of a material breach of a multilateral treaty by one of the parties, the Vienna Convention distinguishes between the right of the other parties to react jointly to the breach and the right of an individual party specially affected by the breach to react alone. In the first case, the other parties by unanimous agreement may suspend the operation of the treaty or terminate it and they may do so either in their relations with the defaulting state or as between all the parties. In the second case any party specially affected by the breach may invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state. Where a material breach is of such a character that it radically changes the position of every party with respect to the performance of its obligations under the treaty, any other party may invoke the breach to suspend the operation of the treaty in whole or in part with respect to itself.<sup>92</sup>

The Restatement (Third) follows a portion of the Vienna Convention in Section 333 as follows:

(1) The operation of an international agreement may be suspended in conformity with its provisions or by consent of all the parties.

(2) Two or more parties to a multilateral international agreement may agree to suspend its operation as between themselves if

(a) the agreement provides for such suspension; or

(b) the agreement does not prohibit such suspension and the suspension would not be incompatible with the rights of the parties to the agreement or with its object and purpose.<sup>93</sup>

While acknowledging that the Constitution does not expressly authorize the President to suspend an international agreement on behalf of the United States, the Restatement (Third) concludes that he may do so because he is empowered to conduct the foreign relations of the United States. The Restatement's rules covering suspension are formulated accordingly. Thus Section 339 provides that:

<sup>90</sup> *Ibid.*, Article 58.

<sup>91</sup> *Ibid.*, Article 59.

<sup>92</sup> *Ibid.*, Article 60.

<sup>93</sup> Rest. 3d, *supra*, § 333.

Under the law of the United States, the President has the power

- (a) to suspend \*\*\* an agreement in accordance with its terms;
- (b) to make the determination that would justify the United States in \*\*\* suspending an agreement because of its violation by another party or because of supervening events, and to proceed to \*\*\* suspend the agreement on behalf of the United States; or
- (c) to elect in a particular case not to suspend or terminate an agreement.<sup>94</sup>

The Restatement rule is in line with a 1941 opinion by Acting Attorney General Biddle who concluded that a treaty could be suspended by the President without aid or intervention of the Senate or Congress. With respect to the International Load Line Convention signed at London on July 5, 1930, which limited the amount of cargo that ships could carry, he said:

The convention may be declared inoperative or suspended by the President. A declaration by the President to that effect would validly render the convention inoperative or suspended, as the case may be. Attention to the observance of treaties is an executive responsibility. Jefferson to Genet, 4 Moore, Digest Int. L. 680-682 (1906). It is not proposed that the United States denounce the convention under article 25 (47 Stat. 2256), nor that it be otherwise abrogated. Consequently, action by the Senate or by the Congress is not required. Cf. 1 Stat. 578, 5 Moore, Digest Int. El 356. The facts which bring into operation the right to declare the convention inoperative or suspended are within the knowledge of and can be promptly and adequately appraised by the Executive Department; and it is proper that the President, as "the sole organ of the Nation in its external relations should speak for the Nation in announcing action which international law clearly permits." See *United States v. Curtiss-Wright Export Corporation* (1936) 299 U.S. 304, 319-320. See also *Charlton v. Kelly* (1913) 229 U.S. 447, 472-476. There is no question here of making or even of the abrogation of a treaty. It is merely a question of a declaration of inoperativeness of a treaty which is no longer binding because the conditions essential to its continued effectiveness no longer pertain.

Accordingly, it is my opinion that the convention referred to may be declared by you to be either inoperative or suspended; and that upon such declaration it would become inoperative or suspended as the case may be leaving the Secretary of Commerce free to set load lines pursuant to the act of March 2, 1929, c. 508 (45 Stat. 1492), as amended by the act of May 26, 1939, c. 151 (55 Stat. 783), without regard to the convention.<sup>95</sup>

Fundamental to the Attorney General's position was the assumption that the convention presupposed peacetime conditions which no longer prevailed. Accordingly, the President could recognize the

<sup>94</sup> Ibid. § 339.

<sup>95</sup> V Hackworth, supra, p. 339, citing 40 Op. Atty. Gen., no. 24 (1941). See 14 Whiteman, supra, pp. 483-485.

changed circumstances (*rebus sic stantibus*) and suspend the convention during the pendency of the abnormal circumstances. Without taking sides as to whether the rule of changed circumstances applies only when the change is essential or fundamental, the opinion concluded that the more onerous circumstance was met in this case.

As previously indicated, a material breach of a bilateral international agreement by one of the parties entitles the other to suspend it in whole or in part. Also, a material breach of a multilateral agreement by one of the parties entitles the other parties by unanimous agreement to suspend it either between themselves and the defaulting state or as between all the parties. Under his authority to conduct the foreign relations of the United States, the President makes the determination that justifies suspending an agreement because of a material breach by another party. Accordingly, as a practical matter the President has the power to suspend a treaty since the courts look to executive determinations for guidance respecting the continued viability of a treaty.<sup>96</sup> Thus, in 1986 the United States gave notice that it was suspending the obligations of the ANZUS Security Treaty as it applied to New Zealand because of that country's prohibition on visits by nuclear-armed and nuclear-powered warships and aircraft. At the same time it gave notice to Australia, the other party to the ANZUS Treaty, that the treaty remained in full effect between the United States and Australia.<sup>97</sup>

Where an intervening act of Congress effectively grants the President discretion to suspend a treaty provision in some material regard, there is no need for Senate or congressional action when the discretion is exercised. Accordingly, when an act of Congress authorized the President to suspend the exercise of judicial functions of American consular and diplomatic officials, the State Department concluded that he could suspend the jurisdiction of the consular and ministerial courts in Egypt and permit their jurisdiction to be transferred to the mixed courts of that country notwithstanding that ratification of a pertinent convention by the United States was still pending.<sup>98</sup>

Also, it has been observed that by virtue of his power to recognize or not to recognize governments, the President can continue or suspend treaty relations with the country in question.<sup>99</sup>

In light of the tendency of domestic courts to be guided by executive actions regarding the continued effectiveness of a treaty, actions effectively waiving noncompliance by the other party do not as a practical matter require Senate or congressional approval. Thus, in upholding the extradition to Italy of an American national notwithstanding Italy's refusal earlier to surrender Italian nationals—a refusal which the United States regarded as a breach of the extradition treaty—the Supreme Court held in favor of the treaty and extradition. It said:

<sup>96</sup> *Charlton v. Kelly*, 229 US 447, 476 (1913). See also *Terlinden v. Ames*, 184 U.S. 270, 290 (1902), and *Baker v. Carr*, 369 U.S. 186, 211–212 (1962).

<sup>97</sup> Nash, *Cumulative Digest 1981–1988*, supra, Book I, pp. 1279–1281.

<sup>98</sup> V Hackworth, supra, p. 342.

<sup>99</sup> Henkin, supra, at 489, note 138.

\*\*\* If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach \*\*\*

That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case.

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.<sup>100</sup>

In 1957 the Department of State indicated that while the President "as a practical matter" can waive the breach of a treaty, the power "would be exercised only in light of the circumstances of the particular case, including anticipated congressional reactions \*\*\*." <sup>101</sup>

Concerning the exercise of a Presidential waiver adversely affecting the rights of American citizens under a treaty, the following comment has been made:

Although it is a general rule that a treaty to which the United States is a party cannot be modified except by the instrument brought into force through the treaty processes, the effect of modification may be achieved in some instances by a waiver of rights under a treaty or a failure to invoke the treaty in circumstances where it could be invoked. To an inquiry from Senator Jenner, Secretary of State Dulles replied:

In light of the fact that your letter \*\*\* specifically raised the question whether the Department of State under the present administration claims "authority to modify treaties," \*\*\* I am glad to assure you that it is my view that the Executive may modify a treaty, or a provision thereof, only by the conclusion of another instrument of equal formality, i.e., by another treaty entered into by and with the advice and consent of the Senate. This is also the view of my advisers, who are fully aware of my position and fully share my views.

To summarize, there are certain instances in which rights to which United States citizens are entitled under treaties or other United States laws may, in the national interest, legally be waived, lessened or extinguished by acts, agreements or decisions of the Executive Branch of the Government. You may be assured, however, that no such decisions would be taken in any situation without

<sup>100</sup> *Charlton v. Kelly*, 229 U.S. 447, 473, 474, 476 (1913).

<sup>101</sup> 14 *Whiteman*, supra, p. 477.

very careful consideration at a high level of the rights involved and the national interest.<sup>102</sup>

#### EXECUTIVE AGREEMENTS

Unless qualified by an act of Congress or treaty authorizing the agreement (that is, by the Senate's conditioning its advice and consent), the President may unilaterally suspend an executive agreement.

#### E. TERMINATION OR WITHDRAWAL

##### TREATIES

##### *Terms of treaty; unanimous consent*

As indicated in connection with the discussion of suspension, the Vienna Convention on the Law of Treaties sets forth the fundamental rule that a treaty may be terminated or that a party may withdraw from a treaty in two ways: first, in conformity with the provisions of the treaty; and second, at any time by consent of all the parties.<sup>103</sup> Most commentaries on this aspect of treaty law agree that the modern practice is to include in international agreements provisions dealing with their termination. These provisions take various forms, such as establishing the agreements' duration, specifying a date for their termination, identifying a condition or event which lays the basis for their termination, or providing for the right to denounce or withdraw from the treaty.

A fairly common formulation conditions the right to withdraw upon notice to the other parties of the intention to withdraw and the expiration of a fixed period of time. In the case of a bilateral treaty the exercise of the right means termination; in the case of a multilateral treaty, withdrawal may, but does not necessarily, terminate the treaty with respect to the other parties. Of course, as consent is the basis of all international agreements, the parties may in most, if not all, circumstances put an end to a treaty by unanimous consent.

Under international law a treaty which does not make any provision for its termination or for denunciation or withdrawal is not subject to denunciation or withdrawal. This prohibition flows from the fundamental principle of international law that treaties are to be observed (*pacta sunt servanda*), that is, that treaty obligations are binding and cannot be unilaterally waived.<sup>104</sup> However, the Vienna Convention allows two exceptions to this rule. Denunciation or withdrawal notwithstanding treaty silence on the subject is permitted if "it is established that the parties intended to admit of the possibility of denunciation or withdrawal" or, alternatively, if "a right of denunciation or withdrawal may be implied by the nature of the treaty." In either of these circumstances, the Vienna Convention states that 12-months' notice must be given of an intention to denounce or withdraw from a treaty.<sup>105</sup>

<sup>102</sup> Ibid., pp. 441-442.

<sup>103</sup> Vienna Convention on the Law of Treaties, supra, Article 54.

<sup>104</sup> Ibid., Article 26.

<sup>105</sup> Ibid., Article 56.

The Restatement (Third) elucidates the U.S. position on the termination and denunciation of international agreements in a manner that is generally in accord with Articles 54 and 56 of the Vienna Convention. Thus, Section 332 provides that:

(1) The termination and denunciation of an international agreement, or the withdrawal of a party from an agreement, may take place only

(a) in conformity with the agreement or

(b) by consent of all the parties.

(2) An agreement that does not provide for termination or denunciation or for the withdrawal of a party is not subject to such action unless the right to take such action is implied by the nature of the agreement or from other circumstances.<sup>106</sup>

The termination of a treaty under international law is not confined to circumstances where termination is the unanimous desire of the parties or in conformity with treaty provisions for termination. A treaty may be effectively terminated when all of the parties to it conclude a later treaty on the same subject if it appears from the latter or it is otherwise established that the parties intended that the matter should be governed by the second treaty. A similar result obtains where the provisions of the later treaty are so incompatible with the earlier one that the two of them cannot effectively coexist.<sup>107</sup>

### *Breach*

Under Article 60 of the Vienna Convention, a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty in whole or in part. In the case of a material breach of a multilateral treaty, the other parties by unanimous agreement may terminate it either in their relations with the defaulting state or all the other parties. A material breach for this purpose consists of an unjustified repudiation of the treaty or a violation of a provision essential to the accomplishment of any object or purpose of the treaty.<sup>108</sup>

The Restatement's treatment of a material breach of an international agreement as a ground for the agreement's termination follows closely in line with the corresponding provisions of the Vienna Convention. Section 335 summarizes the U.S. position as follows:

(1) A material breach of a bilateral agreement by one of the parties entitles the other to invoke the breach as a ground for terminating the agreement or suspending its operation in whole or in part.

(2) A material breach of a multilateral agreement by one of the parties generally entitles

(a) the other parties by unanimous consent to suspend the operation of the agreement in whole or in part or to terminate it, either

<sup>106</sup> Rest. 3d, supra, § 332.

<sup>107</sup> Vienna Convention on the Law of Treaties, supra, Article 59. The Restatement (Third) indicates that the United States adheres to this view regarding the termination of an international agreement by conclusion of a later incompatible agreement. See Rest. 3d, supra, § 332, Comment e.

<sup>108</sup> *Ibid.*, Article 60.

- (i) in the relations between themselves and the defaulting state, or
- (ii) as among all the parties;
- (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the agreement in whole or in part in the relations between itself and the defaulting state;
- (c) any party other than the defaulting state to invoke the breach as a ground for suspending the operation of the agreement in whole or in part with respect to itself, if the agreement is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the agreement.<sup>109</sup>

*Impossibility of performance*

The termination of a treaty may result from a supervening impossibility of performance, a condition that arises from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. The impossibility has to be permanent and may not be the result of a breach by the invoking party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.<sup>110</sup>

*Rebus sic stantibus*

A treaty may become inapplicable and, therefore, subject to being terminated because of a fundamental change of circumstances that has occurred since the conclusion of the treaty. This longstanding principle of international law is commonly called the doctrine of *rebus sic stantibus*. In order for the doctrine to apply, the change in circumstances from those that prevailed at the time the treaty was concluded must be both fundamental and not foreseen by the parties. In addition, the existence of the original circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty, and the effect of the change must be radically to transform the extent of the obligations still to be performed under the treaty. According to the Vienna Convention, the doctrine may not be invoked to terminate a treaty which establishes a boundary. Similarly, it is unavailable if the fundamental change is the result of a breach by the party invoking it, a breach either of an obligation owed under the treaty or of any other international obligation owed to any other party to the treaty.<sup>111</sup>

The doctrine of changed circumstances or *rebus sic stantibus* is described by the Restatement (Third) as follows:

A fundamental change of circumstances that has occurred with regard to those existing at the time of the conclusion of an international agreement, and which was not foreseen by the parties, may generally be invoked as a ground for terminating or withdrawing from the agreement but only if

<sup>109</sup> Rest. 3d, supra, § 335.

<sup>110</sup> Vienna Convention on the Law of Treaties, supra, Article 61.

<sup>111</sup> Ibid., Article 62.

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the agreement and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the agreement.<sup>112</sup>

The Restatement (Third) emphasizes that the invocation of this doctrine is “exceptional,”<sup>113</sup> and Hackworth and Whiteman cite but one instance of its use by the United States (and then to justify suspension rather than termination of a treaty). In 1941 President Roosevelt suspended the International Load Line Convention of July 5, 1930 (47 Stat. 2228). A memo from Acting Attorney General Biddle reasoned that the convention, which restricted the depth to which ships could be loaded and thus the amount of cargo they could carry, had been predicated on the existence of peace and the normal flow of commerce among nations. He contended that because of the wars in Europe and Asia, those conditions no longer existed; and as a consequence, he said, “there is no doubt in my mind that the convention has ceased to be binding upon the United States.” He concluded that “[s]uspension of the convention in such circumstances is the unquestioned right of a state adversely affected by such essential change.”<sup>114</sup>

#### *Jus cogens*

Treaties that conflict with a newly emergent norm of international law become void as of the date the new rule of *jus cogens* is recognized or determined to exist by the international community.<sup>115</sup> When a rule of international law falls into the category of *jus cogens*, it admits of no derogation. Accordingly, it prevails over and invalidates international agreements and other rules of international law in conflict with it. The condemnation of aggression in the U.N. Charter and of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide are asserted to have the character of *jus cogens*.<sup>116</sup>

#### *Severance of diplomatic relations*

The Vienna Convention on the Law of Treaties provides that the severance of diplomatic or consular relations generally does not affect the legal relations of parties to a treaty. Legal relations established by a treaty may be adversely affected, however, in cases where diplomatic or consular relations are indispensable for the application of the treaty.<sup>117</sup>

<sup>112</sup> Rest. 3d, supra, § 336.

<sup>113</sup> Ibid., Comment a, at 218.

<sup>114</sup> See V Hackworth, supra, pp. 353–356 and 14 Whiteman, supra, at 483–485. On December 21, 1945, President Truman revoked the proclamation suspending the convention.

<sup>115</sup> Vienna Convention, supra, Article 64.

<sup>116</sup> Rest. 3d, supra, § 102, Comment k; and Brownlie, Ian. Principles of Public International Law. Clarendon Press, 1990, p. 513.

<sup>117</sup> Vienna Convention on the Law of Treaties, supra, Article 63.



*Hostilities*

The Vienna Convention expressly reserves questions with respect to the effect of hostilities on treaty relations.<sup>118</sup> The older view seems to have been that the outbreak of hostilities terminated treaties between the warring parties or, at the very least, suspended them. The U.N. Charter's condemnation of aggression, however, has introduced an element of uncertainty into the older view's conceptual underpinnings. Therefore, whether hostilities affect adversely all or some of the warring parties' treaty relationships is problematical.<sup>119</sup> The Restatement (Third) notes that court decisions in the United States regarding the effect of war on treaties have traditionally "dealt with them pragmatically, preserving or annulling as the necessities of war exact."<sup>120</sup>

*State succession*

In international law rights and obligations arising out of international agreements, as well as from other sources, belong to the state, not to the government which represents it. Accordingly, changes in government as a rule do not interrupt the rights and obligations of successor governments. However, such may not be the case when one state succeeds, that is, replaces, another in terms of being responsible for the international relations of a given territory.<sup>121</sup> State succession has happened for centuries. But the breakup of the colonial empires of the European powers, the dissolution of the Soviet Union and of Yugoslavia, and the emergence of numerous new states in recent decades has given particular urgency to the question of whether treaties continue to remain in force in such circumstances. International law and state practice on the issue, however, have been described as "uncertain and confused."<sup>122</sup>

As it does with respect to the effect of war on treaties, the Vienna Convention on the Law of Treaties makes no effort to resolve questions concerning the implications of state succession for treaty rights and obligations.<sup>123</sup> Instead, a subsequent agreement approved by a U.N. conference in 1978, the Vienna Convention on Succession of States in Respect of Treaties, attempted to codify the pertinent legal standards.<sup>124</sup> But that agreement has never obtained sufficient ratifications to enter into effect.<sup>125</sup> Moreover, the standards set forth in that convention differ in significant respects from those articulated in the Restatement (Third), and both deviate in some respects from what appears to be U.S. practice.

The standards set forth in the Vienna Convention on Succession of States in Respect of Treaties and in the Restatement (Third)

<sup>118</sup> Ibid., Article 73. "The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty \* \* \* from the outbreak of hostilities between States."

<sup>119</sup> Rest. 3d, supra, § 336, Comment e.

<sup>120</sup> Ibid., Reporters' Note 4, p. 221, quoting *Techt v. Hughes*, 229 N.Y. 221, 241, 128 N.E. 185, 191, cert. den., 254 U.S. 643 (1920).

<sup>121</sup> Ibid., Article 2, para. 1(b). "[S]uccession of States' means the replacement of one state by another in the responsibility for the international relations of territory."

<sup>122</sup> Rest. 3d, supra, § 208, Reporters' Note 1.

<sup>123</sup> Vienna Convention on the Law of Treaties, supra, Article 73, provides, in part, that "[t]he provisions of the present Convention shall not prejudice any question \* \* \* in regard to a treaty from a succession of States \* \* \*"

<sup>124</sup> U.N. Doc. A/CONF. 80/31 (August 22, 1978); 17 ILM 1788 (1978).

<sup>125</sup> The United States has never signed the agreement.

vary according to the nature of the succession that has occurred. They set forth the following main categories:

(1) When part of the territory of an existing state becomes part of another existing state, both the Convention and the Restatement (Third) provide that the treaties of the predecessor state cease to have effect in that part and the treaties of the successor state come into force.<sup>126</sup>

(2) When two or more states unite, the Convention states that the treaties of both continue in effect but only with respect to the part of the territory of the new state to which the treaties previously applied. The Restatement (Third) does not disagree but stresses that “it is sometimes difficult to distinguish between an absorption of one state by another and the merger of two or more states into a Federal union.” In the case of absorption, the Restatement (Third) states that the treaties of the absorbed state are terminated and those of the absorbing state become applicable to the whole territory.<sup>127</sup>

(3) When a former colony becomes a new state (termed a “newly independent State” by the Convention), both the Convention and the Restatement (Third) provide that the new state does not succeed to the treaty rights and obligations of the colonial power, unless it expressly agrees to them or by conduct is considered to have agreed to them. This rule is designated the “clean slate” rule.<sup>128</sup>

(4) When a new state emerges from a condition other than colonialism, e.g., as the result of secession or the dissolution of the predecessor state, the Convention states a “continuity” rule, i.e., that the international agreements of the predecessor state continue in force for every successor state. The Restatement (Third), in contrast, does not differentiate these states from former colonies and applies the clean slate rule to both.<sup>129</sup> The Convention’s differentiation is based on the notion that a colony had no voice in the making of the international agreements of the colonial power, whereas states arising from secession or dissolution purportedly did. The Restatement (Third) rejects that distinction, contending that “it does not reflect consistent practice and would be difficult to apply.”<sup>130</sup>

Both the convention and the Restatement (Third) provide that pre-existing boundary and other territorial agreements continue to be binding on successor states.<sup>131</sup>

State practice with respect to state succession and treaty obligations has not been consistent, however. A 1991 State Department study of past state practice found that, historically, a spectrum of “divergent approaches” has been employed depending on the circumstances.<sup>132</sup> The Restatement (Third) notes that in practice even

<sup>126</sup> Vienna Convention on Succession of States in Respect of Treaties, *supra*, Article 15; Rest. 3d, *supra*, § 210(1).

<sup>127</sup> *Ibid.*, Article 31 and § 210(2) and Comment c.

<sup>128</sup> *Ibid.*, Article 16 and § 210(3).

<sup>129</sup> *Ibid.*, Articles 34–35 and § 210(3).

<sup>130</sup> Rest. 3d, *supra*, § 210, Reporters’ Note 4.

<sup>131</sup> *Ibid.*, Article 11 and § 210(4).

<sup>132</sup> Williamson, Edwin D., and Osborne, John E., “A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia,” 33 *Virginia Journal of International Law* 261, 263–64 (1993).

states emerging from colonial status “have found it inconvenient to wipe out entirely the often complex network of agreements that had been applicable to their territory.”<sup>133</sup> U.S. practice, at least in recent times, appears to have generally employed the continuity principle while being open to negotiations on whether particular treaties ought to continue to apply. That has been the case with respect to the successor states of the former Soviet Union and the former Yugoslavia, the breakup of Czechoslovakia, and the separation of Eritrea from Ethiopia.<sup>134</sup>

#### F. U.S. LAW AND PRACTICE IN TERMINATING INTERNATIONAL AGREEMENTS

##### GENERAL

The constitutional requirements that attend the termination of treaties remain a matter of some controversy. The Senate Foreign Relations Committee has from time to time contended that the termination of treaties requires conjoint action by the President and the Senate (or Congress).<sup>135</sup> But in the most recent instance of open conflict between the President and some Members of the Senate regarding the termination of a treaty—President Carter’s termination of the Mutual Defense Treaty with Taiwan in 1979—the Federal trial and appellate courts reached contrary conclusions regarding the requirements of the Constitution for terminating a treaty and the Supreme Court avoided resolving the constitutional question.<sup>136</sup>

<sup>133</sup> Rest. 3d, supra, § 210, Reporters’ Note 3.

<sup>134</sup> Williamson, supra, note 132, pp. 261–272; Williams, Paul R., “The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?” 23 *Denver Journal of International Law and Policy* 1 (1994); and Nash, Marian (Leich), “Contemporary Practice of the United States Relating to International Law,” 87 *American Journal of International Law* 595 (1993).

<sup>135</sup> The Senate Committee on Foreign Relations early on took the position that “[t]he President and Senate, acting together, [were] ‘competent’ to terminate a treaty” but allowed that in certain circumstances a treaty could be terminated by joint action of the President and Congress. S. Rept. 97, 34th Cong., 1st Sess. (1857), p. 3. In 1979 the Senate Committee on Foreign Relations gave renewed consideration to the treaty termination issue in the context of President Carter’s unilateral termination of the 1954 Mutual Defense Treaty with Taiwan. It said: “The Committee has reviewed its actions over the last decade because it believes it important that the issue of treaty termination be viewed in context. That context \*\*\* is a history of efforts by the Committee and the Senate to ensure the constitutional prerogatives of the Congress and the special role accorded the Senate by the treaty Clause are respected by the executive branch \*\*\* The constitutional role of the Congress has too often been short-circuited because it was viewed in the executive branch and even by some Members of Congress as an impediment to the expeditious adoption of substantive policies commanding the support of a majority. Thus, when in our recent history the substance of those policies lost that support, the procedures once available as checks had atrophied, and the Congress was forced to struggle to reclaim its powers. The lesson was learned the hard way: procedural requirements prescribed by the Constitution must not be disregarded in the name of efficiency, and the substance of a policy, however, attractive, can never justify circumventing the procedure required by the Constitution for its adoption \*\*\* The issue of treaty termination, in the judgment of the Committee, must be viewed pursuant to this principle. \*\*\* [T]he Committee \*\*\* cannot accept the notion advanced by administration witnesses that the President possesses an ‘implied’ power to terminate any treaty, with any country, under any circumstances, irrespective of what action may have been taken by the Congress by law or by the Senate in a reservation to that treaty. Such an argument in this context is at odds with the most fundamental precepts underlying the separation of powers doctrine \*\*\*.” S. Rept. 96–119, 96th Cong., 1st Sess. (1979), pp. 5–6.

<sup>136</sup> A number of Members of Congress attempted to force a judicial resolution of the legality of President Carter’s action by filing suit in Federal court. At trial a Federal district court initially held that “any decision of the United States to terminate [the Mutual Defense Treaty of 1954] must be made with the advice and consent of the Senate or the approval of both houses of Congress. That decision cannot be made by the President alone.” *Goldwater v. Carter*, 481 F. Supp. 949, 965 (D.D.C. 1979). But the U.S. Court of Appeals for the District of Columbia reversed and held that “the President did not exceed his authority when he took action to with-

The Restatement (Third) subscribes to the view that the power to terminate treaties is lodged in the President.<sup>137</sup> With regard to international agreements that do not take the form of treaties, the conclusion is generally true or, at least, has not been seriously challenged in the past. However, as indicated at the outset, the assertion of an exclusive Presidential power in the context of a treaty is controversial and flies in the face of a substantial number of precedents in which the Senate or Congress have been participants.

In so far as domestic law and practice are concerned, two non-controversial observations may be made with respect to the termination of an international agreement. First, as the official spokesperson with other governments, the President is the person who communicates the notice of impending termination.<sup>138</sup> Second, the termination of an international agreement is a political act, and, accordingly, the courts do not terminate international agreements.<sup>139</sup> However, whether a treaty to be legally as distinguished from effectively terminated requires conjoint action of the political branches remains, as previously indicated, a live issue which the Supreme Court has sidestepped in the past.

"The procedure by which, from the viewpoint of national law and practice, treaties may be terminated involves questions to be resolved in accordance with constitutional and related procedures in each country. The United States Constitution is silent with respect to the power to terminate treaties. The matter was not discussed in the debates of the Constitutional Convention in Philadelphia."<sup>140</sup> "The Constitution tells us only who can make treaties for the United States; it does not say who can unmake them."<sup>141</sup> As a consequence of the Constitution's silence in this regard, "there

---

draw from the \*\*\* treaty, without the consent of the Senate or other legislative concurrences." *Goldwater v. Carter*, 617 F. 2d 697, 709 (D.C. Cir. 1979). The Supreme Court then vacated that decision and ordered the complaint dismissed. *Goldwater v. Carter*, 444 U.S. 996 (1979). In so doing the court issued no majority opinion. Then-Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Stevens, opined that the issue was a political question inappropriate for judicial resolution. Justice Powell concurred in the court's judgment but disagreed with the plurality's reasoning. He said that the case should be dismissed on grounds of ripeness but contended that the political question doctrine did not stand as an inevitable barrier to judicial resolution of the constitutional question. Justice Marshall concurred in the result without opinion. Justices Blackmun and White argued that the case should be scheduled for briefing and oral argument. Justice Brennan dissented, arguing that the decision of the Court of Appeals should be affirmed to the extent "it rests upon the President's well-established authority to recognize, and withdraw recognition from, foreign governments." 444 U.S. at 1006. The direction by the Supreme Court to dismiss the complaint vitiates any precedential value of the earlier rulings and leaves the issue of Presidential authority to terminate a treaty effectively unresolved. However, it should be noted that subsequent decisions have made it difficult for Members of Congress to bring suit on separation of powers issues. See, for example, *Raines v. Byrd*, 521 U.S. 811 (1997) (Members of Congress held to lack standing to challenge the constitutionality of the "Line Item Veto Act") and *Campbell v. Clinton*, 203 F. 3d 19 (D.C. Cir.), cert. den., 2000 U.S.LEXIS 4928 (2000) (Members of Congress held to lack standing to challenge the constitutionality of U.S. participation in NATO's military actions against the former Yugoslavia).

<sup>137</sup> Rest. 3d, supra, § 339. Section 339, captioned "Authority to Suspend or Terminate International Agreement: Law of the United States," reads as follows: "Under the law of the United States, the President has the power (a) to suspend or terminate an agreement in accordance with its terms; (b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or (c) to elect in a particular case not to suspend or terminate an agreement."

<sup>138</sup> "The President is the sole organ of the Nation in its external relations, and its sole representative with foreign nations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 319, quoting John Marshall in debate in the House of Representatives on March 7, 1800. "\*\*\* Congress has no power to communicate directly with foreign powers." Willoughby, *Constitutional Law of the United States*, v. 1, 1929, p. 587 (hereafter cited as 1 Willoughby).

<sup>139</sup> *Charlton v. Kelly*, 229 U.S. 447, 474 (1913).

<sup>140</sup> 14 Whiteman, supra, p. 461.

<sup>141</sup> Henkin, supra, p. 211.

has been some confusion of doctrine upon this point and a variety in practice.”<sup>142</sup>

The doctrinal confusion stems in large measure from various seemingly inconsistent or opposing concepts. As explained by one noted legal scholar:

From the point of view of American law \*\*\*, the Constitution does not limit the authority to terminate treaties to the possessors of the treaty-making power, i.e., the President and Senate \*\*\*. Article VI [of the Constitution] vests treaties with the same domestic status as Federal statutes, which means that the courts must disregard treaty provisions insofar as they are inconsistent with later acts of Congress. A Federal statute inconsistent with the terms of an existing treaty consequently operates to deprive such treaty of its force as law within this country. Under Article VI the Congress can, in effect, terminate a treaty, so far as its effect in our domestic law is concerned. Such congressional termination, the Supreme Court has said, “must control in our courts as the later expression of our municipal law, even though it conflicted with the provision of the treaty and the international obligation remained unaffected.”

At the same time, it is clear that, in such a case, the international obligation does remain unaffected \*\*\*. The repeal of a treaty by a later statute is only a matter of American law. Regardless of the abrogation of the municipal effect of a treaty by an overriding statute, the treaty is not abrogated in the international sense. \*\*\*<sup>143</sup>

In addition to effectively terminating a treaty by legislatively negating its municipal consequences, the Congress may effect a termination in other ways, such as by a declaration of war<sup>144</sup> or, in the case of non-self-executing treaties, by failing to approve necessary implementing legislation.

All of the foregoing is true notwithstanding that “[i]n so far as a treaty is regarded as an international compact, it seems almost too clear for argument that Congress [as distinguished from the Senate], not having been made by the Constitution a participant in the treaty-making power, has no constitutional authority to exercise that power either affirmatively or negatively, that is, by creating or destroying international agreements.”<sup>145</sup> Moreover, “[i]t may be noted that Congress has no means whereby it may itself give notice of termination of a treaty to the foreign government concerned under the Constitution; Congress has no power to communicate directly with foreign Powers.”<sup>146</sup> “But it is well for the Senate and for Congress also to remember that it does not lie in our hands alone to give this notice to a foreign Government. We can not give the notice.”<sup>147</sup>

<sup>142</sup> 1 Willoughby, *supra*, p. 581.

<sup>143</sup> Schwartz, *The Powers of Government*, v. II (1963), p. 130.

<sup>144</sup> See *Bas v. Tingy*, 4 Dall. (4 U.S.) 37 (1800); Wright, *The Control of American Foreign Relations*, p. 256; cf. 14 Whiteman, p. 290 et seq.

<sup>145</sup> 1 Willoughby, *supra*, p. 585.

<sup>146</sup> *Ibid.*, p. 587.

<sup>147</sup> Senator Lodge, chairman, Committee on Foreign Relations, 48 Congressional Record 587 (1911).

To the President is ascribed the role of being the “organ of foreign relations.” The Supreme Court has described this role as “the very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations.”<sup>148</sup> Although the Congress can effectively terminate a treaty’s domestic effect by passage of a superseding public law (which requires the President’s signature or the override of a veto), the termination of the outstanding international obligation seems to reside with the President since he alone is able to communicate with foreign powers. “The only organ of this Government recognized by foreign Governments is the Executive—the President of the United States. If he does give the notice, it will be given.”<sup>149</sup>

Whether the President alone can terminate a treaty’s domestic effect remains an open question.<sup>150</sup> As a practical matter, however, the President may exercise this power since the courts have held that they are conclusively bound by an executive determination with regard to whether a treaty is still in effect.<sup>151</sup> The same result may apply to a congressional termination, particularly if it is regarded as a declaration of war.<sup>152</sup>

#### TREATIES

“International law,” it has been observed, “\* \* \* recognizes the power—though not the right—of a state party to break a treaty and pay damages or abide other international consequences.”<sup>153</sup> That the U.S. Government has the constitutional power to terminate treaties on behalf of the United States is clear.<sup>154</sup> It is a power which inheres in sovereignty and is not negated by the supremacy clause or any other clause of the Constitution.<sup>155</sup> Although the other party to a broken agreement has a ‘legitimate grievance,’ its avenue of redress is “by the negotiation of a new agreement, or failing peaceful modes of settlement, by more drastic means, should the grievance be deemed a sufficiently serious one.”<sup>156</sup> “A violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take non-forcible reprisals and these reprisals may properly relate to the defaulting party’s rights under the treaty.”<sup>157</sup> But “[t]he question whether our government is justified in disregarding its engagements with another Nation is not one for the determination of the courts \* \* \*. This court is not a censor of the morals of other departments of the government \* \* \*.”<sup>158</sup>

The actual practice whereby treaties have been terminated demonstrates considerable variation. “In some cases treaties have been terminated by the President, in accordance with their terms pursuant to action by Congress. In other cases action was taken by the President pursuant to resolutions of the Senate alone. In still oth-

<sup>148</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

<sup>149</sup> Senator Lodge, *supra*, note 146.

<sup>150</sup> See *Van der Weyde v. Ocean Transport Co.*, 297 U.S. 114, 117 (1936).

<sup>151</sup> See *Terlinden v. Ames*, 184 U.S. 270, 290 (1902); *Charlton v. Kelly*, 229 U.S. 447, 474-476 (1913).

<sup>152</sup> See *Bas v. Tingy*, 4 Dall. 37 (4 U.S.) (1800).

<sup>153</sup> Henkin, *supra*, p. 211.

<sup>154</sup> The Chinese Exclusion Case, 130 U.S. 581, 602 (1889).

<sup>155</sup> *Ibid.*

<sup>156</sup> 1 Willoughby, *supra*, note 115, p. 582; cf. 14 Whiteman, *supra*, note 8, pp. 468 et seq.

<sup>157</sup> U.N. International Law Commission, 14 Whiteman, *supra*, note 8, p. 468.

<sup>158</sup> The Chinese Exclusion Case, 130 U.S. 581, 602-603 (1889).

ers the initiative was taken by the President, in some cases independently, and in others his action was later notified to one or both Houses of Congress and approved by both Houses. No settled rule or procedure has been followed.”<sup>159</sup> Hackworth quoted the Solicitor of the Department of State as saying “that the choice of method would seem to depend either upon the importance of the international question or upon the preference of the Executive.”<sup>160</sup> The “actual practice” has been summarized as follows:

Executive action pursuant to prior authorization or direction by the Congress;

Executive action pursuant to prior authorization or direction by the Senate;

Executive action without prior specific authorization or direction, but with subsequent approval by the Congress;

Executive action without prior specific authorization or direction, but with subsequent approval by the Senate;

Executive action without specific prior authorization or direction and without subsequent approval by either the Congress or the Senate.<sup>161</sup>

*Executive action pursuant to prior authorization or direction by the Congress*

The instances in which the Congress, by joint resolution, has authorized or directed the President to terminate treaties “have been considerable in number”:<sup>162</sup>

In some instances the congressional action for the denunciation of a treaty has empowered the President “at his discretion” to give the necessary notice to the foreign Governments concerned. In other instances, he has been directed, that is, charged with the duty, of giving the notice. For example the Joint Resolution of Congress of January 18, 1865, relative to the Canadian Reciprocity Treaty, declared that notice of denunciation should be given, and that “the President of the United States is hereby charged with the communication of such notice.” Of the same tenor was the Joint Resolution of March 4, 1883, relative to the Treaty of Washington with Great Britain. [This Resolution declared that articles of the treaty ought to be terminated at the earliest time, and that to this end, “the President be, and he hereby is, directed to give notice to the government of His Britannic Majesty that the provisions of \* \* \* the articles aforesaid will terminate and be of no force on the expiration of two years next after the time of giving such notice.”]<sup>163</sup>

In 1846, pursuant to a request from President Polk, a joint resolution was enacted providing that “the President \* \* \* be, and he is hereby, authorized, at his discretion, to give to the Government of Great Britain the notice required by the second article of the said convention of the 6th of August, 1827, for the abrogation of the

<sup>159</sup> 14 Whiteman, supra, p. 460.

<sup>160</sup> V Hackworth, supra, p. 319.

<sup>161</sup> 14 Whiteman, supra, p. 462.

<sup>162</sup> 1 Willoughby, supra, p. 583.

<sup>163</sup> Ibid.

same.”<sup>164</sup> That convention provided for the joint occupancy of certain parts of the Oregon Territory. Similarly, the Seaman’s Act of March 4, 1915<sup>165</sup> requested and directed the President to give notice of the termination of the treaty provisions in conflict with the Act. Section 16 of the Act expressly provided that “the President be \*\*\* requested and directed \*\*\* to give notice to the several Governments, respectively, that so much as herein described of all such treaties and conventions between the United States and foreign Governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions.”

A subsequent Supreme Court decision noted that “[i]t appears that, in consequence, notice was given and that a large number of treaties were terminated in whole or in part.”<sup>166</sup> But in *Van der Weyde v. Ocean Transport Co.*, the court upheld the method of terminating treaties used in the Seamen’s Act, stating: “From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law.” The court did not opine on whether the language of the statute was binding, but stated simply that the President was obligated to distinguish between consistencies and inconsistencies in foreign treaties and the law in question. Moreover, the court expressly stated that the question of the sufficiency of Presidential power alone to terminate the treaties was not before it; “\*\*\* the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States is not here involved.”<sup>167</sup>

More recently, Congress mandated the termination of a treaty in the Anti-Apartheid Act of 1986. Section 313 of that Act required the Secretary of State to terminate immediately, in accordance with its terms, the tax treaty and protocol with South Africa that had been concluded on December 13, 1946.<sup>168</sup>

The propriety of congressional action advising or directing the President to notify foreign governments of the termination of treaties between them and the United States has not gone unchallenged. In 1879 President Hayes vetoed the Chinese Immigration Bill of that year on the ground, inter alia, that it instructed him to abrogate certain articles of the existing treaty with China. He said: “As the power of modifying an existing treaty, whether by advising or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress, nor would the assent of China to this partial abrogation of the treaty make the action of Congress in thus procuring an

<sup>164</sup> 9 Stat. 108 (1846).

<sup>165</sup> 38 Stat. 1164.

<sup>166</sup> *Van der Weyde v. Ocean Transport Co.*, 297 U.S. 114, 116 (1936).

<sup>167</sup> *Ibid.*, pp. 117–118.

<sup>168</sup> Public Law 99–440, § 313 (October 2, 1987); 100 Stat. 3515; 22 U.S.C. 5063. The treaty provided for termination upon 1 year’s notice.



amendment of a treaty, a competent exercise of authority under the Constitution.”<sup>169</sup>

Similarly, in 1920 President Wilson refused to carry out Section 34 of the Merchant Marine Act of that year. That section directed the President to terminate any provisions of existing treaties that restricted the right of the United States “to impose discriminating customs duties on imports entering the United States and discriminatory tonnage duties \* \* \*” A Department of State press release of September 24, 1920, in part, stated:

The Department of State has been informed by the President that he does not deem the direction, contained in Section 34 \* \* \* an exercise of any constitutional power possessed by the Congress.

Secretary Colby, commenting on the point made by the President that Congress had exceeded its powers, called attention to the veto by President Hayes of an Act passed by Congress in 1879. \* \* \* President Hayes declared that “the power of making new treaties or of modifying existing treaties is not lodged by the Constitution in Congress, but in the President, by and with the advice and consent of the Senate, as shown by the concurrence of two-thirds of that body.”<sup>170</sup>

*Executive action pursuant to prior authorization or direction by the Senate*

The Department of State has taken the position that the principals who can execute treaties can terminate them. “\* \* \* [T]he power that makes the treaty can likewise revoke it; in other words, that the President acting in conjunction with the Senate of the United States would be authorized to terminate a treaty to which the United States is a party.”<sup>171</sup> This method has also received judicial recognition: “The President and Senate may denounce the treaty and thus terminate its life.”<sup>172</sup>

This procedure was apparently first employed in the mid-1850s and precipitated considerable controversy. On January 26, 1855, the House passed a joint resolution authorizing the President to give notice of the termination of the 1826 Treaty of Friendship, Commerce, and Navigation between Denmark and the United States according to its terms.<sup>173</sup> But on March 3, 1855, the Senate adopted instead a simple resolution authorizing the President to do so; and President Pierce on April 14 of that year gave the requisite notice on the basis of the latter authority. Subsequently, at the initiative of Senator Sumner, the Senate directed the Committee on Foreign Relations to examine the constitutionality of this procedure and whether a statute was required to effect the termination.<sup>174</sup> The committee did so and concluded that the procedure was con-

<sup>169</sup> 1 Willoughby, *supra*, p. 584.

<sup>170</sup> V Hackworth, *supra*, p. 323. A memorandum from the Solicitor for the State Department buttressed this view as follows: “Congress may pass an act violative of a treaty. It may express its sense that a treaty should be terminated. But it cannot in effect undertake legally to modify a treaty no matter what methods it may employ. In doing that, it, in effect, attempts to conduct diplomatic negotiations and to encroach on the treaty-making power composed of the President and the Senate.”

<sup>171</sup> *Ibid.*, p. 319.

<sup>172</sup> *Techt v. Hughes*, 229 N.Y. 222, 243 (1920).

<sup>173</sup> Congressional Globe, 33d Cong., 2d Sess. (1855), pp. 414–415.

<sup>174</sup> *Ibid.*, 34th Cong., 1st Sess. (March 6, 1856), pp. 599–607.

stitutionally proper: "The Committees are clear in the opinion that it is competent for the President and Senate, acting together, to terminate in the manner prescribed by the eleventh article without the aid or intervention of legislation by Congress, and that when so terminated it is at an end to every intent both as a contract between the Governments and as a law of the land."<sup>175</sup> The Senate, subsequently, had an extensive debate on the report and on a resolution reported by the committee endorsing that view,<sup>176</sup> but the resolution never came to a final vote.

This procedure has been used on subsequent occasions. In 1921, for instance, President Wilson sought the Senate's advice and consent to the denunciation of the International Sanitary Convention of 1903. That convention had been superseded by a 1912 convention but remained in force for those parties which had not ratified the latter convention. The Public Health Service believed that situation to "prevent the enforcement of measures necessary for the prevention of diseases from abroad" and said that it would be "infinitely better to have no international sanitary convention than to continue to abide by the terms of the Paris convention of 1903."<sup>177</sup> By a resolution adopted by a two-thirds majority on May 26, 1921, the Senate gave its advice and consent to the denunciation of the convention; and the Secretary of State communicated notice of the denunciation to the convention's depositary.<sup>178</sup>

*Executive action without prior specific authorization or direction, but with subsequent approval by the Congress*

In 1864 the Secretary of State directed the U.S. Minister in London to give the British Government the stipulated 6-months' notice of an intention to terminate the Great Lakes Agreement of 1817 regulating armaments on the Great Lakes. The minister did so, and a few months later Congress by joint resolution "adopted and ratified" the notice of termination.<sup>179</sup> In 1911, President Taft, without congressional direction but after House passage of a strongly worded joint resolution, gave notice to the Russian Government of the termination of the commercial treaty of 1832 with that country. Thereafter, he communicated his action to the Senate, "as a part of the treaty-making power of this Government," for its approval. The Senate Foreign Relations Committee, however, reported a joint resolution by which the notice of termination by the President was "adopted and ratified." This joint resolution was passed by both houses of Congress and was signed by the President on December 21, 1911.<sup>180</sup>

*Executive action without specific prior authorization or direction, but with subsequent approval by the Senate*

Although many authorities recognize this method and affirm its use, supporting examples are rarely provided. It should be noted

<sup>175</sup> S. Rept. 97, 34th Cong., 1st Sess. (1856), p. 3.

<sup>176</sup> Congressional Globe, 34th Cong., 1st Sess. (May 8, 1856), p. 826 (text of resolution) and pp. 1146-1158 (debate).

<sup>177</sup> See 61 Congressional Record 1794 (May 26, 1921) (letter of April 12, 1920, from D.F. Houston, Secretary of the Treasury, to the Secretary of State).

<sup>178</sup> V Hackworth, *supra*, p. 322.

<sup>179</sup> 5 Moore, *supra*, p. 323.

<sup>180</sup> 37 Stat. 627 (1911); V Hackworth, pp. 319-320; 1 Willoughby, p. 582.

that President Taft in terminating the 1832 treaty with Russia, discussed above, sought to employ this mode. Although his action was subsequently approved by joint congressional action, it seems likely that his initial approach was based on some precedent.

During the Senate debate on the resolution, Senator Lodge, chairman, Foreign Relations Committee, endorsed the President's use of this method. He said:

The President has entire authority to give that notice and to ask for the approval of Congress or approval of the Senate. He takes the view, which is held by many of the best judges that the treaty-making power is entirely able to terminate a treaty which carries with it no legislation and the President did nothing unusual in this action.<sup>181</sup>

\* \* \*

The Senate and the President alone can end an existing treaty by simply agreeing to a new one, they can do it without any consultation with any other body, and certainly where no legislation is involved it seems to me that those who represented the high contracting party in the making of a treaty are capable of representing the high contracting party in its unmaking.<sup>182</sup>

*Executive action without specific prior authorization or direction, and without subsequent approval by either the Congress or the Senate*

There appears to be some uncertainty among the commentators as to the first termination of a treaty by a President acting alone. But one of the earliest appears to be the termination in 1899 of the most-favored-nation clauses in a commercial treaty of 1850 with France, as extended to Switzerland under a commercial agreement entered into in 1898. A 1936 memorandum from the State Department to President Roosevelt cited that instance in justification of its conclusion that the President could also give notice of an intent to terminate a treaty with Italy "without seeking the advice and consent of the Senate or the approval of Congress to such action."<sup>183</sup> Hackworth gives a number of other examples of the "President acting alone," including the terminations of a 1926 convention with Mexico for the prevention of smuggling in 1927; a 1927 convention for the abolition of import and export prohibition and restriction in 1933; an 1871 Treaty of Commerce and Navigation with Italy in 1936; and a 1911 commercial treaty with Japan in 1939.<sup>184</sup> Henkin adds to the list President Roosevelt's termination of an extradition treaty with Greece in 1933 because Greece had refused to extradite a particular fugitive (Mr. Insull).<sup>185</sup> President Johnson in 1965 gave notice of the withdrawal of the United States from the Convention for the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Conven-

<sup>181</sup> 48 Congressional Record 455 (1911).

<sup>182</sup> *Ibid.*, p. 480.

<sup>183</sup> V Hackworth, *supra*, pp. 330-331.

<sup>184</sup> *Ibid.*, pp. 329-332.

<sup>185</sup> Henkin, *supra*, p. 212.

tion),<sup>186</sup> although he subsequently withdrew it 1 day before the denunciation would have taken effect.<sup>187</sup>

As already noted, President Carter, on December 15, 1978, gave notice of termination of the Mutual Defense Treaty with Taiwan. This action not only was taken without prior or subsequent authorization of Congress or of the Senate but in the face of an expression of the sense of Congress “that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954.”<sup>188</sup>

President Reagan also unilaterally terminated a treaty with little apparent protest that Congress was not involved. On May 1, 1985, he ordered the imposition of economic sanctions against Nicaragua under the general authority of the International Emergency Economic Powers Act. These sanctions included notification of the intent to terminate the Treaty of Friendship, Commerce, and Navigation with Nicaragua. After the required waiting period of 1 year, the treaty was terminated.<sup>189</sup>

Finally, it should be noted that in one instance Congress adopted a statute that purported to terminate treaties of its own force, without the necessity of any notice by the President. On July 7, 1798, President Adams signed into law a measure providing “[t]hat the United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France; and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.”<sup>190</sup> In the 1856 report of the Senate Foreign Relations Committee previously referred to, this action by the Congress was viewed as being tantamount to a declaration of war.<sup>191</sup> In fact, 2 days following its passage, the Congress authorized hostilities against France, and in *Bas v. Tingy* the Supreme Court regarded these acts as, in effect, declaring war.<sup>192</sup> It might be noted, however, that France refused to recognize the abrogation of the treaties.<sup>193</sup>

The arguments in support of the respective claims of the President and the Congress as regards the proper method of terminating treaties turn on a number of factors. The Senate’s role in treaty termination is said to derive from its participation in treaty-making. With respect to the congressional role, much weight is given to a treaty’s status as law pursuant to Article VI of the U.S. Constitution, that is, to the distinction between a treaty as an international compact, and, under American law, as domestic law. Arguments on

<sup>186</sup> 49 Stat. 3000; TS 876; 2 Bevans 983.

<sup>187</sup> See Senate Foreign Relations Committee Print, *Termination of Treaties: The Constitutional Allocation of Power* (1978), pp. 397–398, for additional examples given by the Department of State Legal Adviser.

<sup>188</sup> 92 Stat. 730, 746 (1978).

<sup>189</sup> U.S. Congress, House, Committee on Foreign Affairs, *Congress and Foreign Policy, 1985–1986* (99th Cong.), p. 7.

<sup>190</sup> Act of July 7, 1798; 1 Stat. 578.

<sup>191</sup> S. Rept. 97, 34th Cong., 1st Sess., pp. 4–5.

<sup>192</sup> 4 Dall. (4 U.S.) 37 (1800).

<sup>193</sup> Moore, John Bassett. *A Digest of International Law*, Vol 5. U.S. Government Printing Office, 1906, pp. 608 et seq. A century later, Congress’ action was held to have effectively terminated the treaties both municipally and internationally. See *Hooper v. United States*, 22 Ct. Cl. 408, 425–26 (1887). Cf. *Ship James Williams v. United States*, 37 Ct. Cl. 303 (1902).

behalf of Presidential claims focus prominently on his preeminent position in foreign affairs.<sup>194</sup>

#### EXECUTIVE AGREEMENTS

As indicated at various points in the foregoing discussion, the President's authority to terminate executive agreements, in particular sole executive agreements, has not been seriously questioned in the past. To the extent that the agreement in question is authorized by statute or treaty, its mode of termination likely could be regulated by appropriate language in the authorizing statute or treaty. Thus, the *Restatement (Third)* states: "If the United States Senate, in giving consent to a treaty, declares that it does so on condition that the President shall not terminate the treaty without the consent of Congress or of the Senate, or that he shall do so only in accordance with some other procedure, that condition presumably would be binding on the President if he proceeded to make the treaty. \*\*\* *Congress could impose such a condition in authorizing the President to conclude an executive agreement that depended on Congressional authority.*"<sup>195</sup>

In the Comprehensive Anti-Apartheid Act of 1986 Congress mandated the termination, in accordance with its provisions, of an executive agreement between the United States and South Africa, namely, the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories.<sup>196</sup>

---

<sup>194</sup> See Committee Print, *supra*, note 17, pp. 145 and 395 for elaboration of these views by former Senator Barry Goldwater and State Department Legal Adviser Herbert J. Hansel.

<sup>195</sup> Rest. 3d, *supra*, § 339, Comment a (emphasis added).

<sup>196</sup> Public Law 99-440, *supra*, note 167, § 306(b)(1). The agreement provided for termination upon 1 year's notice, and the Secretary of State gave the required notice. But the Act also directed the Secretary of Transportation to revoke the permit of any air carrier designated by the government of South Africa to provide service under the agreement 10 days after the Act's enactment. Upon suit challenging the Secretary's revocation of the permit of South African Airways pursuant to this provision as a violation of the agreement, the revocation was upheld on the grounds that a statute can supersede an international agreement. *South African Airways v. Dole*, 817 F. 2d 119 (D.C. Cir.), cert. den., 484 U.S. 896 (1987).

## X. CONGRESSIONAL OVERSIGHT OF INTERNATIONAL AGREEMENTS <sup>1</sup>

---

A major problem for the legislative branch in the foreign policy area has been the tendency of the executive branch to make important international agreements by executive power alone, bypassing the advice and consent role of the Senate in treaty approval and sometimes failing to inform Congress of agreements with other countries that are considered binding under international law. Two objectives have predominated congressional perspectives on this issue. The first has been to ensure that Congress is aware of all important U.S. agreements. The second has been to provide a process which will ensure that important U.S. commitments are made with legislative approval.

The primary tools available to Congress for its oversight of international agreements, especially international agreements other than treaties, start with the Case-Zablocki Act on transmittal of international agreements other than treaties.<sup>2</sup> Other tools include consultations on the form of agreements; legislation to implement concluded agreements; legislation requiring congressional approval of concluded agreements; required reports to Congress on some aspect of international agreements; consultation between Members or congressional staff and appropriate executive branch officials; and hearings. This chapter discusses these and other tools for congressional oversight.

### A. THE CASE ACT <sup>3</sup>

The fundamental thrust of the Case Act is that the executive branch transmit to the Congress within 60 days after entry into force, the text of all international agreements not submitted to the Senate as treaties. All forms of agreements, whether written or oral, classified or unclassified, negotiated by the State Department or by other executive agencies, are included in the requirement. The goal is to ensure congressional knowledge of commitments made by the executive branch on behalf of the U.S. Government. Passage of the legislation has its roots in a number of earlier congressional efforts.

---

<sup>1</sup>Prepared by Marjorie Ann Browne, Specialist in International Relations and Lois B. McHugh, Analyst in International Relations.

<sup>2</sup>Public Law 92-403, "An Act to require that international agreements other than treaties, hereinafter entered into by the United States, be transmitted to the Congress within sixty days after the execution thereof." This law is often referred to as the Case-Zablocki Act, or the Case Act for short.

<sup>3</sup>Ibid.

*Provisions for publication*

Congress historically tried to ensure that it receive copies of all treaties and agreements entered into force on behalf of the United States. The Public Printing Act of 1895 required the Secretary of State, at the end of each Congress, to edit, print, bind, and distribute the Statutes at Large that would include not only “all laws, joint and concurrent resolutions passed by Congress,” but “also all conventions, treaties, proclamations, and agreements.” (28 Stat. 615) The language in this Act was further refined in 1938, to include:

all treaties to which the United States is a party that have been proclaimed since the date of the adjournment of the regular session of Congress next preceding; all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other final formality has been executed, since that date;<sup>4</sup>

In practice, a number of agreements escaped publication. In 1909, the Senate, in S. Res. 252, 60th Congress, authorized preparation, under the Senate Committee on Foreign Relations, of a “compilation of treaties, conventions, important protocols, and international acts to which the United States may have been a party from 1778 to March 4, 1909, and such other material pertaining to treaties as may be recommended for insertion \*\*\* by the Secretary of State.” The resulting compilation eventually covered 1776 through 1937 and was the only official comprehensive collection of U.S. treaties and international agreements covering that period.<sup>5</sup> In the interim period between 1938 and 1949, a hodgepodge of published bits and pieces was developed. The State Department issued as individual pamphlets the Executive Agreements Series (EAS) and Treaty Series (TS) until 1945 when the Treaties and Other International Acts Series (TIAS) replaced them as the form for the texts of individual agreements. Until the collection compiled under Charles Bevans was completed, no official consolidation of all U.S. treaties and international agreements concluded between 1937 and 1950 had been published.<sup>6</sup>

In 1950, when the function of publishing the U.S. Statutes at Large was transferred from the Secretary of State to the Administrator of General Services, Congress required the Secretary to publish, starting January 1, 1950,

a compilation entitled “United States Treaties and Other International Agreements,” which shall contain all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other

<sup>4</sup> 52 Stat. 760. The full citation follows: Printing Act, Chapter 23, section 73 (28 Stat. 615), approved January 12, 1895; amended by Public Law 657, 75th Cong., approved June 16, 1938, 52 Stat. 760.

<sup>5</sup> Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States and Other Powers. Volumes 1 and 2, covering 1776–1909, were compiled by William M. Malloy; the third, covering 1910–1923, by C.F. Redmond; and the fourth volume, covering 1923–1937, was compiled by Edward J. Trenwith. Washington, D.C., U.S. Government Printing Office, 1910–1938.

<sup>6</sup> Treaties and Other International Agreements of the United States of America, 1776–1949. Compiled under the direction of Charles I. Bevans. Washington, D.C., U.S. Government Printing Office, 1968–1974 and 1976; 13 vols.

than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other final formality has been executed, during each calendar year.<sup>7</sup>

The 1895 Act had provided that a copy of the Statutes at Large would be automatically provided to the office of each Member of the House and Senate. The 1950 revision of section 112 and addition of section 112a did not provide for distribution to offices in this manner. Public Law 94-59, in 1975, stipulated that copies of the U.S. Treaties and Other International Agreements series would not be available to Senators and Representatives unless specifically requested in writing.<sup>8</sup>

The inability of the State Department to publish promptly international agreements that had entered into force, accompanied by a near absence of public requests for copies of those agreements still unpublished, led to Congressional amendment in 1994 of 1 U.S.C. 112a.<sup>9</sup> Section 138 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236) which authorized the Secretary of State to determine that certain categories of international agreements do not require publication.<sup>10</sup> Based on the criteria set forth in section 138, the Secretary of State issued a proposed rule or determination in October 1995 that was published as a final rule on February 26, 1996, listing the following categories of agreements as not requiring publication:

- (1) Bilateral agreements for the rescheduling of intergovernmental debt payments;
- (2) Bilateral textile agreements concerning the importation of products containing specified textile fibers done under the Agricultural Act of 1956, as amended;
- (3) Bilateral agreements between postal administrations governing technical arrangements;
- (4) Bilateral agreements that apply to specified military exercises;
- (5) Bilateral military personnel exchange agreements;
- (6) Bilateral judicial assistance agreements that apply only to specified civil or criminal investigations or prosecutions;
- (7) Bilateral mapping agreements;
- (8) Tariff and other schedules under the General Agreement on Tariffs and Trade and under the Agreement of the World Trade Organization;
- (9) Agreements that have been given a national security classification pursuant to Executive Order No. 12958 or its successors; and (b) Agreements on the subjects listed in paragraphs

<sup>7</sup> 64 Stat. 980; 1 U.S.C. § 112a.

<sup>8</sup> 89 Stat. 296.

<sup>9</sup> Federal Register, October 23, 1995: 54319.

<sup>10</sup> Section 138. "Publishing International Agreements." listed "the following criteria: (1) such agreements are not treaties \*\*\* pursuant to section (2)(2) of Article II of the Constitution \*\*\*; (2) the public interest in such agreements is insufficient to justify their publication, because (A) as of the date of enactment of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, the agreements are no longer in force, (B) the agreements do not create private rights or duties, or establish standards intended to govern government action in the treatment of private individuals; (C) in view of the limited or specialized nature of the public interest in such agreements, such interest can adequately be satisfied by an alternative means; or (D) the public disclosure of the text of the agreement would, in the opinion of the President, be prejudicial to the national security of the United States; and (3) copies of such agreements \*\*\* will be made available by the Department of State upon request."



(a)(1) through (9) of this section that had not been published as of February 26, 1996.

While the laws cited above endeavored to ensure that Congress, and the public, would have access to all treaties and international agreements other than treaties, no provisions were made to ensure that the Congress would, in some way, have access to international agreements not in the public domain, that is, classified agreements. In addition, experience had demonstrated that U.S. Government agencies other than the State Department concluded agreements with other governments and the texts of those agreements usually were not sent to the State Department. These so-called agency-to-agency agreements were another category of agreement not easily accessible to the Congress.<sup>11</sup>

*The Bricker amendment and its legacy*

In the 1950s, a number of concerns were expressed by some in Congress and in other American forums, such as the American Bar Association, that: (1) rights and freedoms guaranteed by the Constitution might be altered by treaty; (2) that the President might "legislate" by international agreement or executive agreement without Senate approval; (3) that the Federal government might acquire through treaties the power to legislate in areas primarily within the jurisdiction of the States; and (4) that treaties might acquire Senate approval by a vote of only a small number of Members present. These concerns grew out of the foreign policy activism of the executive branch during and since World War II. Some Members were concerned over secret agreements such as those made by Presidents Franklin Roosevelt and Harry S. Truman with Stalin at Yalta and Potsdam in 1945, and the extent to which those and similar agreements might never be routinely shared with the Senate or with Congress. Others were concerned that active U.S. participation in the United Nations and U.N.-affiliated agencies might lead to U.S. adherence to treaties and agreements that would contravene or abrogate such U.S. constitutional principles as the reserved powers of the States and the fundamental freedoms guaranteed and protected in the bill of rights.

Senator John W. Bricker in late 1951 introduced the first in a series of resolutions to amend the Constitution with respect to treaties and executive agreements. The Bricker amendment, as it was reported by the Senate Judiciary Committee on June 15, 1953, would have given Congress the power to regulate all executive and other agreements with any foreign power or international organization. Additionally, the amendment would have made any provision of a treaty invalid if it conflicted with the Constitution and an executive agreement effective in domestic law only through passage of enacting legislation. Debate on the Senate floor in January–February 1954 centered around three versions of the Bricker legislation: the Judiciary Committee amendment; a series of amendments proposed by Republican leaders, including William F. Knowland and Homer Ferguson; and a substitute resolution sponsored by Senator Walter F. George. On February 26, Senator George's ver-

<sup>11</sup> See below, Impact and Assessments of the Case Act, for additional discussion of transmittal problems.

sion was agreed to as a substitute for the Republican leadership amendment. The same day, the George version of the proposed constitutional amendment failed to pass the Senate with the required two-thirds majority by one vote.<sup>12</sup>

Support in the Congress for this type of limitation faded through the 87th Congress (1961–1962) and disappeared in the 89th Congress (1965–1966).<sup>13</sup> Senator Bricker introduced a version of his 1953 resolution in the 84th Congress (1955–1956) and the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee held hearings in April and May 1955 that generated a 1016-page record.<sup>14</sup> The full committee did not report the resolution until the following year, offering a substitute resolution, that was never considered on the Senate floor. Bricker's final proposal was introduced during the 85th Congress (1957–1958) and while hearings were held, the resolution was not reported from committee. After Bricker left the Senate, other Members of the Senate and House introduced similar resolutions in the 87th and 88th (House resolutions only) Congresses, but no action was taken on them.

In 1985 one of the fundamental issues of the Bricker amendment debate was revived—the question of the supremacy of the Constitution over treaties. At the initiative largely of Senator Helms, the Senate included the following language as a reservation in its resolution of ratification on the U.N. Convention on the Prevention and Punishment of the Crime of Genocide:

Nothing in this Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

In succeeding Congresses the Senate extended its use of the condition not only to other human rights treaties but also to those concerning mutual legal assistance and extradition. Beginning with the 105th Congress, the Senate began including the condition in the resolutions of ratification on virtually all treaties. As the result of compromises achieved in the late 1980s and early 1990s, however, the condition is no longer in the form of a reservation (which requires notice to, and agreement by, the other party or parties to the treaty) but is now expressed as a proviso.<sup>15</sup>

#### *National commitments concerns*

Congress became concerned in the late 1960s over the impact of U.S. involvement in other countries, such as Vietnam, and how the United States became heavily committed militarily in such countries. During August 1966 and February and March 1967, the Pre-

<sup>12</sup>For history and contextual discussion of the amendment, see the following: Tananbaum, Duane A. The Bricker Amendment Controversy: Its Origins and Eisenhower's Role. *Diplomatic History*, v. 9, Winter 1985: 73–93; Grant, Philip A. The Bricker Amendment Controversy. *Presidential Studies Quarterly*, Summer 1985: 572–582; and Reichard, Gary W. Eisenhower and the Bricker Amendment. *Prologue*, Summer 1974: 88–99. For legislative history discussion, see *Congressional Quarterly Almanac* for the year of interest.

<sup>13</sup>U.S. Library of Congress. Legislative Reference Service. *The Bricker Amendment and Similar Proposals for Amending the Treaty Provisions of the Constitution*. By Hugh P. Price, Dec. 2, 1964.

<sup>14</sup>U.S. Congress. Senate. Committee on the Judiciary. *Treaties and Executive Agreements. Hearings before a subcommittee, 84th Cong., 1st Sess. on S.J. Res. 1, April and May 1955*. Washington, U.S. Government Printing Office, 1955.

<sup>15</sup>For a more detailed description of the evolution of this condition, see the section in Chapter VI on the "Condition Regarding Supremacy of the Constitution."

paredness Investigating Subcommittee of the Senate Committee on Armed Services held hearings on worldwide military commitments. These were followed in August and September 1967 by hearings before the Senate Foreign Relations Committee on U.S. commitments to foreign powers, focusing on S. Res. 151, a resolution on national commitments.

On January 23, 1969, the Foreign Relations Committee created a Subcommittee on U.S. Security Agreements and Commitments Abroad (known as the Symington Subcommittee after its chairman, Senator Stuart Symington) for the duration of the 91st Congress. This subcommittee uncovered significant information previously unknown to Congress about various security arrangements with other countries that had been made by executive agreement. The information gathered by the subcommittee was instrumental in the passage of other legislation in the area of executive agreements and secret commitments.<sup>16</sup>

Meanwhile, on June 25, 1969, the Senate passed a national commitments resolution, S. Res. 85, expressing its sense that a U.S. national commitment should result “only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both houses of Congress specifically providing for such commitment.” The resolution was not legally binding on the President since it was not legislation, as was the War Powers Resolution. As a statement of Senate policy, however, the resolution established a guidepost that might be used in tracking future presidential actions.

In December 1970, the Symington Subcommittee concluded its lengthy investigations with a report, “Security Agreements and Commitments Abroad,” that included a number of observations and recommendations over the use or failure to use treaties and executive agreements in the making of national commitments. The subcommittee recommended that appropriate congressional committees request and receive full information on all understandings and agreements of a security nature which are undertaken between the United States and foreign countries or their leaders. Where appropriate, the proper committees should, in executive session, be informed on the progress of negotiations to this end.<sup>17</sup>

Congressional concerns over U.S. national commitments did not diminish in the 1990s. In November 1990, Congress required the President annually to report to the House and Senate Armed Services Committees and to the House Foreign Affairs and Senate Foreign Relations Committees on U.S. security arrangements with, and commitments to, other nations.<sup>18</sup> The fundamental concern of

<sup>16</sup>Over a 22-month period, this subcommittee “held 37 days of hearings, with 48 witnesses covering U.S. military forces, facilities and security programs in 13 countries, plus NATO.” See U.S. Congress. Senate. Committee on Foreign Relations. Subcommittee on United States Security Agreements and Commitments Abroad. *United States Security Agreements and Commitments Abroad, Hearings, 91st Congress*. Washington, U.S. Government Printing Office, 1970. 2 v., 2442 p. (Issued initially in 11 different parts; final publication in 2 volumes)

<sup>17</sup>U.S. Congress. Senate. Committee on Foreign Relations. Subcommittee on United States Security Agreements and Commitments Abroad. *Security Agreements and Commitments Abroad*; report. Washington, U.S. Government Printing Office, 1970. (91st Cong., 2d Sess. Committee Print.) p. 28.

<sup>18</sup>National Defense Authorization Act for Fiscal Year 1991, Section 1457, Public Law 101-510, approved November 5, 1990. The study shall include, (1) A description of (A) each security

this Senate-initiated provision was with the “ability of the United States to meet worldwide commitments in the future,” taking into account the “sizing down” of defense budgets and reduced force structure. The Senate Armed Services Committee believed it appropriate that a review be done to determine whether or not these commitments were “still necessary in the changing international environment.”<sup>19</sup> This report was transmitted to the required committees in 1991 and 1992.

*Military base agreements (Spain, Portugal, Bahrain)*

Another recommendation of the Symington Subcommittee urged that Congress “take a realistic look at the authority of the President to station troops abroad and establish bases in foreign countries.”<sup>20</sup> Referring to a practice of “creeping commitment,” the subcommittee observed that

Overseas bases, the presence of elements of United States armed forces, joint planning, joint exercises, or extensive military assistance programs represent to host governments more valid assurances of United States commitment than any treaty or executive agreement.<sup>21</sup>

This issue came to the fore in early August 1970, when the Nixon Administration concluded an executive agreement with Spain extending the original 1953 agreement governing American use of bases in Spain (the agreement had already been extended in 1963). A number of Senators expressed displeasure that the agreement was not being negotiated as a treaty. Senator J. William Fulbright, chairman of the Senate Foreign Relations Committee, argued that “This Spanish agreement is a classic example of how to enlarge the commitments of this country by secret agreements and executive agreements without the approval of Congress.”<sup>22</sup> On December 11, 1970, the Senate agreed to S. Res. 469 (91st Congress), expressing the sense of the Senate that nothing in the executive agreement with Spain should be deemed to be a national commitment by the United States. In 1976, a Treaty of Friendship and Cooperation with Spain that included provisions on use of the bases was finally concluded as a treaty and approved by the Senate. In 1981, the Senate Foreign Relations Committee agreed that future base agreements with Spain could be concluded as executive agreements after Spain became a member of NATO, a step finalized in May 1982.

In December 1971, the Nixon Administration concluded executive agreements with Portugal and Bahrain, providing for continued stationing of U.S. military personnel at a base in the Azores and

---

arrangement with, or commitment to, other nations, whether based upon (i) a formal document (including a mutual defense treaty, a pre-positioning arrangement or agreement, or an access agreement), or (ii) an expressed policy; and (B) the historical origins of each such arrangement or commitment. (2) An evaluation of the ability of the United States to meet its commitments based on the projected reductions in the defense structure of the United States. (3) A plan for meeting each of those commitments with the force structure projected for the future. (4) An assessment of the need to continue, modify, or discontinue each of those arrangements and commitments in view of the changing international security situation. See Chapter XI, for discussion of the 1992 report.

<sup>19</sup> Senate Report 101–384, p. 238 (101st Cong., 2d Sess.).

<sup>20</sup> *Ibid.*, p. 28.

<sup>21</sup> *Ibid.*, p. 20.

<sup>22</sup> Fulbright, James W. Spanish Bases. Congressional Record vol. 129, part 20, July 31, 1970: 28791.

continued use of support facilities in Bahrain. In response to this action, several members of the Senate Foreign Relations Committee introduced S. Res. 214, that any agreement with Portugal "should be submitted as a treaty to the Senate for advice and consent." In January 1972, Senator Clifford Case introduced an amendment to the resolution, to the effect that the agreement with Bahrain should also be submitted to the Senate as a treaty. In reporting favorably on S. Res. 214, the committee recalled that "no lesson" had been learned from the experience with the Spanish base agreement. These two agreements, the committee report continued, raised "important foreign policy questions" and the "submission of these agreements as treaties \*\*\* is the best and most appropriate way" of scrutinizing these questions.<sup>23</sup> As passed by the 92d Congress in March 1972, S. Res. 214 stated that "any agreement with Portugal or Bahrain for military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent." Neither of these resolutions had the force of law. Over the following 2 years, unsuccessful attempts were made in Congress to tie appropriation of funds to implement these agreements to their being submitted as treaties.

*Separation of Powers Subcommittee approach*

In spring 1972, a few months before adoption of the Case Act, another series of legislative proposals became the focus of hearings and legislative debate. The overall thrust of the proposals, spearheaded by Senator Sam Ervin, was a requirement that all international agreements other than treaties be transmitted to Congress 60 days before their entry into force. Congress would have the opportunity to adopt a resolution of disapproval before the expiration of the 60-day waiting period. In the absence of a disapproval resolution, the agreements would enter into force at the end of the 60-day period. Ultimately, none of these proposals was enacted.

The original legislation (S. 3475, 92d Congress) was introduced in April 1972, with 5 days of hearings concluding on May 19, 1972. Senator Ervin, who chaired the Separation of Powers Subcommittee of the Senate Judiciary Committee, reintroduced the legislation in 1973 (S. 1472, 93d Congress) and, in 1974, in S. 3830 (93d Congress), added a section that, in effect, removed from coverage most executive agreements. Section 4 of S. 3830 provided that executive agreements negotiated pursuant to a provision of the Constitution or to prior authority in treaty or law would not come under the procedures set forth in S. 3830. In November 1974, the Senate passed S. 3830, which was not considered in the House. While Senator Ervin's service in the Senate ended in 1974, his legislative proposal was reintroduced in 1975, with the Separation of Powers Subcommittee holding 4 days of hearings in May and July 1975 on S. 632 and S. 1251 (94th Congress). The House International Relations Committee (the House Foreign Affairs Committee), in 1976, held 6 days of hearings on similar legislative proposals (H.R. 4438).

<sup>23</sup>U.S. Congress. Senate. Committee on Foreign Relations. Agreements with Portugal and Bahrain. Report to Accompany S. Res. 214. Washington, U.S. Government Printing Office, 1972. (92d Cong., 2d Sess. S. Rept. No. 92-632) pp. 5, 8.

No further legislative action, beyond the hearings, was taken on any of these proposals.<sup>24</sup>

#### INTENT AND CONTENT OF THE CASE ACT

In response to the secret agreements uncovered during the Symington Subcommittee hearings, Senator Clifford P. Case in December 1970, introduced the legislation that became the Case-Zablocki Act. Senator Case recalled that an earlier version of the legislation had been proposed in 1954, 1955, and 1957 by Senators Homer Ferguson and William F. Knowland as an alternative to the Bricker amendment. The earlier bills, which called for submission of all executive agreements to the Senate within 60 days after entry into force, were passed by the Senate in the 84th and 85th Congresses but not acted on by the House.<sup>25</sup> Senator Case revised the Ferguson-Knowland bills to include the House. He reintroduced the legislation in February 1971 as S. 596, and it successfully proceeded through the legislative process to become Public Law 92-403.<sup>26</sup> House companion bills had been introduced in April 1972 by Representatives Clement Zablocki and Charles Whalen.

The Case Act requires the executive branch to keep Congress informed of all international agreements concluded by the United States, including those of a sensitive nature. The Senate Foreign Relations Committee described the bill as "an effective means of dealing with the prior question of secrecy and of asserting the obligation of the executive to report its foreign commitments to Congress."<sup>27</sup> The House Foreign Affairs Committee described S. 596 as "a step toward restoring a proper working relationship between the Congress and the executive branch in the area of foreign affairs. By establishing in law a formal procedure for the transmittal to Congress of all executive agreements, the bill would eliminate one potential source of friction."<sup>28</sup>

The act was not retroactive and required transmittal only of agreements made after the legislation took effect. The Senate report noted that the committee expected the executive branch to make all such previously enacted agreements available to the Con-

<sup>24</sup>More extensive discussion of the legislative proposals with citations to hearings and reports may be found in the following publications: U.S. Congress. House. Committee on International Relations. Congress and Foreign Policy—1975. Washington, U.S. Government Printing Office, 1976. See pp. 45-48. Congressional Oversight of Executive Agreements; U.S. Congress. House. Committee on International Relations. Congress and Foreign Policy—1976. Washington, U.S. Government Printing Office, 1977. See pp. 11-18. Executive Agreements and Treaties.

<sup>25</sup>In the 83d Congress, S. 3067 was introduced in March 1954 and reported to the Senate in August 1954, but not passed by the Senate. In the 84th Congress, S. 147 was introduced in January 1955, reported to the Senate in July 1956, and passed by the Senate in July 1956. In the 85th Congress, S. 603 was introduced in January 1957, reported to the Senate in June 1957, and passed by the Senate in June 1957.

<sup>26</sup>Legislative history of Public Law 92-403 follows: Feb. 4, 1971: S.596 introduced. Oct. 20 and 21, 1971: Public hearings, Senate Foreign Relations Committee. Printed. Dec. 7, 1971: Ordered reported. Jan. 19, 1972: Reported to the Senate, S. Rept. 92-591. Feb. 16, 1972: Passed Senate, 81-0. Feb. 17, 1972: Referred to House Foreign Affairs Committee. June 19, 1972: Public hearings by Subcommittee on National Security Policy and Scientific Developments. Printed. Aug. 3, 1972: Passed full House committee, ordered reported, and reported to the House, H. Rept. 92-1301. Aug. 14, 1972: Passed House. Voice vote. Aug. 22, 1972: Approved. Public Law 92-403.

<sup>27</sup>U.S. Congress. Senate. Committee on Foreign Relations. Transmittal of Executive Agreements to Congress. Report to accompany S. 596. S. Rept. 92-591, 92d Cong., 2d Sess. Washington, U.S. Government Printing Office, 1972, p. 5.

<sup>28</sup>U.S. Congress. House. Committee on Foreign Affairs. Transmittal of Executive Agreements to Congress. Report to accompany S. 596. H. Rept. 92-1301, 92d Cong., 2d Sess. Washington, U.S. Government Printing Office, 1972, p. 2.

gress or its foreign affairs committees at their request and in accordance with the procedures defined in the bill.

As originally enacted, the law had two provisions. First, it required the Secretary of State to transmit to Congress the text of any international agreement other than a treaty as soon as practicable but no later than 60 days after it entered into force. Second, those agreements which the President determined should be classified would be transmitted not to Congress as a whole, but to the House Foreign Affairs Committee and the Senate Foreign Relations Committee under an injunction of secrecy to be removed only upon notice from the President.

#### IMPLEMENTATION, 1972–1976

Passage of the Case Act established the basic obligation for the transmittal by the Secretary of State to Congress of any international agreement other than a treaty within 60 days after its entry into force. Implementation of this obligation started immediately and satisfactorily. However, Senator Case, concerned over Administration inferences during Senate consideration of the legislation that “certain kinds of agreements” might not be transmitted under the Act, sought a clarification of this point from the State Department. In response to the committee’s request for “a written statement defining executive agreements and listing specifically the kinds of agreements that will be submitted and whether there are any categories of agreements that the Department believes are not covered by the Case Act,” the State Department’s Acting Legal Adviser, Charles N. Brower, submitted the following:

The expression “executive agreement” is understood by the Department of State to include any international agreement brought into force with respect to the United States without the advice and consent of the Senate under the provisions of clause 2 of Section 2, Article II of the Constitution of the United States. The words “all international agreements other than treaties to which the United States is a party” in the act of September 23, 1950 (paragraph 2, 64 Stat. 980; 1 U.S.C. 112a) and the words, “any international agreement, other than a treaty, to which the United States is a party” in the Case Act (86 Stat. 619; U.S.C. 112b) are considered as including all international agreements covered by the expression “executive agreement.”

Accordingly, the Department of State considers the Case Act as covering “all international agreements other than treaties” specified in the act of September 23, 1950, and required by that act to be published in the new compilation entitled “Treaties and Other International Agreements of the United States: (UST),” plus comparable agreements that are classified in the interest of national security and not published in that compilation.<sup>29</sup>

On the question of the kinds of agreements that would be submitted, the Legal Adviser reported that the “Department considers that the Case Act is intended to include every international agree-

<sup>29</sup>Case, Clifford P. Cooperation of Department of State under Public Law 92–403. Congressional Record, vol. 119, part 16, June 18, 1973: 1974.

ment, other than a treaty, brought into force with respect to the United States after August 22, 1972, regardless of its form, name or designation, or subject matter.”<sup>30</sup>

Senator Case noted his agreement with the “State Department’s interpretation” and for the record listed the following as among the types of agreements the committees would regularly receive:

- Intelligence agreements;
- Nuclear basing agreements;
- Presidential executive agreements;
- Intergovernmental agreements between Cabinet or independent agencies in the United States and their foreign counterparts;
- Nuclear technology sharing agreements;
- International trade agreements;
- Military and economic assistance agreements;
- Agreements with foreign intelligence agencies; and
- Contingency agreements with countries with which the United States does not have security commitments by treaty.<sup>31</sup>

Senator Case added that this list should not be considered all inclusive and did not preclude Congress receiving other types of agreements.

Finally, the Department of State also agreed to provide to Congress certain material requested by the Chairman of the Foreign Relations Committee, Senator William Fulbright, concerning classified agreements. Senator Fulbright had requested that “each classified executive agreement transmitted to the committee be accompanied by an explanation of the agreement, background information on its negotiations, and a statement of its effect.” The Congressional Relations office of the Department of State indicated its willingness to “provide the information \*\*\* requested,” concluding “we are initiating immediately the steps necessary to insure that classified agreements transmitted \*\*\* under the Act will be accompanied by appropriate background information.”<sup>32</sup>

Earlier in 1973, the General Accounting Office (GAO) found that executive branch agencies had concluded U.S. executive agreements and arrangements to provide substantial assistance to seven countries that contributed forces to Vietnam without notification of these agreements to Congress. In view of the Case Act, the GAO recommended that the Secretary of State,

—Establish procedures to require that all agreements be subject to his approval. This would include those subordinate to or designed to implement basic government-to-government agreements which commit the United States to specific performance requiring expenditure of substantial amounts of money.

—Require a central repository to be established within the State Department for all such international agreements, arrangements, and commitments, similar to the one now in existence for treaties.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.



—Provide annually to the appropriate committees of the Congress a list and description of all such agreements, together with estimates of the future years' costs that each agreement involves.<sup>33</sup>

This report highlighted the need to ensure that the State Department had copies of all executive agreements concluded with other countries by various agencies of the government. In response, on September 6, 1973, Acting Secretary of State Kenneth Rush sent a letter to all executive branch departments and agencies concerning the State Department's obligation under the Case Act to transmit all agreements to the Congress. In part, the letter read,

it seems clear that texts should be transmitted to the Department of State of [all subordinate and implementing agreements involving substantial amounts of U.S. funds or other tangible assistance] and of any agreements of political significance, any that involve a substantial grant of funds, any involving loans by the United States or credits payable to the United States, any that constitute a commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations, and any that involve continuing or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment. In general, the instruments transmitted to the Congress pursuant to the Case Act, and those published (other than those classified under E.O. 11652), should reflect the full extent of obligations undertaken by the United States and of rights to which it is entitled pursuant to instruments executed on its half.

The fact that an agency reports fully on its activities to a given Committee or Committees of Congress, including a discussion of agreements it has entered into, does not exempt the agreements concluded by such agency from transmission to the Congress by the Department of State under the Case Act.<sup>34</sup>

In August 1973, the Department of State initiated plans to revise its Circular 175 procedures, issued in the Foreign Affairs Manual, an internal instruction for State Department personnel. The proposed revision, incorporating changes reflecting the Case Act obligations, among other things, was published in the Federal Register because of "the public interest in the manner in which treaties and other international agreements are entered into by the United States."<sup>35</sup>

Congressional concerns over gaps in the transmittal of agreements and lack of clarity over what constituted an executive agreement persisted in 1974 and 1975. In April 1975, Senator James

<sup>33</sup> U.S. General Accounting Office. U.S. Agreements with and Assistance to Free World Forces in Southeast Asia Show Need for Improved Reporting to the Congress. Report of the Comptroller General. April 24, 1973. Washington, 1973. 5 p. (B-159451) See pp. 1, 4-5. An unclassified digest furnished in lieu of a report containing classified security information.

<sup>34</sup> Rovine, Arthur W. Digest of United States Practice in International Law, 1973. Washington, D.C., U.S. Government Printing Office, 1974. pp. 187-188. Text may be seen in its entirety in U.S. General Accounting Office. U.S. Agreements with the Republic of Korea; Departments of State and Defense. Report of the Comptroller General of the United States. February 20, 1976. Washington, 1976. See Appendix III, pp. 22-24.

<sup>35</sup> Treaties and Other International Agreements; Notice of Proposed Rulemaking. Federal Register, v. 38, no. 157, August 15, 1973: 22084f.

Abourezk, chairman of the Senate Judiciary Committee's Subcommittee on Separation of Powers, asked the General Accounting Office to explore whether all agreements with Korea had been transmitted under the Case Act and whether there were any oral agreements that had not been reduced to writing. In February 1976, the GAO responded, identifying 34 agreements made since 1972 between the United States and South Korea which had not been transmitted to Congress by the State Department since they had never been sent to the State Department, as required by the Rush letter.<sup>36</sup> In response, the Department of State circulated to ALL DIPLOMATIC POSTS an airgram dated March 9, 1976, outlining "Case Act Procedures and Department of State Criteria for Deciding What Constitutes an International Agreement." A copy of the Case Act and the Rush letter accompanied the Airgram. A similar letter, under the same title, was sent to Key Department Personnel on March 12, 1976.

One of the concerns expressed at the time the Case Act was enacted was the quantity of agreements to be transmitted. Initial discussions between the State Department's Legal Adviser and the Senate Foreign Relations and House Foreign Affairs Committees dwelt on assurances that all agreements other than treaties would be transmitted. In 1976, the focus of attention turned to consultations on agreements that might not be transmitted. The proliferation of transmitted agreements was especially large for those negotiated by the Agency for International Development (AID). According to the Legal Adviser, many of the agreements were for relatively small amounts of money and AID already reported regularly to Congress on its activities and programs. In a letter to Foreign Relations Committee Chairman John Sparkman dated May 27, 1976, Legal Adviser Monroe Leigh wrote:

Subject to your concurrence and that of Chairman Morgan of the House Committee on International Relations, it has been agreed that the Department of State will submit to the Congress pursuant to the Case Act any international agreement or amendment thereto entered into by the Agency for International Development with a foreign government or international organization which provides that the United States will contribute at least \$1 million in support of the project or projects set forth in the agreement.

This \$1 million limitation will be subject to three exceptions. First, it is understood that all AID agreements with foreign governments or international organizations which have as a principal purpose the establishment of an AID program will be submitted \* \* \*.

Second, it is agreed that any other AID agreement or amendment that is significant for reasons other than level of funding will be submitted to the Congress pursuant to the Case Act, even if it provides for less than \$1 million \* \* \*.

Finally, it is agreed that any AID agreement with a foreign country or international organization, without regard to dollar amount, entered into pursuant to Section 607 of the Foreign

<sup>36</sup>U.S. General Accounting Office. U.S. Agreements with the Republic of Korea, Departments of State and Defense. Report of the Comptroller General of the United States. February 20, 1976. Washington, 1976. (ID-76-20; B-110058)

Assistance Act of 1961, as amended, will be submitted pursuant to the Case Act \* \* \*.<sup>37</sup>

The amount was subsequently raised from \$1 million to \$25 million.

#### AMENDMENTS OF THE CASE ACT, 1977-1978

After nearly 5 years' experience with the Case Act, some limitations of the original Act became clear. The Case Act was amended in both 1977 and 1978 to address these limitations. During 1977, Congress modified the Case Act to require that

Any department or agency of the U.S. Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than 20 days after such agreement has been signed.<sup>38</sup>

The amendment was intended to ensure, by law, that the Department of State would receive agreements made by other agencies in a timely manner and thus be able to transmit them to the Congress within the limits of the Case Act. A 1976 General Accounting Office report had identified the Department's unsuccessful efforts in acquiring the texts of agreements concluded by other agencies as a major problem.

In 1978, Congress further amended the Case Act. A major intent of those amendments was to consolidate, within the executive branch, the role of the State Department as the central coordinator for negotiations with other countries and international organizations and to set forth in U.S. statute the obligations of the executive branch relative to international agreements other than treaties. They were added in the Foreign Relations Authorization Act, Fiscal Year 1979.<sup>39</sup> The first amendment included "any oral international agreement" within the coverage of the Act, stipulating that oral agreements must be "reduced to writing." The Foreign Relations Committee sought to eliminate "any possible incentive for entering into certain agreements orally rather than in writing" and specifically to "require the transmission of intelligence sharing and intelligence liaison agreements, many of which are oral."<sup>40</sup>

The rest of the amendments aimed at the problem of agreements negotiated outside of the State Department although they apply equally throughout the government. The second amendment required that the President send to Congress annually<sup>41</sup> a report on

<sup>37</sup>Letter from Monroe Leigh, Legal Adviser, Department of State to Senator John J. Sparkman, Chairman, Senate Foreign Relations Committee. Dated May 27, 1976. 2 p. Senate Foreign Relations Committee files. Section 607 of the Foreign Assistance Act authorizes the President to furnish services and commodities on an advance-of-funds or reimbursable basis to countries, international organizations, the American Red Cross, and voluntary nonprofit relief agencies.

<sup>38</sup>Section 5, Public Law 95-45, 91 Stat. 244, approved June 15, 1977. This amendment was recommended by the Senate Foreign Relations Committee in its report to the Senate on H.R. 5040, authorizing additional appropriations for the Department of State for fiscal year 1977 (S. Rept. 95-99). It was accepted by the Senate on May 11, 1977, and by the House on May 26, 1977.

<sup>39</sup>Section 708, Public Law 95-426, 92 Stat. 993, approved October 7, 1978.

<sup>40</sup>U.S. Congress. Senate. Committee on Foreign Relations. Foreign Relations Authorization Act, Fiscal Year 1979. Report on S. 3076. Washington, U.S. Government Printing Office, 1978. p. 45. (95th Cong., 2d Sess. S. Rept. 95-842).

<sup>41</sup>The actual language is "Not later than March 1, 1979, and at yearly intervals thereafter."

all agreements which “during the preceding year” were transmitted to Congress after the 60-day period set forth in the Act. This “late agreements report” was to describe “fully and completely the reasons for the late transmittal.” The committee believed that a report at the presidential level would bring such noncompliance with the Act by whatever agency to the President’s attention. This report has been transmitted in typescript form to the Congress in late February or early March annually. In 1985 and 1986, the transmittals were in late March and early April, respectively. The report covering 1981 was published as a House Document, thereby increasing the availability of the information.<sup>42</sup> This was a one-time occurrence.

The third amendment required that no agreement be signed or concluded by any agency in the executive branch without prior consultation with the Secretary of State. The purpose of this amendment was to ensure that the Secretary of State was aware of agreements or classes of agreements being made by other agencies of the government and to maintain the Secretary’s role as coordinator of negotiations between the United States and other countries. It also sought to ensure that the Congress would be consulted under the State Department’s Circular 175 procedures as to whether an agreement should be an executive agreement or a treaty. The fourth amendment specified the Secretary of State as the U.S. Government official with the authority within the executive branch to determine whether an arrangement with a government constitutes an international agreement under the Act.

The final amendment required the President to develop rules and regulations implementing the Case Act and make them applicable to all agencies. This was to ensure that the Case Act was applied to the agreements made by any U.S. agencies. These regulations, “Coordination and Reporting of International Agreements,” were published in final form in the Federal Register on July 13, 1981, and apply to all agencies.<sup>43</sup> They outline the procedures to be followed by all agencies in consulting with the Secretary of State before concluding an international agreement and the procedures to be followed by the State Department in transmitting executive agreements to Congress.

The regulation specifies the following criteria for determining whether an agreement constitutes an executive agreement that should be reported under the Case Act:

1. The parties must be states, the domestic agencies of a state, or an international organization and must intend to be legally bound by the agreement;
2. The agreement must be significant, a determination based, in part, on application of four additional elements, namely, that the agreement: have political significance, involve substantial grants of funds or credits, constitute a substantial commitment of funds extending beyond a fiscal year, and in-

---

<sup>42</sup>The citation for the 1981 report is 97th Cong., 2d Sess., House Document No. 97-148. 12 p.

<sup>43</sup>For text, see Appendix 3. U.S. Department of State. Regulation 108.809. 22 CFR, Part 181. Coordination and Reporting of International Agreements. Final Rule. Federal Register, v. 46, no. 133, July 13, 1981: 35917-35921.

volve continuing and/or substantial cooperation in the conduct of a program or activity;

3. The agreement must be specific enough in the undertaking required of the parties as to be legally enforceable;

4. There must be at least two parties;

5. The agreement normally follows the customary form for international agreements.

These same criteria apply to agency-level agreements, implementing agreements, extensions and modifications of agreements, and oral agreements.

The regulations also set forth the procedures for consultation with the Department for a determination of the form of the agreement (whether treaty or executive agreement); procedures for ensuring that an agreement or class of agreements is consistent with U.S. foreign policy objectives; adherence to the 20-day rule for concluded agreements; and materials required to be transmitted to the Congress.

According to Department of State officials, the process of gathering the background information desired by Congress and supplying an official copy of the agreement often takes the full 60 days specified by the Case Act.<sup>44</sup>

In 1994, Congress amended the publication section of 1 U.S.C. 112a, authorizing the State Department not to publish certain categories of agreements after February 26, 1996. See *supra*, this chapter, first section.

#### COMMITTEE PROCEDURES UNDER THE CASE ACT<sup>45</sup>

Since the passage of the Case Act, the Senate Foreign Relations and House International Relations Committees have developed procedures for consulting, receiving, and using the executive agreements transmitted to Congress under the Case Act.<sup>46</sup> The letter of transmittal to the President of the Senate and the Speaker of the House is noted in the Congressional Record. The agreements are referred to the Senate Foreign Relations Committee and the House International Relations Committee. Classified executive agreements are sent directly to the two committees.

##### *Senate Foreign Relations Committee procedures*

After being transmitted to the President of the Senate, the unclassified agreements are informally referred to the Parliamentarian for a referral determination and then to the "morning clerk" who gives the transmittal an executive communication number. The package of agreements and materials is formally referred to the Senate Committee on Foreign Relations and cited in the Congressional Record the next day. The transmission is listed in the committee calendar, with the Executive Communication (EC) number cited. Each agreement is also listed, identifying the country and subject, along with the EC number, in a Weekly Summary of Committee Activity that is circulated to committee members and

<sup>44</sup>Information from Office of Assistant Legal Adviser for Treaty Affairs, Department of State, February 1993.

<sup>45</sup>Information in this section was verified in interviews with committee staff in January 2001.

<sup>46</sup>After 1994, the House Committee on Foreign Affairs was renamed the House Committee on International Relations.

staff and is a main communication tool. The committee's chief counsel reviews each agreement for completeness and also serves an alert function for members and staff as necessary. The committee information system office (1) maintains a data bank that facilitates retrieval of the agreements by country, subject matter, or date and (2) provides for the microfilming of each unclassified agreement. At the end of each Congress, the agreements are sent to the committee's official records in the National Archives.

Classified agreements are sent directly to the committee and stored with other classified materials. A chronological listing of all classified agreements received is maintained and appropriate committee staff are notified of their receipt for possible consultation with Members. The Weekly Summary of Committee Activities also includes a notification that classified agreements have been received; information on the country and subject matter is not included in this listing. The chief counsel also reviews each classified agreement for completeness of transmission and the necessity for briefings for Members and staff. The classified agreements are not microfilmed but are kept in the committee's custody for a longer period of time.

#### *House International Relations Committee procedures*

In the House International Relations Committee, all unclassified executive agreements transmitted to the Speaker and referred to the committee are listed separately in the committee calendar by country, with the subject of the agreements and its executive communication number. Appropriate staff are notified of the receipt of specific agreements, the texts of which are maintained in committee files for a single Congress. Thereafter, the agreements are sent to the committee's records at the National Archives.

Classified agreements are received directly by the committee. A brief notice of their receipt is included in the committee's Survey of Activities which is circulated weekly to all committee staff and members. A memorandum of notification that such agreements have been received is sent to appropriate committee staff. Classified executive agreements are recorded in a log with other executive branch reports and are retrievable through the log. Classified agreements can be sent to the committee's records at the National Archives at the end of each Congress.

#### IMPACT AND ASSESSMENT OF THE CASE ACT

The Case Act has been helpful in apprising Congress of executive agreements as defined by the Act. Staff members of both the Foreign Relations and the International Relations Committees indicate their satisfaction that all agreements the State Department knows of are transmitted, although notifications to the "Treaty Office" in the State Department of agreements signed may still be unpredictable (see below on late agreements). Implementation of the Case Act has contributed to improved relations between Congress and the executive branch in the area of executive agreements. In addition, the Case Act has helped the Department of State gain control of the agreements negotiated by other agencies.

Problems still remain with ensuring that Congress is informed and consulted on all binding international agreements. Some prob-

lems are due to difficulties in Congress in handling the executive transmittals. Others are based on the continuing lack of clear and agreed definitions of executive agreements.

*Number of agreements transmitted*

The language of the Case Act is general enough to encompass a great variety and number of executive agreements. In an effort to comply with the act, the Department of State initially interpreted it broadly and sent to the Congress a large number of agreements. The first and immediate impact of the Act, particularly as more agreements negotiated by other executive branch agencies were sent to the State Department's treaty office, was a dramatic increase in the number of executive agreements reported as concluded on behalf of the United States. See Table II-2, in Chapter II, especially the figures for 1976-1978.<sup>47</sup> This phenomenon brought to both the committees and the State Department the problems of processing such a large number of agreements. Consultations among all involved resulted in a decision that certain agreements made by the Agency for International Development would not be transmitted (see discussion above).

An associated problem for the State Department was ensuring that the agreements were published in a timely manner as part of its TIAS series. Financial and personnel shortages have delayed the publishing of the TIAS, and also of UST, by the Department of State by at least 10 years.

The numbers of agreements transmitted remained high, at least through 1990. The calendar year 1991 and 1992 figures of 280 and 296, respectively, probably reflect the 1990 redefinition and exclusion of 60 to 80 Public Law 480, Title I agreements concluded annually (see below, under Insufficient Transmittal of Agreements to Congress). During the rest of the 1990s, the number of agreements gradually fell until in 1998 and 1999, fewer than 200 agreements were transmitted annually. See Table X-1.

Table X-1.—Transmittal of Executive Agreements to Congress, 1978-1999

Year Covered	Total Transmitted	Total Late		Late Agreements, Agency of Origin		
		Number	Percent	State		Other Agencies
				Total <sup>1</sup>	From Posts	Total
1978	520	132	25.4	45 (includes 1 classified)	?	87 (includes 3 classified)
1979	355	46	13	19 (includes 1 classified)	7	27 (includes 2 classified: DOD)
1980	320	43	13.4	24 (includes 2 classified)	9	19 (includes 1 classified: DOD)
1981	368	99	27	69 (includes 2 classified)	19	30 (includes 1 classified: DOD)
1982	372	84	23	44 (includes 1 classified)	13	40 (includes 6 classified: DOD, 5; Treasury, 1)

<sup>47</sup> For comprehensive data on the conclusion of treaties and executive agreements, see Chapter II above.

Table X-1.—Transmittal of Executive Agreements to Congress, 1978–1999—Continued

Year Covered	Total Transmitted	Total Late		Late Agreements, Agency of Origin		
		Number	Percent	State		Other Agencies
				Total <sup>1</sup>	From Posts	Total
1983	335	71	21.2	39 (includes 1 classified)	21	32 (includes 0 classified)
1984	369	69	18.7	45 (includes 5 classified)	27	24 (includes 5 classified: DOD, 1; USAF, 2; Treasury, 2)
1985	343	88	25.7	39 (includes 2 classified)	25	49 (includes 8 classified: DIA, 3; NRC, 2; DOD, 1; USN, 2)
1986	383	65	17	32 (includes 1 classified)	25	33 (includes 3 classified: DIA, 1; DOD, 1; Treasury, 1)
1987	396	57	14.4	35 (includes 2 classified)	26	22 (includes 2 classified) <sup>2</sup>
1988	412	79	19.2	39 (includes 2 classified)	26	40 (includes 7 classified) <sup>2</sup>
1989	344	55	16	38 (includes 2 classified)	22	17 (includes 4 classified) <sup>2</sup>
1990	364	51	14	23 (includes 1 classified)	18	28 (includes 10 classified) <sup>2</sup>
1991	280	30	11	18 (includes 0 classified)	8	12 (includes 1 classified) <sup>2</sup>
1992	296	56	18.9	38 (includes 0 classified)	19	18 (includes 8 classified) <sup>2</sup>
1993	243	45	18.5	26 (includes 0 classified)	12	19 (includes 10 classified) <sup>2</sup>
1994	313	27	8.6	15 (includes 1 classified)	10	12 (includes 0 classified)
1995	276	29	10.5	11 (includes 0 classified)	8	18 (includes 6 classified: Treasury, 5; DIA, 1)
1996	225	41	18	28 (includes 3 classified)	11	13 (includes 5 classified: DIA, 3; Navy, 2)
1997	212	29	13.6	18 (includes 0 classified)	7	11 (includes 1 classified: DIA)
1998	199	18	9	12 (includes 0 classified)	4	6 (includes 0 classified)
1999	166	31	18.6	18 (includes 3 classified)	9	13 (includes 4 classified) <sup>2</sup>
1993–1999 Subtotals	1634	220	13.5	128	61	92
Totals— all years	7091	1245	17.5	675 (54.2% of total late)	326	570 (45.8% of total late)

<sup>1</sup>Total includes those which are classified and/or late from posts.

<sup>2</sup>Agencies not identified.

**One tool for determining when transmitted agreements are significantly more important than others is the background statement**



required to accompany the texts of each agreement. While the Case Act did not require such a statement, correspondence between the Senate Foreign Relations Committee and the State Department included the requirement for a background statement for each classified agreement.<sup>48</sup> The regulation implementing the Act stipulates that each agreement, classified or unclassified, be accompanied by a background statement including "information explaining the agreement, the negotiations, the effect of the agreement, and a precise citation of legal authority."<sup>49</sup> These statements can be useful in setting a context for committee staff and members.

*Late transmittal of Case Act agreements*

The number of agreements which were not transmitted to Congress within the 60-day time limit is still a source of concern although the numbers are notably lower in recent years than in earlier periods. Referring to Table X-1, between 1978 and 1985, the percent of late transmittals to total agreements transmitted was often between 20 and 25 percent. Between 1985 and 1992, the percent of late to total transmittals dropped below 20 percent, falling to 11 percent in 1991 and 18.9 percent in 1992. Between 1993 and 1999, the percent of late to total transmittals fell to 13.5 percent. Some agreements are still transmitted months or even a year or two late. In some cases, it is only when an agreement is amended that the original comes to light.

Table X-1 also shows that during the period 1978-1992, 547 agreements transmitted after the 60-day date, or 53.4 percent, originated from the State Department, including 265 agreements arriving late from overseas posts into the Department. During the same period, 478 agreements, or 46.7 percent of the total agreements transmitted late, were transmitted late to the State Department from other executive branch agencies. In comparison, for the period 1993-1999, 128 or 58.2 percent of the 220 agreements transmitted late originated within the Department of State, including 61 from overseas posts, while 92 agreements or 41.8 percent of all late transmittals, originated from other agencies of the U.S. Government.

Table X-2 shows that over the 14-year period, from 1979 through 1992, a total of 29 agencies, other than the State Department, at one time or another, submitted at least one executive agreement to the State Department in such fashion that the State Department could not transmit the agreement to the Congress within the required 60 days after entry into force.<sup>50</sup> This does not include classified agreements, about which information on the agency of origin was absent in the reports covering 1987 through 1993 and for 1999. In this initial 14-year period, the top four late reporting agencies were the Federal Aviation Administration (FAA), the Agency for International Development (AID), the Nuclear Regulatory Commission (NRC), and the Department of Defense (DOD), followed by the U.S. Trade Representative (USTR). Practice over the 7 years since 1992 has improved, with 22 agencies (eight of them new to the list)

<sup>48</sup> See above, under Implementation, 1972-1976.

<sup>49</sup> 22 CFR 181.7, see Appendix, *infra*.

<sup>50</sup> The report for 1978, the initial report, did not include an agency breakdown on the 87 unclassified agreements received late from other agencies.

reported as submitting a total of 92 agreements late. The FAA, DOD, and NRC have been joined by the U.S. Geological Survey. The USTR and AID have probably fared better because of arrangements that eliminated many of the classes of agreements initially required for submittal.

Table X-2.—Agencies Submitting Agreements Late, 1979–1999

Name of Agency	Number of Agreements	Number of Years
Federal Aviation Administration .....	23	15
Department of Defense .....	34	15
Nuclear Regulatory Commission .....	59	13
U.S. Geological Survey .....	19	13
U.S. Trade Representative .....	47	12
Agency for International Development .....	42	12
Department of Energy .....	21	10
Department of the Navy .....	22	8
Department of Agriculture <sup>1</sup> .....	13	7
Department of the Air Force .....	8	7
U.S. Postal Service <sup>1</sup> .....	12	6
National Science Foundation .....	11	5
National Aeronautics and Space Administration .....	14	5
Peace Corps .....	5	5
Department of the Interior <sup>1</sup> .....	4	4
Defense Mapping Agency <sup>1</sup> .....	5	4
Department of Justice <sup>1</sup> .....	5	4
U.S. Information Agency .....	8	4
Department of the Treasury .....	13	4
Overseas Private Investment Corporation .....	7	4
Defense Intelligence Agency .....	5	4
Food and Drug Administration <sup>1</sup> .....	4	3
Department of Transportation <sup>1</sup> .....	5	3
Department of the Army .....	3	3
Department of Commerce <sup>1</sup> .....	2	2
Defense Security Assistance Agency .....	2	2
U.S. Customs Service .....	3	2
Department of Health and Human Services <sup>1</sup> .....	2	1
General Services Administration <sup>1</sup> .....	1	1
National Bureau of Standards (NIST) <sup>1</sup> .....	1	1
National Oceanographic and Atmospheric Administration <sup>1</sup> .....	1	1
U.S. Coast Guard <sup>1</sup> .....	1	1
Department of Labor <sup>1</sup> .....	1	1
Bureau of Mines .....	1	1
Advanced Research Projects Agency .....	1	1
National Institutes of Health .....	1	1
International Boundary Waters Commission .....	1	1
Totals: 37 Agencies .....	423	

<sup>1</sup> Indicates agency has not been included in the late transmittal report after 1992.

The State Department uses the occasion of the late agreements report to remind executive branch agencies and Department offices

and overseas posts of their responsibilities to submit to the Treaty Office the texts of any agreements it concludes within 20 days after signature. Copies of the regulation and/or Circular 175 are forwarded to each office.

Generally, the “late agreements” report does not provide a very detailed explanation for the lateness of transmittal. Instead, it lists the agreements by origin: agreements received in the Department of State from other agencies (the agency is identified for each agreement); agreements received late from the action office in the Department of State; agreements received late from posts abroad; agreements transmitted late due to internal procedures; and agreements, as appropriate, received late from the depositary government or organization. The earlier reports, for 1978–1981, often included a little more detail in an annotation for those agreements originating in the State Department. The legislative requirement for the late agreements report anticipated that the report would describe “fully and completely the reasons for the late transmittal.”

Similarly, the background statements transmitted along with the agreements do not include any explanation of the lateness of the agreement. Another mechanism that might prove useful in obtaining information on the reasons for late transmittal, irrespective of the agency of origin, might be a consultation involving the two committees, the State Department, and an appropriate White House official. In this way, some of the possible difficulties in meeting the deadlines for transmittal might be discussed, with some equitable resolution achieved.

#### *Insufficient transmittal of agreements to Congress*

One category of agreement that may contribute to confused expectations over what will be transmitted is so-called “gray area” agreements. These agreements, concluded in a non-binding form or determined by the executive branch to be legally non-binding on the United States, are not referred to Congress under the Case Act procedures although the executive branch may voluntarily provide information about them to Congress. Non-binding international agreements have been used in several important areas in recent years.<sup>51</sup> They are viewed as involving political or moral obligations but not legal obligations. A prominent example is the 1975 Final Act of the Conference on Security and Cooperation in Europe (CSCE), better known as the Helsinki Agreement.

Another example is the 1978 Bonn Declaration on International Terrorism, which did not take the form of an international agreement but was supported by assurances from the governments involved that they would take steps to carry it out. This Declaration was followed during successive years with additional statements or declarations by the heads of state and government of the Economic Summit countries. For example, the 1986 Tokyo Economic Summit Conference Statement on International Terrorism, May 5, 1986, listed six measures the Summit leaders were prepared to apply in response to any state supporting terrorism.<sup>52</sup> Later statements en-

<sup>51</sup> See discussion of nonbinding agreements and functional equivalents in Chapter III above.

<sup>52</sup> U.S. Congress. House. Committee on Foreign Affairs. International Terrorism: A Compilation of Major Laws, Treaties, Agreements, and Executive Documents. Report Prepared by the Congressional Research Service, Library of Congress, July 1991. Washington, U.S. Government

dorsed the Bonn Declaration and Tokyo Statement and referred generally to the cooperative efforts under way by the Summit countries. Illustrative of the coordination and cooperation that developed under this framework were the actions by many West European countries to expel diplomats and staff of Iraqi Embassies and other Iraqi offices and other potential saboteurs and terrorists during the Persian Gulf war.<sup>53</sup> The collaboration initiated in response to the Bonn and Tokyo documents might be said to have contributed to the success in preventing massive and significant acts of terrorism in coalition countries.

Another subject area where nonbinding agreements or arrangements play a significant role is multilateral nonproliferation regimes.<sup>54</sup> In these instances, a number of supplier nations have decided to meet on a more or less regular basis to draft and approve guidelines under which the participating nations will limit or restrict their export of agreed upon materials. No formal and publicly accessible documentation appears to be available, either on the establishment of these arrangements or on the actions or decisions taken at the meetings. The whole activity is voluntary and any agreements concluded are viewed as political in nature rather than having legal standing.<sup>55</sup> The participating countries, however, often behave as though a real commitment exists. Since the Case Act requires that all agreements other than treaties be transmitted and that oral agreements be put into writing, and establishes a procedure for the transmittal of classified agreements, and in the light of increased multilateral activity in these areas in the post-Cold War era, some believe these kinds of arrangements could represent a large loophole.

---

Printing Office, 1991. (102d Cong., 1st Sess., Committee Print) Carries the texts of the Economic Summit statements and declarations on international terrorism, 1978–1990, pp. 290–301. A July 2000 update of this compilation by the same title for the House. Committee on International Relations, carries Economic Summit texts starting in 1986.

<sup>53</sup>U.S. Department of State. Office of the Coordinator for Counterterrorism. *Patterns of Global Terrorism*: 1991. Washington, 1992, pp. 7–11, 14–15.

<sup>54</sup>The information on this subject area is taken from U.S. Congress. House. Committee on Foreign Affairs. *Nonproliferation Regimes: Policies to Control the Spread of Nuclear, Chemical, and Biological Weapons and Missiles*. Committee Print, 103d Cong., 1st Sess., March 1993. Washington, U.S. Government Printing Office, 1993. Hereafter cited as Davis, *Nonproliferation*. See also Department of State Web site, <http://www.state.gov>, under Arms Control, Nonproliferation.

<sup>55</sup>In the nuclear supplier area, two arrangements exist. The first, the Nuclear Exporters Committee (known as the Zangger Committee), was formed in the early 1970s by seven nations to “reinforce and assist in the implementation of the restrictions on nuclear trade included in Article III of the NPT” (the 1970 Treaty on the Nonproliferation of Nuclear Weapons). The Zangger Committee, in 1974, drew up a “list of nuclear export items that could be potentially useful for military applications of nuclear technology. The nuclear suppliers agreed that the transfer of items on the list would ‘trigger’ application of IAEA safeguards to assure that the items were not used for the development of nuclear explosives.” (Davis, *Nonproliferation*, pp. 20–21) The Zangger Committee meets twice a year. The second arrangement is the Nuclear Suppliers Group (the London Group), that met for the first time in 1975 to develop a set of nuclear export guidelines. In 1978, the group “announced a common policy regarding nuclear exports,” including some “dual-use” items on its list. The 1992 meeting of the NSG agreed on new guidelines and sought to coordinate its list with the Zangger Committee list. (Davis, *Nonproliferation*, pp. 20–21, 52) Another arrangement, the Australian Group, developed in 1984 in response to an Australian initiative, under which member nations of the Organization for Economic Cooperation and Development (OECD) “joined together to establish voluntary export controls on certain chemicals.” This is “an informal organization open to any nation seeking to stem CW [chemical weapons] proliferation” and has 20 members. (Davis, *Nonproliferation*, pp. 35–36, 54) A final arrangement, the Missile Technology Control Regime (MTCR), was set up among the seven Economic Summit nations in April 1987 to “limit the proliferation of missiles capable of delivering nuclear weapons.” Twenty-two nations are now “partners” in the MTCR. (Davis, *Nonproliferation*, pp. 45–46, 49–51)

Another group of agreements that are not transmitted under the Case Act are those the State Department views as contracts; they are usually commercial in nature, involving sales or loans. In 1990, a class of agreements previously transmitted under the Case Act was removed from the definition of agreements as a result of a State Department interpretation of language in the 1990 congressional reform of the Agricultural Trade Development and Assistance Act of 1954, Title I of Public Law 480.<sup>56</sup> The reinterpretation was based on language changes in the 1990 farm act that authorized the Secretary of Agriculture rather than the President to “negotiate and execute agreements \* \* \* to finance the sale and exportation of agricultural commodities \* \* \*.”<sup>57</sup> As a result of this and other changes affecting Public Law 480, Title I, the agreements concluded under this section were interpreted as contracts, rather than as agreements. This represented an average of 60 to 80 agreements formerly transmitted under the Act annually and lowered the number of agreements transmitted in 1991 (see Table X-1 above).<sup>58</sup> The thrust of the Case Act, however, was to ensure that the Congress was aware of potentially significant commitments made by executive agreement. Fiscal year 1991 values for Public Law 480, Title I agreements concluded by the U.S. Department of Agriculture ranged from \$2 million to the Congo to \$165 million to Egypt. Any new trend increasing the value of agreements made or increasing the number of agreements signed with any one country might signal a qualitative change in U.S. policy direction toward a country or bring into question the potential for misuse of the credits provided. The two committees may decide to initiate consultations on a formal State Department interpretation and a change in procedures that would ensure that the Secretary of Agriculture would submit to the Department for Case Act transmittal Public Law 480, Title I agreements under certain specified circumstances.<sup>59</sup>

#### *Pre-Case Act executive agreements*

During consideration of the Case Act in 1972 the Senate report clearly outlined the Senate Foreign Relations Committee intent that although the Case Act did not include past executive agreements, they were also to be provided if requested in the same manner as Case Act agreements.<sup>60</sup> The only instance remembered by International Relations and Foreign Relations committee staff in which a Member of Congress had asked for pre-Case Act agreements was Senator Jesse Helms’ request for the texts of all exchanges between the United States and the Soviet Union during the 1962 Cuban Missile Crisis. While some written exchanges were declassified and published in 1972, Senator Helms maintained that oral agreements made at the time and in the years since have

<sup>56</sup> See section 1512 of Public Law 101-624, Food, Agriculture, Conservation, and Trade Act of 1990, approved November 28, 1990; often referred to as “the 1990 farm act.”

<sup>57</sup> 7 U.S.C. 1701 (b)

<sup>58</sup> This information is based on discussions with the Office of Assistant Legal Adviser for Treaty Affairs and with CRS specialists covering Public Law 480 aid.

<sup>59</sup> See discussion of AID agreements above under Implementation, 1972-1976.

<sup>60</sup> U.S. Congress. Senate. Committee on Foreign Relations. Transmittal of Executive Agreements to Congress. Report to accompany S. 596. Washington, U.S. Government Printing Office, 1972, p. 4 (92d Cong., 2d Sess. S. Rept. 92-591.)

changed the original understandings and that these have not been made available to the committee.<sup>61</sup>

The State Department has denied the existence of an agreement between the United States and the Soviet Union about Cuba, and no such agreement is listed in the State Department's annual U.S. Treaties in Force. The letters between the two countries are described as an understanding by each country of the intentions of the other country toward Cuba, but not an agreement on conduct of either.<sup>62</sup> Since 1962, U.S. and Soviet representatives met several times and agreed that they would abide by the intentions expressed in the 1962 letters, but the two countries were not agreed on what behavior constituted abiding by the letters. In January 1992, the State Department declassified and released an additional 12 letters from the October through December 1962 period.<sup>63</sup> These additional letters were not transmitted to Senator Helms since they were not viewed as agreements under international law.

#### B. CONSULTATIONS ON FORM OF AGREEMENT

A second major problem for Congress has been to ensure that the most important international agreements have the status of treaties or are authorized by the entire Congress. The Senate particularly was concerned that the executive branch may use executive agreements as a substitute for treaties to avoid submitting them to the Senate for advice and consent. The Foreign Relations Committee in 1976 and 1978 considered a measure, referred to as the Treaty Powers Act, by which the Senate, through passage of a simple (one-House) resolution requiring the submission of a particular international agreement as a treaty, could prevent funding to execute that agreement until it was submitted as a treaty. In lieu of this measure, the Senate passed S. Res. 536 on September 8, 1978, stating the sense of the Senate that,

in determining whether a particular international agreement should be submitted as a treaty, the President should have the timely advice of the Committee on Foreign Relations through agreed procedures established with the Secretary of State.

This resolution formalized a procedure which was negotiated by the committee with the State Department earlier that year.

Under these procedures the House International Relations and Senate Foreign Relations Committees would receive a periodic list of significant international agreements which have been cleared for negotiation, a citation of the legal authority for the agreement, and the expected form the agreement would take (treaty or executive agreement). Each committee would then have the opportunity of consulting with the administration over the proposed form of the agreement. Under the negotiated agreement, the State Department

<sup>61</sup> Helms, Jesse. The Kennedy-Khrushchev Accords—Do They Exist? Congressional Record, vol. 129, part 20, October 20, 1983: 28791.

<sup>62</sup> Telephone conversation with Department of State, Office of the Legal Adviser, Dec. 12, 1983. Updated by phone conversation with the Office of the Assistant Legal Adviser for Treaty Affairs, March 4, 1993.

<sup>63</sup> Department Releases Kennedy-Khrushchev Correspondence on Cuban Missile Crisis. Statement, January 6, 1992. U.S. Department of State Dispatch, January 13, 1992: 29. The full exchange of correspondence was published in Problems of Communism, Special Edition, v. 41, Spring 1992 (A bimonthly publication of the United States Information Agency.)

wrote to then Chairman of the Senate Foreign Relations Committee John Sparkman:

If agreeable to you, we propose to send you periodically a confidential list of significant international agreements which have been authorized for negotiation pursuant to the Circular 175 procedure. The list would briefly discuss the subject matter of the agreements listed and indicate their anticipated form.<sup>64</sup>

In his reply, Senator Sparkman indicated that he hoped the consultation would take place concerning agreements negotiated by the Department of State as well as those negotiated by other departments and agencies.<sup>65</sup>

In current practice, the list of agreements is selective, chosen by the administration based on its perception of the interests of Congress. In making the selection, the State Department takes into account the agreement's importance to Congress in the view of the agency negotiating the agreement, the significance of the agreement, and the political importance of the country. In addition, on occasion the Treaty Office has consulted informally with International Relations or Foreign Relations Committee staff on the appropriate form of an agreement. In these instances, a formal record, such as a memorandum of conversation, may not exist. In the committees, the formal negotiations lists are circulated and filed in a manner similar to the classified agreements submitted under the Case Act.

The Department of State or another agency may consult with other Members or congressional committees on the substance of an agreement either before or after sending the confidential list letter. Prior consultation on the substance of an agreement is not used as a basis for excluding the agreement from the negotiations list sent to the Foreign Relations and International Relations Committees.

Another requirement under which Congress is to be consulted over the form that an agreement might take, although this does not substitute for the formal procedure described above, is contained in Circular 175 procedures (Section 721.4). These are the Department's internal procedures for negotiating and signing treaties and executive agreements, contained in Chapter 700, volume 11 of the Department of State's Foreign Affairs Manual, most recently revised in 1985.<sup>66</sup> Among its objectives, the 1985 revision included "timely and appropriate consultation" with Congress on treaties and other international agreements, and compliance with the Case Act.

Circular 175 states that a request for authorization to negotiate and/or sign a treaty or other international agreement should take the form of a written "action memorandum." This memorandum may request (1) authority to negotiate, (2) authority to sign, or (3) authority to negotiate and sign an international agreement. It should indicate what arrangements for congressional consultation and public comment have been planned. The action memorandum

<sup>64</sup>U.S. Congress. Senate. Committee on Foreign Relations. International Agreements Consultation Resolution. Report to Accompany S. Res. 536. Washington, U.S. Government Printing Office, 1978, pp. 2-3. (S. Rept. 95-1171, 95th Cong., 2d Sess.)

<sup>65</sup>Ibid.

<sup>66</sup>These guidelines are generally referred to as the Circular 175 procedures of December 13, 1955. The text can be found in Appendix 4.

should be accompanied by any texts to be negotiated or signed, and a memorandum of law discussing thoroughly the bases for the type of agreement recommended. This justification should include consideration of the following eight factors:

1. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
2. Whether the agreement is intended to affect State laws;
3. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
4. Past U.S. practice as to similar agreements;
5. The preference of Congress as to a particular type of agreement;
6. The degree of formality desired for an agreement;
7. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
8. The general international practice as to similar agreements.

When there is a question whether an international agreement should be concluded as a treaty or executive agreement, Circular 175 calls for consultation with congressional leaders and committees as may be appropriate. In addition, Section 723.1e states that the office or official responsible for the negotiation should, with the assistance of the Assistant Secretary of State for Congressional Relations, advise the appropriate congressional committees and leaders of the intention to negotiate significant new international agreements, consult them concerning the agreements, and keep them informed of negotiating developments affecting Congress, especially the need for implementing legislation. Where any especially important treaty or international agreement is contemplated, the Office of the Assistant Secretary for Congressional Relations is to be informed as early as possible by the office responsible for the subject.

Circular 175, however, does not refer in any way to the negotiated procedure under which the two foreign affairs committees are to be consulted over the appropriate form for proposed agreements.

### C. CONGRESSIONAL REVIEW OR APPROVAL OF AGREEMENTS

Congress has sometimes established an oversight role by requiring in legislation that certain categories of agreements be transmitted to it. Table X-3 describes the statutory provisions of this nature. This list is not comprehensive, but represents the main provisions in the U.S. Code requiring agreements to be sent to the Congress.<sup>67</sup>

<sup>67</sup>A search of the computerized U.S. Code to identify laws with some combination of "international agreement," "submit," "transmit" and "report" within 25 words of "Congress" resulted in 2,085 citations. Raymond J. Celada, Senior Specialist in American Public Law, CRS, reviewed the texts of those citations, and identified 20 that were relevant. This author further reviewed the texts of 19 of those 20 (one was the Case Act, discussed in the first part of this chapter) in the U.S. Code Annotated (USCA) and its 1992 pocket parts, narrowing the provisions to ten. A review of the most recent USCA and its 2000 pocket parts for the ten provisions in Table X-3 resulted in few substantive changes.



Table X-3.—Statutory Requirements for Transmittal of Agreements to Congress

Title of Act and Public Law Citation [U.S.C.]	Subject of Agreement	Transmittal Before or After Entry into Force?	Approval Required for Entry into Force? How?	Disapproval Provisions? How?	Specified Recipients of Agreements	Are Congressional Procedures Set Forth?
Atomic Energy Act of 1954, as amended (P.L. 83-703); Sections 123 & 130 (g),(h) & (i) [42 U.S.C. 2153 & 2159 (g), (h), & (i)].	Nuclear Cooperation Agreements.	Before; 30-day waiting period.	Yes; Joint Resolution.	Yes; Joint Resolution.	SFRC, HFAC <sup>1</sup> ...	Yes, general provisions
Atomic Energy Act of 1954, as amended (P.L. 83-703); Sections 91c, 144 b or c; and Sections 123 & 130 (g), (h), & (i) [42 U.S.C. 2153 & 2159 (g), (h) & (i)].	Nuclear Cooperation Agreements relating to defense materials or military uses.	Before; 60-day waiting period.	Yes; Joint Resolution.	Yes; Joint Resolution.	SFRC, HFAC, HASC, SASC.	Yes, general provisions
Fishery Conservation and Management Act of 1976, as amended (P.L. 94-265) Section 203 [16 U.S.C. 1823].	International Fisheries Agreements (GIFAs).	Before; 60-day waiting period.	No; will enter into force if No action within 60 days. <sup>2</sup> .	Yes; Joint Resolution.	House & Senate; HMM&F, SFRC, S Commerce.	Yes, detailed provisions
Taiwan Relations Act (P.L. 96-8), Section 12 [22 U.S.C. 3311].	Agreements made by the American Institute in Taiwan.	After .....	No .....	No .....	Congress .....	No
Social Security Amendments of 1977 (P.L. 95-216), Section 317 [42 U.S.C. 433].	Social security agreements between U.S. and foreign social security systems.	Before; 60-day waiting period.	No; will enter into force if No action within 60 days.	Yes; resolution of either house.	Congress .....	No
International Development and Food Assistance Act of 1978, as amended (P.L. 95-424), Section 603 (a)(2) [22 U.S.C. 2395a (2)].	International agreements concerning debt relief 30 days.	Before .....	No .....	No .....	SFRC, HFAC, H & S Appropriations.	No

Enterprise for the Americas Initiative Act of 1992 (P.L. 102-532), Section 2 [7 U.S.C. 1738q].	Any agreement with any foreign government resulting in any debt relief under Title VI of the Agricultural Trade Development & Assistance Act of 1954, as amended.	30 days before	No .....	No .....	HFAC, SFRC, H & S Agriculture.	No
Trade Act of 1974, as amended (P.L. 93-618), Section 405 [19 U.S.C. 2435].	Agreements on trade relations with non-market-economy countries.	Before; Section 151 process.	Yes; Joint Resolution.	No .....	Congress .....	Yes
OTCA of 1988, as amended <sup>3</sup> (P.L. 100-418), Sections 1102 (b) & 1103 (a) and Trade Act of 1974, as amended (P.L. 93-618), Section 151 [19 U.S.C. 2191].	Agreements on elimination of non-tariff barriers.	Before; Section 151 process.	Yes; Joint Resolution.	No .....	House; Senate	Yes; detailed process
OTCA of 1988, as amended (P.L. 100-418), Sections 1102 (c) & 1103 (a) [19 U.S.C. 2903] Trade Act of 1974, as amended (P.L. 93-618), Section 151 [19 U.S.C. 2191].	Bilateral agreements regarding tariff and nontariff barriers.	Before; Section 151 process.	Yes; Joint Resolution.	No .....	House; Senate	Yes; detailed process

<sup>1</sup>Guide to abbreviations of committee names: SFRC—Senate Committee on Foreign Relations; HFAC—House Committee on Foreign Affairs, now House Committee on International Relations; HASC—House Armed Services Committee; SASC—Senate Armed Services Committee; HMM&F—House Merchant Marine and Fisheries Committee, now House Committee on Resources; S Commerce—Senate Committee on Commerce, Science, and Transportation; S Agriculture—Senate Committee on Agriculture, Nutrition, and Forestry.

<sup>2</sup>Many GIFAs have been approved by Congress and entered into force before the end of the 60-day period.

<sup>3</sup>OTCA is the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418.

Almost all of the provisions require transmittal of the agreement to Congress prior to its entry into force. In only one of the ten cases, the Taiwan Relations Act, is the requirement similar to the Case Act requirement for transmittal after entry into force, and it differs by not having a deadline for transmittal. In that instance, the goal of the provision appears to be informational. Most of the legislation provides for congressional approval or disapproval of the agreement. An exception is the International Development and Food Assistance Act of 1978, as amended, which requires that agreements concerning debt relief be transmitted 30 days before they take effect, but does not provide for congressional action regarding the agreements. This would theoretically permit a congressional effort to halt the agreement, but there are no explicit procedures for this.

The Social Security Amendments of 1977 provision allowing disapproval of social security agreements by a simple resolution of either house, a form of "legislative veto," would seem a likely candidate for revision in light of the constitutional problems raised by the 1983 Supreme Court Decision of *INS v. Chadha*.<sup>68</sup> In the remaining seven cases, such a legislative veto provision has been replaced by a requirement for a joint resolution of approval or disapproval. Provisions permitting Congress to reject or approve a proposed agreement by bill or joint resolution would not be affected by the Chadha decision. A joint resolution of approval would in all likelihood be signed by the President, but a joint resolution of disapproval would be subject to a veto by the President and thus require a two-thirds majority to override the President.

The Fishery Conservation and Management Act of 1977, as amended, provides that the governing international fisheries agreements would enter into force at the end of a 60-day waiting period, unless Congress adopted a joint resolution of disapproval. The practice has been, however, that Congress has often, by legislation, approved the agreements, bringing them into force before the end of the 60-day period. The three trade agreement provisions all require affirmative approval by Congress to bring the agreement into force.

#### D. REQUIRED REPORTS TO CONGRESS

A requirement that the executive branch report to Congress on some matter is an often used technique for maintaining oversight in the foreign affairs area. Some estimates of the number of reporting requirements in this field reach as high as 820.<sup>69</sup>

The reports may be required at regular intervals or upon the occurrence of a certain event. A much smaller number relate directly to oversight of international agreements. Table X-4 provides a representative listing of such reports and their statutory basis. The reporting requirement process gives the Members and committees of Congress and their staff an informational tool for exploring further both past and future negotiations on a wide variety of issues.

<sup>68</sup> 462 U.S. 919 (1983).

<sup>69</sup> This figure is based on a count of foreign affairs related reporting requirements enacted by the Congress and in force as of the end of the 102d Congress in 1992.

Table X-4.—Required Reports Related to International Agreements

Agreement	Requirement/Citation to Law	From Whom	Frequency
Bretton Woods Agreements.	U.S. participation in international financial institutions/P.L. 95-118, sec. 1701 & P.L. 101-240, sec. 541.	Treasury .....	Annual
U.N. Charter ....	Report on U.S. Participation in the United Nations/P.L. 79-264, sec. 4.	President .....	Annual
Various arms control agreements.	Adherence and compliance with arms control agreements/P.L. 87-297, sec. 52, as amended.	President .....	Annual, by January 31
Various trade agreements.	Operation of the Trade Agreements Program/P.L. 93-618, sec. 163 (b).	U.S. International Trade Commission.	Annual
International Coffee Agreement, 1983.	Report on operation of agreement and the International Coffee Organization/P.L. 96-599, sec. 5, amended.	President .....	Annual
Nuclear Non-Proliferation Treaty.	Review of government-wide activities to prevent proliferation/P.L. 95-242, sec. 601, amended.	President .....	Annual, January
U.N. Charter ....	Special reports on Security Council decisions to take enforcement measures/P.L. 79-264, sec. 4.	President .....	As occurs

In addition, the Senate, during its consideration of certain treaties, has added reporting requirements as a condition to its resolution approving U.S. ratification. For example, the Senate's "advice and consent" resolution of November 25, 1991, to the 1990 Treaty on Conventional Armed Forces in Europe (CFE) included a one-time requirement that the President certify to the Senate within 30 days of the resolution "whether or not the Soviet Union is in violation or probable violation of the terms of the CFE Treaty and protocols thereto." On October 1, 1992, the Senate, in its resolution approving ratification of the 1991 Treaty on the Reduction and Limitation of Strategic Offensive Arms (START Treaty), required from the President within 180 days of the Senate resolution a one-time report on compliance with a number of arms control or reduction treaties including the SALT I Interim Agreement, SALT II, ABM, INF and START Treaties.

#### E. OTHER TOOLS OF CONGRESSIONAL OVERSIGHT

Among other tools Congress has used for oversight of international agreements are implementation legislation, recommendations in legislation, consultation requirements, and oversight hearings. These are summarized briefly below. Further, section 136 of the 1970 Legislative Reorganization Act (Public Law 91-510), specifically required the committees of Congress to exercise oversight of those programs within their jurisdiction. An alternative ap-

proach that Congress has used in one instance is to establish a committee or commission, such as the [Helsinki] Commission on Security and Cooperation in Europe. This Commission, set up by Public Law 94-304, approved June 3, 1976, as amended, monitors the actions of the countries that signed the Final Act of the Conference on Security and Cooperation in Europe (CSCE), a non-binding political agreement, especially those acts relating to human rights and cooperation in humanitarian fields. The Commission has 21 members, 18 of whom are members of the Congress. Three are from the executive branch. The President must report annually to Congress on compliance with or violation of provisions of the Final Act.

#### IMPLEMENTATION LEGISLATION <sup>70</sup>

Implementation legislation can be an effective method for overseeing a treaty or other international agreement. Many treaties require legislation to ensure implementation on a national basis of the international obligations established by the treaty. Congress might include in that implementation legislation certain provisions to ensure a congressional role in monitoring implementation of the treaty. Implementation legislation of this sort is often one-time legislation related to a treaty, but like other legislation it may be amended. Some citations to treaty implementation legislation are shown in Table X-5, for illustrative purposes.

As Table X-5 shows, the subjects for implementation legislation are as varied as the subjects for the negotiation of treaties.

Another type of implementation legislation occurs when the executive branch requests the authorization and appropriation of funds to carry out the terms of a treaty or international agreement other than treaty. When an international agreement requires funding, Congress is in a strong position to influence the extent to which that agreement will be implemented. Sometimes the provision of funds is a single legislative occurrence. Other agreements require an annual authorization and appropriation of funds, such as is authorized in the United Nations Participation Act, the implementing legislation for the U.N. Charter. Section 8 of this law authorizes annual appropriations for U.S. contributions to the United Nations. The annual authorization and appropriations for the Department of State are accompanied by hearings which give committees an opportunity to question the administration on U.S. participation in the United Nations.

#### RECOMMENDATIONS IN LEGISLATION

Another tool for Congress to affect international agreements is legislation or resolutions asking the executive branch to initiate negotiations on an issue toward a specific goal or to ensure that an agreement under negotiation include a specific item of congressional interest. For example, in Section 37 of the Arms Control and Disarmament Act, as amended,<sup>71</sup> Congress registered its sense

<sup>70</sup> See also section on Obligation to Implement in Chapter VIII above.

<sup>71</sup> Public Law 87-297, approved Sept. 26, 1961, as amended by Public Law 95-108, August 17, 1977.

“that adequate verification of compliance should be an indispensable part of any international arms control agreement.”

Table X-5.—Legislation Implementing Treaties

Treaty Name	Citation to Implementation Legislation
1945 U.N. Charter .....	P.L. 79-264, December 20, 1945
1948 U.N. Convention on the Prevention and Punishment of the Crime of Genocide.	P.L. 100-606, November 5, 1988
1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Tokyo.	P.L. 91-449, October 14, 1970
1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, with annex.	P.L. 93-248, February 5, 1974
1970 Convention for the Suppression of Unlawful Seizure of Aircraft, Hague.	P.L. 93-366, August 5, 1974
1971 Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Internationally Protected Persons and Related Extortion That are of International Significance, OAS.	P.L. 94-467, October 8, 1976
1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal.	P.L. 98-473, October 12, 1984
1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.	P.L. 101-298, May 12, 1990
1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, New York (UN).	P.L. 94-456, October 8, 1976
1977 Panama Canal Treaty .....	P.L. 96-70, September 27, 1979
1979 Convention on the Physical Protection of Nuclear Material.	P.L. 97-351, October 18, 1982
1979 Convention Against the Taking of Hostages .....	P.L. 98-473, October 12, 1984
1990 Treaty on Conventional Armed Forces in Europe (CFE Treaty).	P.L. 102-228, December 12, 1991
1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.	P.L. 106-279, October 6, 2000

In a second example, Congress, in 1990, adopted two laws on Antarctica, expressing its concerns on the preservation of the Antarctic environment. In the Antarctic Protection Act of 1990, Congress stipulated that the Secretary of State negotiate an international agreement that would, among other things, “prohibit or ban indefinitely Antarctic mineral resource activities by all parties to the Antarctic Treaty.” Congress further determined that “any treaty or other international agreement submitted by the President to the Senate for its advice and consent to ratification relating to mineral resources or activities in Antarctica should be consistent

with the purpose and provisions of this Act.”<sup>72</sup> In a second law, Protection of Antarctica as a Global Ecological Commons, Congress stated that “pending negotiation and entry into force of \*\*\* new agreements” regarding environmental protection, the 1988 “Convention on the Regulation of Antarctic Mineral Resource Activities should not be presented to the Senate for advice and consent to ratification.”<sup>73</sup> As a result of these provisions, the executive branch went back into negotiations, working out a Protocol on Environmental Protection to the Antarctic Treaty that was adopted in October 1991, submitted to the Senate in February 1992, and approved by the Senate in October 1992 for U.S. ratification. The Protocol, with its annexes, establishes a comprehensive, legally binding environmental protection regime for Antarctica and prohibits all Antarctic mineral resource activities, except for scientific research. This prohibition may not be reviewed until at least 50 years following entry into force of the Protocol.

The House and the Senate, acting separately in simple resolutions, or jointly, in concurrent or joint resolutions, have over the years expressed their views on a variety of circumstances, including those calling on the President or other officials of the executive branch to negotiate an agreement on a particular issue or to take a particular position on a set of negotiations or vis-a-vis another government.<sup>74</sup>

#### CONSULTATION REQUIREMENTS

Another method of keeping track of administration actions on international agreements is to provide in legislation for consultation with Congress prior to or during negotiations that would result in a treaty or executive agreement. The Omnibus Trade and Competitiveness Act includes mechanisms for consultation on negotiations including the selection of five members of the House Ways and Means Committee and Senate Finance Committee as congressional advisers for trade policy and negotiations who would be accredited by the U.S. Trade Representative as official advisers to U.S. delegations to international conferences, meetings, and negotiating sessions when trade agreements are involved.<sup>75</sup> This section also provides for regular consultations with the appropriate committees on U.S. trade policy and direction.

Congress has also sought consultation on the termination of a treaty. The International Security Assistance Act of 1978 contained the following clause regarding the Mutual Defense Treaty with the Republic of China: “It is the sense of the Congress that there should be prior consultation between Congress and the executive branch on any proposed changes affecting the continuation in force

<sup>72</sup> Public Law 101-594, approved November 16, 1990.

<sup>73</sup> Public Law 101-620, approved November 16, 1990.

<sup>74</sup> A list of these resolutions may be found in the Legislative Review Activities Report of the House Committee on International Relations and the Legislative Activities Report of the Senate Committee on Foreign Relations, each of which covers an entire Congress. Other expressions of position may be found in such omnibus pieces of legislation as the Foreign Relations Authorization Act and the Foreign Assistance Act of 1961, as published in the multi-volume compilation, *Legislation on Foreign Relations*, published annually as a joint committee print of the House International Relations and Senate Foreign Relations Committees.

<sup>75</sup> Section 1632, Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, approved August 23, 1988.

of the Mutual Defense Treaty of 1954.”<sup>76</sup> It might be noted that the treaty was terminated by the President with almost no real consultation with Congress.<sup>77</sup> In another example, U.S. withdrawal of its declaration accepting the compulsory jurisdiction of the World Court, a concurrent resolution deploring the U.S. notification was introduced and hearings held, but Congress did not approve the resolution.<sup>78</sup>

#### OVERSIGHT HEARINGS

In keeping with the overall obligation of committees to maintain oversight of executive branch programs within their jurisdiction, international agreements in their various stages have been monitored in Congress. This has included hearings on the need for and purpose of negotiations, the status and direction of negotiations, the agreements resulting from negotiations and their impact and implementation requirements, and after they come into force, the nature and effect of compliance with the provisions of the agreements.

For example, at different times between 1983 and 1992, various committees in Congress have held hearings on the 1982 U.N. Convention on the Law of the Sea, which was negotiated, with constant congressional review, over a previous 8- to 11-year period. The focus of occasional hearings during the 1980s was the extent to which U.S. interests were served by remaining outside the treaty and legislative and other steps that might be required to best protect U.S. law of the sea interests. On other issues, the Senate Foreign Relations Committee during 1991 and 1992, held hearings on possible nuclear proliferation issues in North Korea, conducted regular hearings on developments regarding chemical weapons proliferation and efforts to negotiate a treaty in this area, and held a series of hearings in 1991 on “issues related to a bilateral Free Trade Agreement with Mexico,” to name only a few examples.

---

<sup>76</sup>Section 26, Public Law 95-384, approved September 26, 1978. On December 23, 1978, the State Department delivered notice, effective January 1, 1979, that the United States was terminating the treaty. Under Article X, the treaty remained in force until January 1, 1980.

<sup>77</sup>U. S. Congress. House. Committee on Foreign Affairs. Executive-Legislative Consultation on China Policy, 1978-1979. By Robert G. Sutter. Committee Print, June 1980.

<sup>78</sup>For discussion see Chapter VIII.





## XI. TRENDS IN MAJOR CATEGORIES OF TREATIES<sup>1</sup>

---

The subject matter of treaties is varied and reflects changing circumstances that affect U.S. foreign policy interests. In the first decade after World War II, from 1945 through 1955, treaties established a network of political and security alliances that provided a framework that endured throughout the Cold War. Later, the focus of political-security treaties shifted to arms control. The end of the Cold War brought new or revised agreements with a number of Eastern European nations and the independent states formed from the former Soviet Union and the former Yugoslavia. A security treaty framework to reflect the new international environment in the post-Cold War era is still emerging.

New policy concerns have led to a growing importance of treaties outside the traditional political-security field. Economic treaties, including consular, investment, and tax agreements, have become the main component of such treaties submitted to the Senate. To deal with international narcotics trafficking and other crimes, the United States has embarked on a new series of treaties for legal cooperation, such as extradition and mutual legal assistance treaties (MLATs). Treaties for conservation of certain species of wildlife and regulation of fisheries have been supplemented with broad treaties for environmental cooperation.

The number of treaties submitted to Congress reflects the legislative-executive balance of power and views regarding which international agreements must be submitted to the Senate. After the immediate post-World War II period, few significant political and military commitments, except in arms control, were made by treaty. For the rest of the Cold War, the Senate acquiesced when Presidents expanded the post-World War II treaty framework with executive agreements.<sup>2</sup> In the case of the Treaty on the Final Settlement with Respect to Germany, discussed below, the Senate insisted it be submitted as a treaty.

A principal concern of Presidents about treaties has been that a minority in the Senate could use the advice and consent power to block executive branch plans or even the will of the majority in the Senate. In practice the Senate has rejected few treaties either di-

---

<sup>1</sup> Prepared by Richard F. Grimmett, Specialist in National Defense and the following CRS analysts and attorneys who made specialized contributions to various sections: Amy Wolff, Jonathan Medalia, Jeanne J. Grimmett, Robert Burdette, Susan Fletcher, Charles Doyle, Larry Eig, Vita Bite and Lois McHugh.

<sup>2</sup> For example, after getting the Spanish Bases Agreement submitted to the Senate as a treaty in 1975, the Senate agreed that a successor base agreement could be concluded as an executive agreement when Spain became a member of the North Atlantic Treaty Organization (NATO), in keeping with agreements with other NATO countries. Agreement Extending for Eight Months Provisions of the Treaty of Friendship and Cooperation with Spain (Treaty Doc. 97-20, September 4, 1981, approved by Senate November 18, 1981), Exec. Rept. 97-24, November 9, 1981.

rectly or indirectly and, except for the Versailles Treaty providing for membership in the League of Nations, the rejection of treaties by the Senate has seldom affected foreign policy in a major way. The Senate has continued in its long-established pattern of approving most treaties without crippling conditions. At the same time, the Senate has added conditions on the substance of treaties when it deemed conditions essential, as in certain arms control, tax, and human rights treaties.

A statutory agreement, that is a congressionally approved or authorized executive agreement, has historically provided an alternative. Such an alternative allows congressional involvement in international agreements and provides for majority control. But it does not call for the extraordinary majority and greater recognition of the interests of 50 individual states provided by the two-thirds Senate majority specified in the Constitution. In some areas, especially trade agreements, Congress has chosen this option. In other areas, such as arms control, the Senate has insisted that international agreements be concluded as treaties.

The Senate has also demonstrated in other ways an intention to maintain the significance of the treaty power. For example, it has added provisions or expressed concerns that treaties be interpreted in accordance with the common understanding shared by the Senate at the time it gave its advice and consent, and that they not be reinterpreted without the advice and consent of the Senate, as indicated in the section on arms control below. Similarly, the Senate has protested when the executive branch signed multilateral treaties with a provision prohibiting nations from ratifying with reservations, as indicated in the section on environmental treaties below.

This chapter discusses trends in five broad categories of treaties: political and security, economic, environmental, legal cooperation, and human rights. The focus is on the period from 1983 through late 2000, but the study sometimes discusses earlier periods for comparative purposes. Similarly, the chapter sometimes discusses international agreements other than treaties for illustrative purposes.

#### A. POLITICAL AND SECURITY AGREEMENTS

At the end of World War II, treaties played an important part in shaping post-war U.S. foreign policy, especially in the political and security field. Peace treaties were concluded with Italy, Romania, Bulgaria, Hungary, and Japan. The Charters of the United Nations and the Organization of American States provided a framework for international cooperation.

After that time, a decline in the significance of treaties submitted to the Senate in the political-security field became apparent. In 1972, Senator J. William Fulbright, chairman of the Foreign Relations Committee, wrote there had been a "steady attrition of the status and significance of treaties submitted to the Senate."<sup>3</sup> He compared the importance of numerous agreements not submitted to the Senate, such as a 1968 executive agreement to return the

<sup>3</sup>Fulbright, J. William. *The Crippled Giant: American Foreign Policy and Its Domestic Consequences*. New York, Random House, 1972. p. 217.

Bonin Islands to Japan, with the less significant nature of some agreements that were submitted, such as a protocol with Mexico modifying an agreement on radio broadcasting.

In more recent years, with the exception of the Panama Canal Treaties of 1977 and arms control agreements, few important political or defense agreements have been concluded as treaties. The United States has entered several major agreements in the political-security field, but for various reasons Presidents have not submitted them to the Senate as treaties. Several have been concluded as executive agreements, including the 1973 Paris agreement on the end of the Vietnam War, the Afghanistan settlement agreement of April 1988, and the political settlement of the Cambodia conflict of October 1991.<sup>4</sup> Others have been considered political statements or politically but not legally binding agreements, such as the U.S.-Russian Charter<sup>5</sup> or agreements that have been concluded in the Conference on Security and Cooperation in Europe (CSCE).<sup>6</sup>

#### NATIONAL SECURITY AND DEFENSE COMMITMENTS

In 1969, the Senate adopted the National Commitments Resolution, which defined a national commitment as "the use of Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of Armed Forces or financial resources of the United States, either immediately or upon the happening of certain events." The resolution expressed the sense "that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment."<sup>7</sup> Since the initial post-World War II security treaties, however, security commitments have been made almost entirely by means other than treaties.

The framework for the current U.S. network of mutual security treaties was built between 1947 and 1954, with the North Atlantic Treaty, the Inter-American Treaty of Reciprocal Assistance, the Southeast Asian Treaty, the ANZUS Pact with Australia and New Zealand, and bilateral security treaties with the Philippines, South Korea, Japan, and the Republic of China (Taiwan). Since that time, no new mutual security commitments have been made by treaty, with the possible exception of an additional commitment, embodied in the Panama Canal Treaties of 1979, to protect the Panama Canal until December 31, 1999, and to maintain permanently its regime of neutrality. The only defense agreement submitted as a treaty in the 1980s, the Treaty Between the United States and Ice-

<sup>4</sup> Act of the International Conference on Vietnam, March 2, 1973. 24 UST 485; TIAS 7568; 935 UNTS 405; Afghanistan Settlement Agreement of April 14, 1988, State Department Document Number 88-163; Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, October 23, 1991, State Department Document Number 91-240; and Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia, October 31, 1991, State Department Document Number 91-243.

<sup>5</sup> A Charter for American-Russian Partnership and Friendship, June 17, 1992. Department of State Dispatch, June 22, 1992, vol. 3, p. 490.

<sup>6</sup> Vienna Document 1992 of the Negotiations on Confidence and Security-Building Measures, March 4, 1992. Department of State Dispatch Supplement, July 1992.

<sup>7</sup> S. Res. 85, 91st Cong., 1st Sess., adopted June 25, 1969.

land to Facilitate their Defense Relationship, had a primarily economic purpose: superseding U.S. cargo preference laws and equitably sharing trade.<sup>8</sup>

In 1992, at the request of Congress, President Bush submitted to Congress a list of current U.S. security commitments, defined by the administration as “an obligation, binding under international law, of the United States to act in the common defense in the event of an armed attack on that country.”<sup>9</sup> The President listed only one U.S. security commitment in addition to those concluded from 1947 to 1954 mentioned above. This was to the Freely Associated States, embodied in the Compacts of Free Association with the Republic of the Marshall Islands and the Federated States of Micronesia. Approved by Congress, the compacts give the United States “full authority and responsibility for security and defense matters, in or relating to” those states, including the obligation to defend them and their peoples from attacks or threats thereof, “as the United States and its citizens are defended.”<sup>10</sup>

The President also listed a number of U.S. “security arrangements,” defined as a pledge by the United States to some action in the event of a threat to that country’s security. According to the President, “security arrangements typically oblige the United States to consult with a country in the event of a threat to its security. They may appear in legally binding agreements, such as treaties or executive agreements, or in political documents, such as policy declarations by the President, Secretary of State or Secretary of Defense.”<sup>11</sup>

Most of the legally binding security arrangements listed in the President’s report were prior to the 1980s, and would be considered sole executive agreements, namely agreements with Israel, Egypt, Pakistan, and Liberia.<sup>12</sup> One could be considered a statutory agreement: in 1981, executive agreements committed the United States to the establishment of the Multinational Force and Observers (MFO) in the Sinai, subject to congressional authorization and appropriations, and Congress subsequently authorized the MFO in legislation.<sup>13</sup>

The President listed as security arrangements in political documents executive branch declarations of support for Israel, the Carter Doctrine on the Persian Gulf of January 23, 1980, and the Declaration on the Air Defense of India of July 22, 1963. He also included two policies embodied in the Eisenhower Doctrine on

<sup>8</sup>Exec. Rept. 99-7, October 8, 1986. Treaty Doc. 99-31. Signed September 24, 1984. Approved by the Senate October 8, 1986.

<sup>9</sup>A Report on United States Security Arrangements and Commitments with Other Nations, Submitted to the Congress in accordance with Section 1457 of Public Law 101-510, the National Defense Authorization Act of 1991, August 17, 1992.

<sup>10</sup>Section 311, Public Law 99-239, signed January 14, 1986.

<sup>11</sup>U.S. President. A Report on United States Security Arrangements.

<sup>12</sup>Memoranda of Agreement (concerning Assurances, Consultations, and United States Policy on Matters Related to Middle East Peace, concluded on September 1, 1975, with Egypt (32 UST 2150; TIAS 9828) and Israel (32 UST 2150; TIAS 9828) and an updated memorandum dated March 26, 1979, following the Israeli-Egyptian Peace Treaty, 32 UST 214 1; TIAS 9825.

Agreement of Cooperation with Pakistan, March 5, 1969, 10 UST 317; TIAS 4190; UNTS 285. Agreement of Cooperation with Liberia, July 8, 1959, 10 UST 1598; TIAS 4303; 357 UNTS 93.

<sup>13</sup>Identical letters of August 3, 1981, from Secretary of State Haig to Egyptian Deputy Prime Minister/Foreign Minister and Israeli Foreign Minister, August 3, 1981, TIAS 10556 and 10557; Congress authorized participation in the Multinational Force and Observers Participation Resolution, Public Law 97-132, signed December 29, 1981.

International Communism and the Middle East, and the Taiwan Relations Act of 1979.

Finally, the President reported that a large number of defense agreements, including those on training and pre-positioning of equipment, establish conditions under which the United States may undertake activities with or in other countries. He said these could not be considered security commitments or arrangements because they did not obligate the United States to act in defense of another country.

A survey of lists submitted under the Case Act indicates that the United States has concluded large numbers of executive agreements concerning defense. Many of these involve routine military cooperation and assistance. Often these have been with partners in a security treaty such as Japan, Korea, or the NATO countries, and could be considered executive agreements pursuant to treaty. Some have been with non-treaty states, such as Saudi Arabia.<sup>14</sup>

In addition, some defense agreements are not made public. Since these are transmitted to Congress on a classified basis, they have not been analyzed for this report. An example would be a bilateral defense agreement concluded with Kuwait after Operation Desert Storm. According to press reports, on September 19, 1991, the United States agreed to pre-position equipment in Kuwait that could help defend Kuwait, and Kuwait would contribute funds to help pay the cost and allow U.S. access to Kuwaiti facilities.<sup>15</sup> The agreement also provided for arms sales, training, and joint military exercises.

Since the early 1980s, with the exception of arms control treaties, only a few treaties approved by the Senate fell into the political or security category. These included treaties that dealt with boundaries between South Pacific Islands,<sup>16</sup> the Constitution of the United Nations Industrial Development Organization,<sup>17</sup> an Amendment to the Statute of the International Atomic Energy Agency, and approval of the Protocols to the North Atlantic Treaty on the Accession of Poland, Hungary, and the Czech Republic.<sup>18</sup>

Two other very important treaties of the early 1990s in all likelihood would have been concluded as executive agreements except for close Senate oversight. Senate action to obtain submission of these two treaties, the Final Settlement with Respect to Germany and the Maritime Boundary Agreement with the Soviet Union, is discussed below.

<sup>14</sup> Agreement extending agreements of May 24 and June 5, 1965, relating to the construction or military facilities in Saudi Arabia, February 14, 1989, State Department Document Number 89-89.

<sup>15</sup> Kuwait to Pay \$215 Million for U.S. Presence, *Defense News*, June 15, 1992, p. 26. *Kuwait Journal: The Runaway Army is Back But Standing at Ease*, *New York Times*, January 14, 1992, p. A4.

<sup>16</sup> All four were approved by the Senate on June 21, 1993: Treaty of Friendship with Tuvalu (Ex. W, 96-1, signed September 20, 1979); Friendship Treaty with Kiribati (Ex. A, 96-2, signed September 20, 1979); Friendship and Maritime Boundary Treaty with the Cook Islands (Ex. P, 96-2, signed September 3, 1980); Treaty with New Zealand on the Delimitation of the Maritime Boundary between the United States and Tokelau (Treaty Doc. 97-5, signed December 2, 1980).

<sup>17</sup> Constitution of the United Nations Industrial Development Organization (Treaty Doc. 97-19, adopted April 8, 1979, approved by the Senate, with understandings, June 21, 1983).

<sup>18</sup> Amendment to the Statute of the International Atomic Energy Agency, increasing the board members from nine to ten (Treaty Doc. 99-7, approved by IAEA September 27, 1984). Approved by the Senate September 7, 1988. Protocols to the North Atlantic Treaty of 1949 on the Accession of Poland, Hungary, and the Czech Republic (Treaty Doc. 105-36, Exec. Rept. 105-14, reported with seven declarations and four conditions on March 6, 1998. Advice and consent given on April 30, 1998).

*Treaty on the Final Settlement with Respect to Germany*

The Treaty on the Final Settlement with Respect to Germany, signed September 12, 1990,<sup>19</sup> one of the first major post-Cold War treaties, was concluded after the Communist regime in Eastern Germany collapsed at the end of 1989, the Berlin Wall fell, and reunification of Germany appeared inevitable. Its purpose was to terminate the remaining rights in Germany of the United States, France, the United Kingdom, and the Soviet Union, which had been established at the end of World War II. It also confirmed the borders of a united Germany and reaffirmed Germany's renunciation of nuclear, biological, and chemical weapons.

On July 23, 1990, the Senate Foreign Relations Committee held hearings to discuss the future status of Germany and the legal instruments that would embody the agreements being negotiated. The State Department spokesman said the decision on whether the agreement would be submitted to the Senate had not yet been made, but indicated a leaning toward an executive agreement. He held that the allied rights and other subjects that were being negotiated were established in executive agreements, not treaties, and were technical in nature; that the West German Government wished to avoid a peace treaty that might make them appear as a vanquished foe rather than a close ally; and that the treaty did not constitute new obligations that involved commitments or risks affecting the nation as a whole.<sup>20</sup> Private witnesses stressed the importance of Senate advice and consent and therefore of a peace treaty with Germany.

After the agreement was signed, Senate Majority Leader George Mitchell called on the administration to submit the treaty to the Senate as soon as possible so the Senate could address it prior to adjournment. Noting press reports that unidentified administration officials believed the agreement might not require Senate approval, Senator Mitchell said:

Such a view hardly merits serious consideration. It is an erroneous one. It is my judgment that this treaty bears on issues of historic importance, of great significance for our national security as well as for our future political relations with all of Europe, and treaties on such matters absolutely require the participation of the Senate in its treaty-making role.<sup>21</sup>

The President submitted the treaty to the Senate on September 26, 1990. Later, Senate Foreign Relations Committee Chairman Claiborne Pell said Secretary Baker had asked his views, and Senator Pell felt strongly it should be a treaty.<sup>22</sup> On October 5, 1990, the Foreign Relations Committee reported the treaty without condition and the Senate approved it by a vote of 98-0 on October 9, 1990. Simultaneously, the committee also reported and the Senate approved a companion measure, a simple resolution expressing the

<sup>19</sup>Treaty Doc. 101-20. Signed by the Four Powers from the Second World War (United States, France, the United Kingdom, and the Soviet Union) and the two Germanys (the Federal Republic of Germany and the German Democratic Republic) in Moscow.

<sup>20</sup>U.S. Congress. Senate. Committee on Foreign Relations. Legal Issues Relating to Future Status of Germany. Hearing. July 12, 1990. S. Hrg. 101-899, Statement of Michael K. Young, Deputy Legal Advisor, pp. 2-11.

<sup>21</sup>Congressional Record, September 18, 1990, p. S13292 (daily ed.).

<sup>22</sup>U.S. Congress. Senate. Committee on Foreign Relations. Treaty on the Final Settlement with Respect to Germany. Hearing. September 28, 1990. S. Hrg. 101-1124, p. 38.

sense of the Senate that U.S. ratification not be construed to diminish U.S. determination not to recognize the incorporation of the Baltic States by the Soviet Union.<sup>23</sup>

*Maritime Boundary Agreement with the Soviet Union*

The Agreement with the U.S.S.R. on the Maritime Boundary concluded June 1, 1990,<sup>24</sup> resolved a dispute between the United States and the Soviet Union which arose after 1977 when both nations established 200-mile fishery and exclusive economic zones (EEZs). The formation of these zones revealed conflicting interpretations and measurements of the line established in the 1867 Convention ceding Alaska.

During the negotiations, which lasted 9 years, some Senators became concerned that the Department of State was considering concluding the agreement as an executive agreement on grounds that the 1867 line was a boundary line and the new line was just a variation. Senator Jesse Helms contended the 1867 line was merely a line of demarcation but not a boundary under international law, and that boundaries such as the new line had always been delimited by treaty. Subsequently, in 1989 the Senate adopted legislation stating its sense that the Department of State should submit to the Senate in treaty form all boundary agreements with the Soviet Union. In the conference with the House, this was changed to a sense of Congress statement "that all international agreements pertaining to the international boundaries of the United States should be submitted to the Congress for such consideration as is appropriate pursuant to the respective constitutional responsibilities of the Senate and the House of Representatives."<sup>25</sup> The agreement was submitted to the Senate on September 26, 1990, and approved without reservation by a vote of 86-6 on September 16, 1991.

ARMS CONTROL TREATIES

Arms control treaties are the only category of agreement in the political-military field that have been concluded primarily in treaty form, and have provided the major vehicle in recent years for special Senate influence on foreign policy. This may be in part because the congressional desire to pass judgment on arms control agreements was clear. The Arms Control and Disarmament Act provided that no action obligating the United States to reduce its armaments could be taken except pursuant to the treaty-making power or unless authorized by further affirmative legislation by Congress.<sup>26</sup> The policy statement was buttressed by the power Congress has in determining levels of armaments and armed forces through defense authorizations and appropriations. Presidents have submitted most arms control agreements to the Senate as treaties. An exception is the SALT I Interim Agreement, signed

<sup>23</sup> S. Res. 334, approved by Senate October 9, 1990.

<sup>24</sup> Signed June 1, 1990, and submitted to the Senate September 26, 1990. Treaty Doc. 101-22.

<sup>25</sup> Introduced by Senator Jesse Helms, July 20, 1989, as amendment to Foreign Relations Authorization Act, FY 1990 and 1991. Adopted as Section 1007. See Exec. Rept. 102-13.

<sup>26</sup> Section 33, Public Law 87-297, as amended, approved September 26, 1961.



May 26, 1972, which President Nixon submitted as a statutory agreement and Congress approved by legislation.<sup>27</sup>

Arms control treaties in recent years have generally been among the most controversial treaties and those on which the Senate has spent the most time. In addition to the Foreign Relations Committee, the Armed Services, Intelligence, Governmental Affairs, and Judiciary Committees have reviewed arms control agreements and sometimes issued reports on them. The Senate also established a bipartisan Senate Arms Control Observer Group in 1985 to observe and monitor arms control negotiations with the Soviet Union. The members served as consultants and advisers at negotiations and had frequent meetings with executive branch and military officials.<sup>28</sup> During the 1990s, as the United States and Russia stopped holding formal arms control negotiations while awaiting the ratification and entry into force of existing agreements, the Arms Control Observer Group curtailed its activities. In 1999, in an effort to reinvigorate the group and restore Senate involvement in the arms control process, the Arms Control Observer Group was reconstituted as the Senate National Security Working Group. The members of this new group were to act as observers at negotiations relating to the "reduction, limitation, or control of conventional weapons, weapons of mass destruction, or the means of delivery of any such weapons," at negotiations on missile defenses, and at negotiations on export controls.<sup>29</sup>

The United States and Russia have, in the past decade, taken numerous steps to alter their nuclear forces without the formal framework provided by treaties. Chief among these were the Presidential Nuclear Initiatives of 1991. In late September, President George Bush announced that he was withdrawing all U.S. non-strategic nuclear weapons from naval vessels and overseas deployment, and stated that the United States would eliminate many of these weapons.<sup>30</sup> He called on Soviet President Gorbachev to take similar steps. President Gorbachev reciprocated in early October.<sup>31</sup> These initiatives led to significant reductions in deployed nuclear forces. Although many Members of Congress praised these initiatives after they were announced, President Bush neither consulted with nor informed the Senate of his intentions prior to announcing the initiatives.

In several cases, the United States has chosen to abide by treaties without gaining Senate advice and consent to ratification. This occurred with the SALT II Treaty, which the United States and the Soviet Union signed on June 18, 1979.<sup>32</sup> The Senate never voted on the treaty although the Foreign Relations Committee reported it favorably with 2 reservations and 18 statements and understand-

<sup>27</sup> Public Law 92-448, signed September 30, 1972.

<sup>28</sup> A list of the activities of the Senate Arms Control Observer Group is contained in the remarks of Senator Lugar in the Congressional Record, September 30, 1992, pp. S15715-S15719.

<sup>29</sup> This was accomplished through S. Res. 75 on March 25, 1999. Congressional Record, March 25, 1999, p. S3565.

<sup>30</sup> Presidential Initiative on Nuclear Arms. Fact Sheet. The White House, Office of the Press Secretary, September 27, 1991.

<sup>31</sup> Text of Gorbachev Reply to President's Nuclear Initiative. U.S. Embassy, Moscow. October 5, 1991.

<sup>32</sup> Ex. Y, 96-1. Submitted to the Senate June 25, 1979, Reported November 19, 1979, Exec. Rept. 96-14. Automatically re-referred at end of 96th Congress. Resolution to discharge committee submitted, July 15, 1986, S. Ex. Res. 445. Ordered returned to the President by S. Res. 267, approved by the Senate on October 12, 2000.

ings. In December 1979, after the Soviet invasion of Afghanistan, President Carter asked that consideration be postponed, and Presidents Reagan and Bush never asked for consideration. On May 30, 1982, President Reagan declared that the United States would refrain from actions that would undercut the SALT agreements as long as the Soviet Union showed equal restraint. Congress played a role in shaping this policy because many Members had urged President Reagan to observe the limits in SALT II. A similar circumstance existed with respect to the 1974 Threshold Test Ban Treaty, which limited the underground nuclear tests to 150 kilotons. President Ford submitted the treaty to the Senate in 1976 but the Senate did not approve ratification until 1990, after the United States and the Soviet Union had negotiated new verification protocols. In the interim, the United States did observe the treaty's 150 kiloton limit on nuclear weapons tests.

In contrast, during the latter half of the 1990s, Congress prohibited the United States from reducing its nuclear forces to the levels mandated by the second Strategic Arms Reduction Treaty (START II) until that treaty entered into force. Beginning in fiscal year 1998, it included a provision in the annual defense authorization bills that precluded obligating or expending funds for "retiring or dismantling, or for preparing to retire or dismantle" strategic nuclear weapons that the United States would have retained under the START I Treaty but eliminated under START II.<sup>33</sup> The U.S. Senate had consented to ratification of START II in January 1996, but the Russian parliament did not approve this treaty until April 2000. Many in Congress and the Clinton Administration believed that this legislation would provide an incentive for Russia to approve the treaty by indicating that the United States would not reduce its forces until START II entered into force.

The United States has also pursued arms control through agreements other than treaties. Some "confidence-building measures," such as an agreement of September 30, 1971, on measures to reduce the risk of outbreak of nuclear war by accident, have been concluded as executive agreements. In other cases, particularly under the CSCE, agreements have been labeled politically, rather than legally, binding. At the 1992 Helsinki Review Conference, NATO and former Warsaw Pact members signed a follow-up conventional arms accord on regulating troop levels between the Atlantic and the Urals.<sup>34</sup> Congress has closely monitored action in the CSCE through a joint Commission on Security and Cooperation in Europe. Congress also initiated an "arms control" program with the Soviet Union and Russia through its passage of the Nunn-Lugar amendment to the implementing act for the Conventional Armed Forces in Europe (CFE) Treaty.<sup>35</sup> This amendment created the Cooperative Threat Reduction (CTR) Program, which has provided U.S. assistance to Russia and other former Soviet states to

<sup>33</sup>Public Law 105-85, Sec. 1302, as amended by Public Law 106-65 Sec. 1501.

<sup>34</sup>White House statement said, "President Bush also signed the Concluding Act of the Negotiation on Personnel Strength of Conventional Armed Forces in Europe, otherwise known as the CFE-1A agreement \*\*\*. The CFE-1A accord places politically binding limits on military manpower in Europe." CFE Treaty and CFE-1A Agreement. U.S. Department of State Dispatch, July 13, 1992, p. 560.

<sup>35</sup>Public Law 102-228. Signed on December 12, 1991. Congressional Record, November 25, 1991, p. S18003.

help with the safe and secure transportation, storage, and elimination of nuclear and other weapons and materials. The United States has signed numerous Memorandums of Understanding with the recipient nations to implement this program, but none has required Senate advice and consent. Nonetheless, Congress affects policy and expenditures on this program through the annual authorization and appropriations process.

The complexity and detail in arms control treaties has increased significantly as a result of the desire of the legislative and executive branches to assure adequate verification. The detailed provisions have often resulted in a need for modifications and the development of mechanisms for informal amendments, usually negotiated in compliance bodies established by the treaties, that are not submitted to the Senate.<sup>36</sup> In addition, agreements on implementation issues often concluded as executive agreements that are not submitted to the Senate.

As in other categories, the Senate has, since the end of World War II, approved most arms control treaties without formally attaching conditions of any type.<sup>37</sup> Since the mid-1980s, however, the Senate has attached significant conditions to the major arms control treaties presented to it, namely the Intermediate-Range Nuclear Forces (INF) Treaty, the Threshold Test Ban Treaty and Protocol, the Treaty on Conventional Armed Forces in Europe (CFE), the CFE Flank Agreement, the START I and START II Treaties, the Chemical Weapons Convention (CWC), and the Open Skies Treaty. Beginning with the INF Treaty, the Senate has added a condition concerning reinterpretation of the treaty and a declaration that future arms control agreements should be concluded as treaties. In addition, the Senate has sometimes specified in the resolutions of ratification its intention that certain conditions were to be transmitted to the other parties and that some were to be clearly approved by the other parties, or that some conditions were binding on the President and others declared the intention of the Senate.<sup>38</sup> In 1999, the Senate also rejected a treaty when it voted against providing its advice and consent to the ratification of the Comprehensive Test Ban Treaty (CTBT).

### *INF Treaty*

The U.S.-Soviet Intermediate-Range Nuclear Forces (INF) Treaty, signed December 8, 1987, prohibited the two countries from producing, flight-testing, or possessing ground-launched ballistic or cruise missiles having a range between 500 and 5,500 kilometers, and required the destruction or removal of some missiles and

<sup>36</sup> For discussion, see Koplow, David A. When Is an Amendment Not an Amendment?: Modifications of Arms Control Agreements Without the Senate. *University of Chicago Law Review*, vol. 59, Summer 1992, pp. 981-1072.

<sup>37</sup> These included the Antarctic Treaty of December 1, 1959 (Ex. B, 86-2, approved August 10, 1960, by a vote of 66-21); the Outer Space Treaty of January 27, 1967 (Ex. D, 90-2, approved April 25, 1967, by a vote of 88-0); the Nuclear Non-Proliferation Treaty of July 1, 1968 (Ex. H, 90-2, approved March 13, 1969, by a vote of 81-15); the Seabed Arms Control Treaty of February 11, 1971 (Ex. H, 92-1, approved February 15, 1972, by a vote of 83-17); the Anti-Ballistic Missile (ABM) Treaty (Ex. L, 92-2, approved August 3, 1972, by a vote of 83-17); and the Environmental Modification Treaty of May 28, 1977 (Ex. K, 95-1, approved November 28, 1979, by a vote of 98-0).

<sup>38</sup> For a more detailed discussion of Senate conditions, see Chapter VI.

launchers.<sup>39</sup> The Senate approved the INF Treaty on May 27, 1988, with three “conditions,” two “declarations,” and three “declarations and understandings.”

The primary condition related to the treaty-making power and the reinterpretation of treaties. This became an issue during consideration of the INF Treaty because of concern that the Reagan Administration was reinterpreting the 1972 Anti-Ballistic Missile (ABM) Treaty to permit development and testing of the Strategic Defense Initiative.<sup>40</sup> Many Senators believed that the executive branch could not alter the interpretation of a treaty without the advice and consent of the Senate and wanted to prevent similar reinterpretations in the future. Consequently, the Senate attached a condition, sponsored by Senators Byrd and Biden, stating that “the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification,” and that the United States would not agree to a different interpretation except pursuant to Senate advice and consent or the enactment of a statute. It also spelled out the bases for the common understanding as (1) the text of the treaty and the resolution of ratification, and (2) the authoritative representations provided by the administration to the Senate in seeking its consent.<sup>41</sup>

A second condition made ratification subject to the President’s obtaining the agreement of the Soviet Union that certain agreements on definitions and meanings of the treaty were of the same force and effect as the treaty. A third condition required the President, prior to exchanging instruments of ratifications, to certify that the United States and the Soviet Union had a specified common understanding concerning production of ground-launched ballistic missiles not covered by the treaty. The resolution of ratification also specified that one declaration and two understandings not relating to the subject matter of the treaty were to be communicated to the Soviet Union in connection with (and therefore not necessarily in) the exchange of ratifications: (1) the declaration that respect for human rights was an essential factor to ensure the development of friendly relations; (2) the understanding that the President should seek demonstrable progress by the Soviet Union in its implementation of certain documents concerning human rights; and (3) the understanding that the United States through the Helsinki process would expect full compliance with Soviet commitments in the field of human rights.

---

<sup>39</sup> Submitted to the Senate January 25, 1988, Treaty Doc. 100-11. Reported by the Foreign Relations Committee April 14, 1988, Exec. Rept. 100-15. Approved by the Senate May 27, 1988, by a vote of 93-5.

<sup>40</sup> In 1993, the Clinton Administration made clear it had returned to the original interpretation. Letter of July 13, 1993, from Acting Director of the U.S. Arms Control and Disarmament Agency Thomas Graham, Jr., to Senator Pell.

<sup>41</sup> For text and discussion, see Chapter VI.

*Threshold Test Ban Treaty and Protocol*

The United States and the Soviet Union signed the Threshold Test Ban Treaty in 1974 limiting underground nuclear tests to a yield of 150 kilotons.<sup>42</sup>

President Ford submitted it to the Senate together with the Peaceful Nuclear Explosions Treaty in 1976. The Senate Foreign Relations Committee ordered the treaties reported in 1977, but did not report them so that consideration of the Panama Canal treaties could proceed. The Carter Administration did not promote the two treaties because it was seeking a comprehensive ban of nuclear tests.

In 1982 the Reagan Administration decided that additional verification provisions would be necessary before it would endorse the treaties, but the Soviet Union wanted negotiations on additional verification provisions to await ratification. In 1987 President Reagan asked that the Senate consider the treaties, subject to the condition that he would not ratify them until the new verification protocols were negotiated and approved by the Senate. Some Senators objected to this dual ratification process. On February 27, 1987, the Foreign Relations Committee reported the treaties with a reservation that the President not ratify them until he certified that the Soviet Union had concluded specified additional agreements, and with a declaration supporting negotiations for a comprehensive test ban.<sup>43</sup> The administration did not support the committee's recommendations and the Senate did not vote on the treaties at that time.

The United States and the Soviet Union signed the additional verification protocols on June 1, 1990; President Bush submitted them to the Senate on June 28, 1990. On September 14, 1990, the Foreign Relations Committee reported the Threshold Test Ban Treaty and Protocol subject to a declaration advocating five safeguards originally propounded by the Joint Chiefs of Staff but modified by the committee, and a declaration promoting continued efforts to achieve a verifiable comprehensive test ban.<sup>44</sup>

Future amendments to the agreements were an issue of concern during the committee's debate. In its report the Foreign Relations Committee reviewed concerns that Article XI of the protocol, which allows parties to amend the protocol through agreement in a Bilateral Consultative Commission, should not permit substantive changes without Senate approval. The committee obtained assurances from the Director of the Arms Control and Disarmament Agency that any substantive change that would affect the basic aims of the treaty would have to be made by means of an amendment, and that the executive branch would notify the committee on any changes prior to their becoming binding. The Senate approved both treaties and the new protocols on September 25, 1990.

---

<sup>42</sup>Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Weapons Tests, signed July 3, 1974 (Treaty Doc. 94-2) and protocol signed July 1, 1990 (Treaty Doc. 101-19).

<sup>43</sup>Exec. Rept. 100-1.

<sup>44</sup>Exec. Rept. 101-31.

*CFE Treaty*

The Treaty on Conventional Armed Forces in Europe (CFE) was signed on November 19, 1990, by 16 members of NATO and 6 members of the former Warsaw Pact including the Soviet Union.<sup>45</sup> CFE established equal ceilings for each group of states in certain armaments categories and limited the forces of individual countries. The Senate approved the treaty on November 25, 1991, subject to six conditions and four declarations. The resolution of ratification explicitly stated that the conditions “shall be binding upon the Executive” and that the declarations “express the intent of the Senate.”

One of the conditions dealt with new states that might be formed from the Soviet Union. When the treaty was submitted to the Senate on July 9, 1991, the Soviet Union still existed. After a coup attempt against Soviet President Gorbachev in August 1991, the Soviet Union began to dissolve into a number of independent states. During its consideration of the treaty, the Senate found the situation rapidly changing and obligations of successor states of the Soviet Union became a major issue. The Senate added a condition to the resolution of ratification stating that if, in the future, a new state was formed in the area of application: (A) the President was to consult with the Senate on the effect on the treaty; (B) if the President determined that a new state’s holdings were of such military significance as to constitute a changed circumstance and he decided not to invoke the withdrawal right, he was to request a conference to assess the viability of the treaty; and (C) if he made such a decision, he was to submit for the Senate’s advice and consent any major change in the obligations. If the states in such a conference did not agree on a change in obligations, the President was to seek a Senate resolution of support for continued adherence. The Senate also added a declaration urging the President to seek the accession of any new state that might be formed in the area.

In the CFE resolution of ratification, the Senate made two declarations dealing with the treaty-making power. One affirmed “the applicability to all treaties of the constitutionally based principles of the treaty interpretation set forth” in the INF condition. Another declared the Senate intent to approve international agreements obligating the United States to reduce or limit the armed forces in a militarily significant manner only pursuant to the treaty power.

*CFE Flank Agreement*

As the 1995 deadline for CFE reductions approached, it became evident that Russia would not meet the treaty’s requirements. The outbreak of armed ethnic conflict in and around the Caucasus, most notably in Chechnya, led Russia to claim it needed to deploy equipment in excess of treaty limits in the “flank zones.” The parties to the CFE Treaty signed a flank agreement on May 31, 1996. This agreement removes several administrative districts from the old “flank zone” and, thus, permits the equipment ceilings for the flank zones to apply to a smaller area. To balance these adjust-

<sup>45</sup>Treaty Doc. 102-8, submitted July 9, 1991. Reported November 19, 1991, with five conditions, four declarations, Exec. Rept. 102-22. Approved by Senate, with amendments to resolution of ratification, November 25, 1991, by vote of 90-4.

ments, reporting requirements were enhanced, inspection rights in the zone increased, and district ceilings were placed on armored combat vehicles to prevent their concentration.

The Clinton Administration initially did not plan to submit the flank agreement to the Senate for its advice and consent to ratification because it did not consider it to be an amendment to the treaty. However, after the Senate leadership pressured the administration and linked its submission to approval of the CWC, the administration submitted the CFE Flank Agreement to the Senate on April 7, 1997.<sup>46</sup> The Foreign Relations Committee and the full Senate both approved the resolution of ratification by unanimous votes.<sup>47</sup>

The resolution of ratification contains 14 conditions. Two of these conditions address monitoring and compliance issues; two state that any further modifications to the treaty or the geographical boundaries of the flank zones must be submitted to the Senate for advice and consent. Several of the conditions demonstrate the Senate's concerns regarding the continued stationing of Russian troops on the territories of other newly independent states and with the potential for political and economic coercion as a result of those troop deployments. As with other resolutions approved since 1987, this one also contains the Biden-Byrd condition on treaty interpretation, which was initially included in the resolution of ratification for the INF Treaty.

The resolution of ratification for the CFE Flank Agreement contained one particularly contentious condition. In condition 9, the Senate stated that the United States could not deposit the instruments of ratification for the CFE Flank Agreement until the President certified to the Senate that he would submit the Memorandum of Understanding on Succession (MOUS) to the 1972 ABM Treaty to the Senate for its advice and consent. This agreement named Russia, Ukraine, Belarus, and Kazakhstan as the successors to the Soviet Union for the ABM Treaty. The administration claimed that this agreement was not an amendment to the treaty, but many Senators disagreed, and some wanted to debate and defeat the MOUS as part of their effort to nullify the ABM Treaty. The administration and many Democratic Senators objected to condition 9, primarily because it was not germane to the CFE Flank Agreement, but they realized that they did not have the votes to remove it from the resolution of ratification.

### *START I Treaty*

The first treaty between the United States of America and the Soviet Union on the Reduction and Limitation of Strategic Offensive Arms (the START I Treaty) was signed by U.S. President Bush and Soviet President Mikhail Gorbachev on July 31, 1991.<sup>48</sup> Six months later, the Soviet Union disintegrated into a number of independent states. On May 23, 1992, the United States and Belarus, Kazakhstan, Russia, and Ukraine signed a protocol that named

<sup>46</sup>Treaty Doc. 105-5, submitted to the Senate April 7, 1997. Approved by the Senate May 14, 1997.

<sup>47</sup>Congressional Record, May 14, 1997, p. S4475.

<sup>48</sup>Treaty Doc. 102-20, submitted to the Senate November 25, 1991. Protocol (Treaty Doc. 102-32) submitted June 19, 1992. Treaty Doc. 102-20 reported September 18, 1992, with Treaty Doc. 102-32. Exec. Rept. 102-53. Approved by Senate October 1, 1992.

those four nations, each of which had Soviet nuclear weapons on its territory, as the successors to the Soviet Union for the START I Treaty. The three non-Russian states also agreed to return the nuclear warheads on their territories to Russia. The President submitted the protocol to the Senate on June 19, 1992, as an amendment to and integral part of the START I Treaty. President Bush said the protocol would ensure that only one state emerging from the former Soviet Union would have nuclear weapons, and that all the former states of the Soviet Union that have nuclear weapons would be bound by the START I Treaty.

In the resolution of ratification, the Senate adopted eight conditions designated as binding upon the President. The conditions included that President Bush notify Belarus, Kazakhstan, and Ukraine that letters obligating them to eliminate all nuclear weapons and strategic offensive arms from their territory within 7 years would be legally binding. The President was also directed to communicate to the three states that the United States would regard as inconsistent with the START I Treaty any actions inconsistent with their obligations to adhere to the Non-Proliferation Treaty in the shortest possible time.

Concerning implementation arrangements, the Senate made it a condition that failure to reach agreement would require the President to consult with the Senate. In the event Belarus, Kazakhstan, and Ukraine did not eliminate nuclear weapons and strategic offensive armaments in their territory within 7 years, it was a condition that the President should consult with the Senate and submit any change in obligations for advice and consent of the Senate or, if the President decided not to invoke the withdrawal right, seek a Senate resolution of support. Another condition required the President to submit a report on compliance with specified arms control treaties within 180 days of advice and consent. A final condition, known as the Biden condition, required that the President "seek an appropriate arrangement, including the use of reciprocal measures, to monitor (A) the numbers of nuclear stockpile weapons on the territory of the parties to this treaty and (B) the location and inventory of facilities on the territory of the parties to this treaty capable of producing or processing significant quantities of fissile materials." This condition reflected growing concern about the safety and security of former Soviet nuclear weapons and materials. The Senate Armed Services Committee, in its report on START I, objected to this condition, in part because it doubted the analysis supporting it and in part because it feared that efforts to negotiate such an arrangement could slow the negotiations on the new START II Treaty. The committee recommended that the Biden condition either be eliminated from the START I resolution of ratification, or that it be cast as a non-binding "sense of the Senate" recommendation.<sup>49</sup> The Senate Foreign Relations Committee did not accept this recommendation. However, it indicated, in its report, that this requirement would not apply to the START II Treaty because such a requirement would likely delay negotiations.<sup>50</sup>

<sup>49</sup>United States Senate, Committee on Armed Services, *Military Implications of the START I Treaty and the June 17, 1992 U.S.-Russian Joint Understanding on Further Reductions in Strategic Offensive Arms*, Report 102-124, September 18, 1992, pp 10-14.

<sup>50</sup>Congressional Record, September 28, 1992, p. S15441.



The resolution of ratification also included six declarations designated as expressing the intent of the Senate. Among these, one affirmed the applicability to all treaties of the condition on treaty interpretation in the INF Treaty. Another declared again the Senate position that it would consider for approval accords obligating the United States to reduce or limit its arms in a militarily significant manner “only pursuant to the treaty power set forth in Article II, Section 2, Clause 2 of the Constitution.”

### *START II*

The United States and Russia signed the second Strategic Arms Reduction Treaty (START II), on January 3, 1993. START II limits each of the parties to 3,500 warheads deployed on their strategic offensive nuclear weapons. It bans all land-based missiles with multiple warheads (MIRVed ICBMs) and limits the number of warheads that could be deployed on submarine-based ballistic missiles (SLBMs). In its original form, the two nations were to reduce their forces to the START II limits by January 1, 2003. However, in September 1997, the United States and Russia signed a protocol that would extend this timeline until the end of 2007.

President Bush submitted the START II Treaty to the Senate on January 12, 1993.<sup>51</sup> The Senate Foreign Relations Committee held hearings on the treaty in 1993, but did not report it to the Senate because the START I Treaty did not enter into force until December 1994. The committee held additional hearings in January, February, and March 1995, after the Republican Party gained a majority in the Senate. The committee delayed its vote on the resolution of ratification for most of 1995, while Senator Helms, the chairman, and the Clinton Administration sought to resolve a dispute over reorganization of the State Department. The committee approved the resolution of ratification, by a vote of 18–0 in December 1995 and the full Senate offered its advice and consent to ratification, by a vote of 87–4 on January 26, 1996. The resolution of ratification contains 8 conditions and 12 declarations.<sup>52</sup>

By 1995, the debate over START II had become enmeshed in the debate over ballistic missile defenses and the ABM Treaty. This is evident in the resolution of ratification. The second condition states that U.S. ratification of the START II Treaty does not obligate the United States to accept any modification, change in scope, or extension of the ABM Treaty. Also, the 10th declaration discusses the nature of deterrence, noting that deterrence based on offensive retaliation has become outdated and that ballistic missile defense can contribute to a stable deterrent relationship. The conditions and declarations also address the Senate’s concerns about compliance with START II and, in the eighth declaration, the resolution refers to the “clear past pattern of Soviet noncompliance with arms control agreements and continued cases of noncompliance by the Russian Federation \* \* \*” The resolution also displays the Senate’s concerns about the Clinton Administration’s stewardship of U.S. nuclear forces. The seventh condition states that the treaty is not

<sup>51</sup>Treaty Doc. 103–1, submitted to the Senate January 15, 1993. Reported by the Foreign Relations Committee December 15, 1995, Exec. Rept. 104–10. Approved by the Senate, January 26, 1996.

<sup>52</sup>Congressional Record. January 26, 1996. pp. S461–S463.

binding on the United States until it enters into force and that the President must consult with the Senate if he wants to reduce U.S. forces below START II levels. The 12th declaration states that the United States is committed to maintaining its nuclear weapons infrastructure and that the United States reserves the right to resume nuclear testing to address warhead design flaws or aging problems. Finally, the resolution contains two declarations that have become standard in arms control—one affirmed the applicability to all treaties of the condition on treaty interpretation in the INF Treaty. Another declared again the Senate position that it would consider for approval accords obligating the United States to reduce or limit its arms in a militarily significant manner “only pursuant to the treaty power set forth in Article II, Section 2, Clause 2 of the Constitution.”

#### *Open Skies Treaty*

The Treaty on Open Skies was signed in Helsinki on March 24, 1992, by 25 nations originally including 16 members of NATO, 5 Eastern European members, and 4 former Soviet republics.<sup>53</sup> Its purpose was to enhance military openness by providing each party the right to overfly the territory of other parties in unarmed observation aircraft. After hearings on the treaty and recommendations from the Senate Select Committee on Intelligence and Committee on Armed Services, the Foreign Relations Committee recommended advice and consent with two conditions to be binding on the President. First, if a party sought agreement within the Open Skies Consultative Commission for the introduction of additional categories or improvement of sensors, the President was to notify the Senate and not agree to the improvement until at least 30 days after the notification. Second, since the United States might not need many overflights because of its observation satellite capabilities, the President was to submit a report to the Senate, after the treaty had been in force 1 year, assessing the number of observation flights necessary. In addition, the committee recommended a declaration reaffirming the principles of treaty interpretation. The Senate gave its advice and consent to the treaty on August 6, 1993.<sup>54</sup>

#### *Chemical Weapons Convention*

The Chemical Weapons Convention (CWC) opened for signature in January 1993.<sup>55</sup> Since then, 170 nations have signed it and 129 nations have ratified it. The convention entered into force on April 29, 1997. The CWC is designed to promote the global elimination of chemical weapons. It bans the development, production, transfer, stockpiling, and use of chemical and toxin weapons, mandates the destruction of all chemical weapons production facilities, and seeks to control the production and international transfer of the key chemical compounds of these weapons.

The Senate Foreign Relations, Armed Services, Intelligence, and Judiciary Committees held a total of 13 hearings on the CWC dur-

<sup>53</sup>Treaty Doc. 102-37, submitted to the Senate August 12, 1992. Reported by the Foreign Relations Committee August 2, 1993, Exec. Rept. 103-5. Approved by Senate, August 6, 1993.

<sup>54</sup>Congressional Record, August 6, 1993, p. S10800 (daily ed.).

<sup>55</sup>Treaty Doc. 103-21, submitted to the Senate on November 23, 1993.

ing the 103d, 104th, and 105th Congresses. Under a unanimous consent agreement, the CWC resolution of ratification was to have been brought to the Senate floor in mid-September 1996. However, uncertain of sufficient votes to ensure passage, its supporters postponed its consideration until after the 1996 Presidential election. President Clinton vowed to press for CWC ratification in early 1997, but Senator Jesse Helms, chair of the Foreign Relations Committee, opposed the CWC and stated that it would not be a high priority for his committee. Furthermore, Senator Helms and the Senate's leadership sought assurances that other arms control agreements, such as the CFE Flank Agreement and the Agreed Statements on Demarcation to the ABM Treaty, would be brought before the Senate for its advice and consent. The administration objected to this linkage, but agreed to submit the agreements so that the Senate could address the CWC before it entered into force.

After extensive negotiations between the White House and key Senators, and within the Senate itself, a unanimous consent agreement was reached to bring the CWC resolution of ratification to the Senate floor on April 23, 1997.<sup>56</sup> The resolution contained 33 conditions, 5 of which were struck by roll call votes during floor debate. The 28 remaining conditions address a number of concerns raised during the debate over the CWC. These include the costs of treaty implementation and the U.S. financial contribution to the CWC's compliance organization, verification issues and the U.S. ability to detect and respond to noncompliance, and measures to manage the burden on U.S. industry as a result of CWC inspection and reporting requirements. The resolution of ratification also contains the two conditions that have become standard in arms control—the Biden-Byrd condition on treaty interpretation from the INF Treaty and the condition that reaffirms the Senate's role in regarding arms control treaties.

#### *Comprehensive Test Ban Treaty*

The Comprehensive Test Ban Treaty (CTBT) opened for signature at the United Nations on September 24, 1996. As of December 5, 2000, 160 nations have signed it and 69 have ratified it. The key obligation in the CTBT is in Article I: "Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion \*\*\*." Much of the treaty establishes organizations and procedures for monitoring compliance with this obligation. Entry into force requires ratification by 44 specified nations, essentially those with a nuclear reactor. Of the 44, all have signed but India, Pakistan, and North Korea, and 30 have ratified, including Britain, France, and Russia. On October 13, 1999, the Senate rejected the resolution of ratification, 51 against, 48 for, and 1 present, making the United States the only nation to have rejected the treaty.

The procedure by which the treaty came to a vote was unusual, and influenced its consideration. President Clinton submitted the treaty to the Senate for its advice and consent to ratification on September 22, 1997.<sup>57</sup> In October 1997, the Senate Governmental

<sup>56</sup>S. Res. 75. Congressional Record, April 24, 1997. pp. S3651-S3657.

<sup>57</sup>U.S. Congress, Senate, Comprehensive Nuclear Test-Ban Treaty: Message from the President of the United States Transmitting Comprehensive Nuclear Test-Ban Treaty. \*\*\* 105th

Affairs Committee and the Senate Appropriations Committee held hearings on the U.S. ability to maintain nuclear weapons under a CTBT. As the committee of jurisdiction, however, the Senate Foreign Relations Committee had to report out the treaty or be discharged from consideration. In his State of the Union Addresses of 1998 and 1999, President Clinton called for the Senate to approve the treaty, but Senate Foreign Relations Committee Chairman Jesse Helms demurred. He wrote to the President in January 1998 that “the CTBT is very low on the Committee’s list of priorities,” and stated that “I will be prepared to schedule Committee consideration of the CTBT only after the Senate has had the opportunity to consider and vote on the Kyoto Protocol and the amendments to the ABM Treaty.”<sup>58</sup> In 1998 and most of 1999, the Senate Foreign Relations Committee did not hold hearings dedicated to the treaty and did not report it out of committee.

Senate Democrats called repeatedly for the Senate Foreign Relations Committee to consider the treaty and for the Senate to vote on it. In the summer of 1999, they escalated their pressure by threatening a filibuster and by planning to press for hearings and a vote by March 31, 2000.<sup>59</sup> Meanwhile, Senators Kyl and Coverdell had arranged for briefings of other Republican Senators to make the case against the treaty, and by September 30 had lined up 42 votes against it.<sup>60</sup> On that day, Senator Lott responded to demands to consider the treaty. He asked for unanimous consent to discharge the Senate Foreign Relations Committee from further consideration of the treaty on October 6, to begin consideration of the treaty on that day, with a total of 10 hours of debate, and then to vote on the resolution of ratification. Senator Daschle objected to the request on grounds that it proposed to hold the vote too quickly, did not allow enough time for debate, and assumed the treaty would be defeated.<sup>61</sup> Under the final agreement, the Senate began consideration of the treaty on October 8. Each leader was permitted one amendment to the resolution of ratification, with 8 hours of debate permitted on the two amendments and 14 hours on the resolution of ratification. The Senate would then proceed to a vote.<sup>62</sup>

The resolution of ratification proposed by the majority was simply “[t]hat the Senate advise and consent” to ratifying the treaty.<sup>63</sup> The minority resolution included a number of conditions binding upon the President, such as on nuclear weapons stockpile stewardship, maintenance of nuclear weapons laboratories and nuclear

Cong., 1st Sess., Treaty Doc. 105–28. Washington, U.S. Government Printing Office, 1997, 230 p.

<sup>58</sup> Letter dated January 21, 1998, reprinted in Senator Jesse Helms, “Comprehensive Test Ban Treaty,” U.S. Congress. Congressional Record, September 30, 1999, S11677–S11678.

<sup>59</sup> On September 8, Senator Byron Dorgan said, “If [Senator Lott] and others decide [the treaty] will not come to the floor, I intend to plant myself on the floor like a potted plant and object \*\*\* to other routine business of the Senate” until the treaty is brought to a debate and vote. Congressional Record, September 8, 1999, S10541. Senator Joseph Biden, Senate Foreign Relations Committee ranking minority member, reportedly planned to offer a resolution proposing hearings on the CTBT in 1999 and a vote by March 31, 2000. See Richard Lowry, “Test-Ban Ban,” National Review, November 8, 1999, as reprinted in U.S. Congress. Congressional Record, November 10, 1999, S14579.

<sup>60</sup> *Ibid.*, S14578.

<sup>61</sup> Congressional Record, September 30, 1999, S11666–S11667.

<sup>62</sup> Senator Robert Byrd, “The Comprehensive Test Ban Treaty,” in U.S. Congress. Congressional Record, October 7, 1999, S12257.

<sup>63</sup> Congressional Record, October 8, 1999, S12257.

testing capability, and withdrawal.<sup>64</sup> These were similar to the “safeguards” set forth by the President in August 1995.<sup>65</sup>

By the time the debate began, all recognized that the treaty would be defeated. Many Democrats feared that the defeat would be harmful, and some from both parties were troubled by the hasty consideration and vote. Accordingly, Senators Moynihan and Warner gathered 62 signatures—24 Republicans and 38 Democrats—for a letter to Senators Lott and Daschle requesting that the vote be deferred.<sup>66</sup> Similarly, President Clinton asked Senator Lott to defer consideration.<sup>67</sup> But some objected to rescinding the agreement, so the vote was held.

The Senate debated the CTBT on October 8, 12, and 13. Several hearings were held the week before, by the Foreign Relations Committee on October 7, and by the Armed Services Committee on October 5, 6, and 7. During the debate, Senators debated whether the treaty would advance nuclear nonproliferation objectives, whether other nations could conduct clandestine tests of military significance, and whether the United States could maintain its nuclear deterrent without nuclear tests. Some also raised the question of how the international community might react to U.S. rejection of the treaty, and whether rejection would undermine the U.S. leadership role in the world and lead to the unraveling of other arms control agreements.

The Senate debate also addressed the question of whether the Senate had given the treaty adequate consideration in the form of hearings and floor debate. Senator Helms stated that the CTBT was “extensively discussed” in 14 Senate Foreign Relations Committee hearings in 1998 and 1999,<sup>68</sup> while Senator Daschle presented a list, “Senate Consideration of Major Arms Control and Security Treaties—1972–1999,” showing, on average, that other such agreements received much more consideration than did the CTBT.<sup>69</sup> Senator Byrd stated that the process for considering this treaty was inadequate. “To accept or reject this treaty on the basis of such flimsy understanding of the details as most of us possess,” he said, “is a blot on the integrity of the Senate, and a disservice to the Nation.” As a result, he declared he would vote “present” for the first time in his 41 years as a Senator.<sup>70</sup>

Regarding the status of the U.S. obligation in the wake of the Senate’s rejection of the treaty, Secretary of State Madeleine Albright said in October 1999, that the United States will “live up to the conditions of the treaty.”<sup>71</sup> Senator Lott countered, “If the Senate does not consent to ratification of a treaty \*\*\* it has no status for the United States in international law. In fact, the Sen-

<sup>64</sup> Congressional Record, October 12, 1999, S12427.

<sup>65</sup> U.S. White House. Office of the Press Secretary. “Fact Sheet: Comprehensive Test Ban Treaty Safeguards,” August 11, 1995, 1 p.

<sup>66</sup> Congressional Record, October 13, 1999, S12548–S12549.

<sup>67</sup> Congressional Record, October 12, 1999, S12333.

<sup>68</sup> Senator Jesse Helms. “Comprehensive Test Ban Treaty,” in U.S. Congress. Congressional Record, September 30, 1999, S11670. This reference includes a list of the hearings.

<sup>69</sup> Senator Daschle, colloquy on the CTBT, in U.S. Congress. Congressional Record, October 13, 1999, S12507.

<sup>70</sup> Senator Byrd, colloquy on the CTBT, in U.S. Congress. Congressional Record, October 13, 1999, S12523–S12524.

<sup>71</sup> William Mann, “U.S. Will Honor Its Treaty Commitments, Albright Says,” Associated Press (newswire), October 18, 1999.

ate vote serves to release the United States from any possible obligations as a signatory of the negotiated text of the treaty.”<sup>72</sup>

## B. ECONOMIC TREATIES

Economic treaties and agreements have always been a major component of U.S. relations with foreign countries, and the end of the Cold War has increased their significance. This section discusses four categories of economic treaties: friendship, commerce, and navigation (FCN); investment; consular; and tax treaties.

An important category, reciprocal trade agreements, is not discussed in detail here. Although they are legally binding treaties under international law, these trade agreements are not treaties in the U.S. terminology, that is, agreements submitted to the Senate for its advice and consent. Instead, they have been concluded as statutory or congressional-executive agreements. In accordance with legislative directives, major trade agreements have been submitted to Congress for approval or enactment by legislation requiring approval of both Chambers and providing for expedited or “fast track” procedures. Others are concluded as executive agreements that have been authorized by Congress. Within the Senate, while all treaties are in the jurisdiction of the Foreign Relations Committee, reciprocal trade agreements are in the jurisdiction of the Finance Committee.<sup>73</sup>

### FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES

Friendship, commerce, and navigation (FCN) treaties were among the earliest formal economic treaties and set the framework for U.S. trade and investment relations with foreign countries. Their importance for trade obligations decreased after 1948 when the United States became a contracting party to the General Agreement on Tariffs and Trade (GATT) and U.S. trade relations began to be set through multilateral trade agreements. The United States entered into 21 FCN treaties between 1946 and 1966, however, focusing during this period on the protection of U.S. foreign investment, mainly in developed countries.<sup>74</sup>

In recent years some of the older FCN treaties have been amended by protocols. Recent examples were the Protocols to the Treaties of Friendship, Commerce, and Navigation with Finland and Ireland.<sup>75</sup> The protocols established the legal basis by which the

<sup>72</sup> Bill Gertz, “Lott Hits Clinton’s Stance on Nuke Pact,” *Washington Times*, November 3, 1999: 1. The quotation is from a statement Senator Lott released to that newspaper.

<sup>73</sup> Rule XXV, Standing Rules of the Senate, Revised to July 2, 1992. S. Doc. 102-25, July 27, 1992. For additional information, see Grimmett, Jeanne J. *Why Certain Trade Agreements are Approved as Congressional-Executive Agreements Rather Than as Treaties*. CRS Report 97-896 A, updated October 8, 1999. Holliday, George D. *Fast Track Implementation of Trade Agreements: The Debate over Reauthorization*, CRS Report RS20039, updated January 29, 1999. Holliday, George D. *The Changing Role of Congress in Trade Negotiations*. CRS Report 92-231 E, February 14, 1992. Sek, Lenore. *Congressional Trade Negotiating Authority*. In *Congress and Foreign Policy*, 1991. House Foreign Affairs Committee Print, 1992. pp. 103-117.

<sup>74</sup> See generally Vandeveld, “The Bilateral Investment Treaty Program of the United States,” 2 *Cornell Int’l L. J.* 201, 207-208 (1988).

<sup>75</sup> Protocol to the Treaty of Friendship, Commerce, and Navigation with Finland of February 13, 1934, as modified by the protocol of December 4, 1952, signed July 1, 1991. Submitted to the Senate July 30, 1992. Treaty Doc. 102-34. Reported August 6, 1992, Exec. Rept. 102-49, approved by Senate August 11, 1992. Protocol to the Treaty of Friendship, Commerce, and Navigation with Ireland of January 21, 1950, signed June 24, 1992. Submitted to the Senate July

Continued

United States could issue investor visas to qualified nationals, a benefit provided in most FCN treaties. The Immigration and Nationality Act permits issuance of an investor visa only to a non-immigrant who is "entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national \* \* \*." <sup>76</sup>

#### INVESTMENT TREATIES

Investment treaties are a successor to the Friendship, Commerce, and Navigation (FCN) Treaty Series. To improve investor protection, primarily in developing countries with which the United States had not concluded FCN treaties, the United States negotiated a series of bilateral investment treaties (BITs) under a program begun in 1981.<sup>77</sup> Before beginning the negotiations, the State Department developed a model treaty that has continued to evolve. The general objectives of the program are to facilitate the free flow of investment, prohibit practices that inhibit investment, and codify rules on investment and dispute settlement.

The model treaty serves as a criterion against which the Senate may judge specific investment treaties.<sup>78</sup> Specific objectives include:

1. The better of either national or most-favored-nation treatment for each party, subject to specified exceptions;
2. Application of international law standards to the expropriation of investments, permitting expropriation only for a public purpose and requiring the payment of prompt and fair compensation;
3. The free transfer of funds associated with an investment into and out of the host country;
4. An investor-to-state dispute mechanism that allows U.S. investors access to binding arbitration with the host state without the involvement of the U.S. Government;
5. A prohibition on the imposition of performance requirements, i.e., commitments to use local products or to export goods;
6. The right of companies to hire managers of their choice, regardless of nationality.

23, 1992. Treaty Doc. 102-35. Reported August 6, 1992, Exec. Rept. 102-50. Approved by Senate August 11, 1992.

<sup>76</sup> 8 U.S.C. 1101(a)(15)(E)(ii).

<sup>77</sup> After several European countries had met success with bilateral investment agreements, in 1977 Senators Claiborne Pell and Frank Church wrote letters to the State Department urging the United States to undertake a similar program, and during the Carter Administration efforts began to develop a model treaty. Negotiations on treaties with specific countries began in 1982, and as of August 1992 the United States had signed nineteen BITs. Statement of Kenneth J. Vandeveld in: U.S. Congress. Senate. Committee on Foreign Relations. Bilateral Investment Treaties with the Czech and Slovak Federal Republic, the People's Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland. Hearing, August 4, 1992. S. Hrg. 102-795, pp. 66-67.

<sup>78</sup> The U.S. Model Bilateral Investment Treaty, as of February 1992, and an explanation may be found in: U.S. Congress. Senate. Committee on Foreign Relations. Bilateral Investment Treaties with the Czech and Slovak Federal Republic, the People's Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland. Hearing, August 4, 1992. S. Hrg. 102-795, pp. 56-66. A 1994 Model Bilateral Investment Treaty has since been developed; the BIT with Georgia was the first treaty to be signed using this model. Treaty Doc. 104-13.

The United States concluded and the Senate approved approximately a dozen BITs in the late 1980s. With the emergence of new governments in Eastern Europe and the independent states of the former Soviet Union, the negotiation of such treaties increased. On August 11, 1992, the Senate advised ratification of BITs with the People's Republic of the Congo, Tunisia, Sri Lanka, the Czech and Slovak Federal Republic, and the Russian Federation.<sup>79</sup> On September 15, 1993, the Foreign Relations Committee favorably reported without reservations investment treaties with eight other countries.<sup>80</sup> The Senate gave its advice and consent to one of these, the investment treaty with Kazakhstan, on October 21, 1993.<sup>81</sup> Ratification of the remaining seven treaties was advised on November 17, 1993.<sup>82</sup>

Nine BITs were favorably reported by the Senate Foreign Relations Committee without reservations on June 20, 1996.<sup>83</sup> Ratification was advised by the Senate on June 27, 1996.<sup>84</sup> The treaty with Belarus was reported and approved with a declaration that the President was directed to communicate to the Republic of Belarus when instruments of ratification were exchanged. The declaration expressed the sense of the Senate that the United States "(a) supports the Belarusian Parliament and its essential role in the ratification process of this treaty; (b) recognizes the progress made by the Belarusian Parliament towards democracy during the past year; (c) fully expects that the Republic of Belarus will remain an independent state committed to democratic and economic reform; and (d) believes that, in the event that the Republic of Belarus should unite with any other state, the rights and obligations established under this agreement will remain binding on the part of the Successor State that formed the Republic of Belarus prior to the union."

Ten BITs<sup>85</sup> and one protocol to an earlier BIT<sup>86</sup> were favorably reported by the Senate Foreign Relations Committee on October 4,

<sup>79</sup>Treaty Docs. 102-1, 102-6, 102-25, 102-31, and 102-33. Congressional Record, August 11, 1992, p. 22861.

<sup>80</sup>Investment Treaties with Romania, Argentina, Bulgaria, Armenia, Kazakhstan, Kyrgyzstan, Moldova, and Ecuador. Treaty Docs. 102-36, 103-8, 103-9, 103-11, 103-12, 103-13, 103-14, 103-15. Reported September 15, 1993, S. Exec. Repts. 103-7, 103-2, 103-3, 103-10, 103-11, 103-12, 103-13, and 103-15. Congressional Record, September 15, 1993, p. 21603.

<sup>81</sup>Congressional Record, October 21, 1993, p. 25853.

<sup>82</sup>Congressional Record, November 17, 1993, p. 29688.

<sup>83</sup>Investment Treaties with Jamaica, Belarus, Ukraine, Estonia, Mongolia, Latvia, Georgia, Trinidad and Tobago, Albania. Treaty Docs. 103-35, 103-36, 103-37, 103-38, 104-10, 104-12, 104-13, 104-14, and 104-19. Reported June 20, 1996, S. Exec. Repts. 104-11, 104-12, 104-13, 104-14, 104-15, 104-16, 104-17, 104-18, and 104-19. Congressional Record, June 20, 1996, p. 14807. The Senate Foreign Relations Committee held a hearing on these treaties in November 1995. U.S. Congress. Senate. Committee on Foreign Relations. Bilateral Treaties Concerning the Encouragement and Reciprocal Protection of Investment. Hearing. November 30, 1995. S. Hrg. 104-289.

<sup>84</sup>Congressional Record, June 26, 1996, pp. 15828-15829.

<sup>85</sup>Investment Treaties with Uzbekistan, Bahrain, Bolivia, Honduras, El Salvador, Croatia, Jordan, Mozambique, Lithuania, and Azerbaijan. Treaty Docs. 104-25, 106-25, 106-26, 106-27, 106-28, 106-29, 106-30, 106-31, 106-42, and 106-47. Reported October 4, 2000, S. Exec. Rept. 106-23. Congressional Record, October 4, 2000, pp. S9855-S9856 (daily ed.).

<sup>86</sup>Protocol Between the Government of the United States of America and the Government of the Republic of Panama Amending the Treaty Concerning the Treatment and Protection of Investments of October 27, 1982, Senate Treaty Doc. 106-46. The protocol is intended to ensure that binding international arbitration under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) will be available for disputes between investors and treaty parties, a result that the 1982 BIT precluded after Panama acceded to the convention in 1996.



2000.<sup>87</sup> The Senate advised ratification of these treaties on October 18, 2000.<sup>88</sup> For each BIT, the committee recommended and the Senate approved the following declaration regarding treaty interpretation, stated in each resolution of ratification to be binding on the President:

The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.<sup>89</sup>

Each BIT was also approved with the following committee-recommended proviso to the resolution of ratification: "Nothing in this Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States"; the resolution further stated that the proviso was not to be included in the instrument of ratification to be signed by the President.<sup>90</sup>

The executive branch and the Senate have demonstrated interest in maintaining an escape clause in BITs, similar to that contained in FCN treaties. A standard provision in BITs based on the 1992 and earlier models states that the treaty "shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." In 1988, in approving several BITs, the Foreign Relations Committee added an understanding to the resolutions of ratification stating that under this article, "either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security."<sup>91</sup> The report emphasized that "U.S. national security interests, as determined by the President, should take precedence over provisions of the treaties, should that become necessary."<sup>92</sup>

The committee did not add this understanding in 1992 when it approved BITs with the Czech and Slovak Federal Republic, the People's Republic of the Congo, the Russian Federation, Sri Lanka,

<sup>87</sup> S. Exec. Rept. 106-23. Congressional Record, October 4, 2000, pp. S9855-S9856 (daily ed.).

<sup>88</sup> Congressional Record, October 18, 2000, pp. S10660-S10662 (daily ed.).

<sup>89</sup> See, for example, resolution of ratification for Treaty with Uzbekistan. Congressional Record, October 18, 2000, p. S10662 (daily ed.). Condition (1) of the resolution of ratification for the INF Treaty, among other things, provides that "the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification," lists the elements on which this "common understanding" is based, and states that "the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute." Condition (8) of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe (CFE Flink Agreement), among other things, reaffirms the principles of treaty interpretation contained in resolution of ratification for the INF Treaty. For the text of the cited interpretive provisions, see the Congressional Record, May 27, 1988, p. 12849, and May 14, 1997, p. S4475 (daily ed.).

<sup>90</sup> See, for example, resolution of ratification for Treaty with Uzbekistan. Congressional Record, October 18, 2000, p. S10662 (daily ed.).

<sup>91</sup> Investment Treaties with Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada. Treaty Docs. 99-15, 99-17, 99-19, 99-22, 99-23, 99-24, and 99-25. Reported October 4, 1988, S. Exec. Rept. 100-32. Approved October 20, 1988.

<sup>92</sup> S. Exec. Rept. 100-32, October 4, 1988, p. 3.

and Tunisia. The administration took the view that the understanding could delay progress of the treaties and was not necessary because a treaty article clearly encompassed U.S. economic emergency powers. A protocol attached to the Russian bilateral investment treaty explicitly confirmed the mutual understanding of the two parties "that whether a measure is undertaken by a Party to protect its essential security interests is self-judging."<sup>93</sup> The provision in the 1994 prototype does not contain the earlier language regarding measures necessary for the maintenance of public order; this shortened version is used in the treaties with Georgia, Trinidad and Tobago, Albania, and nine of the treaties approved in October 2000,<sup>94</sup> each of which is based on the 1994 model.

Investment obligations have begun to appear in multilateral frameworks, for example, the World Trade Organization (WTO) Agreement on Trade-Related Investment Measures and the WTO General Agreement on Trade in Services, which contains rights and obligations regarding the commercial presence of service providers in the territory of WTO Member countries.<sup>95</sup> A trilateral investment agreement among the United States, Canada, and Mexico incorporating BIT principles is contained in Chapter 11 of the North American Free Trade Agreement (NAFTA).<sup>96</sup> The negotiation of a Multilateral Agreement on Investment (MAI) by member states of the Organization for Economic Cooperation and Development (OECD) was initiated in 1995, with a consolidated draft text issued in February 1998. Negotiations were ended in December 1998 because of strong objections by labor and environmental groups and various concerns over treaty provisions cited by negotiating countries.<sup>97</sup>

#### CONSULAR CONVENTIONS

Consular conventions provide for the establishment of consular posts and appointments and immunities of consular officials. Consular relations were traditionally governed by customary international law and bilateral consular agreements. In 1963, a conference sponsored by the United Nations adopted the Vienna Con-

<sup>93</sup>Article 8 of Protocol to Treaty with the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, Treaty Doc. 102-33, July 28, 1992.

<sup>94</sup>Investment treaties with Uzbekistan, Bahrain, Bolivia, Honduras, El Salvador, Croatia, Jordan, Mozambique, and Azerbaijan; the BIT with Lithuania, which is based on the 1992 model, contains the earlier version of the provision. See list of treaties at supra note 85.

<sup>95</sup>These agreements were approved by Congress in the Uruguay Round Agreements Act (URAA), Public Law 103-465, Section 101(a). The URAA was considered under expedited legislative procedures for multilateral trade agreements provided for in Title I of the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418.

<sup>96</sup>The NAFTA was approved by Congress in Section 101(a) of the North American Free Trade Agreement Implementation Act (NAFTA Act), Public Law 103-182, under expedited legislative procedures for free trade agreements provided for in Title I of the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418. The NAFTA Act was jointly reported by several Senate committees, including the Foreign Relations Committee, in S. Rept. 103-189. It was referred to the committee because of provisions related to U.S. participation in NAFTA supplemental agreements on labor and the environment, the Border Environmental Cooperation Commission, and the North American Development Bank. S. Rept. 103-189, p. 129.

<sup>97</sup>"OECD Countries Kill MAI Talks But Say World Still Needs Rules," 15 Int'l Trade Rep. 2954 (BNA 1998). Some Senate committee discussion of MAI negotiations may be found in the November 1995 Foreign Relations Committee hearing on pending BITs. U.S. Congress, Senate, Committee on Foreign Relations, Bilateral Treaties Concerning the Encouragement and Reciprocal Protection of Investment. Hearing, November 30, 1995. S. Hrg. 104-289. A House hearing on the negotiations was held in March 1998. U.S. Congress, House, Committee on International Relations, Subcommittee on International Economic Policy and Trade, Multilateral Agreement on Investment: Win, Lose, or Draw for the U.S.? March 5, 1998.

vention on Consular Relations, which has since been ratified or adhered to by more than 130 nations, including the United States.<sup>98</sup> The Diplomatic Relations Act of 1978 established the Vienna Convention as U.S. law on diplomatic privileges and immunities with respect to nonparties to the convention.<sup>99</sup>

The Vienna Convention reduced the need for bilateral consular conventions, but it did not invalidate previously existing bilateral agreements or prevent future agreements to supplement or amplify its provision. The United States has continued to negotiate bilateral agreements on occasion, and by the end of 1991, there were approximately 65 bilateral consular treaties.<sup>100</sup>

In reporting consular conventions with Tunisia and Algeria in 1992, the Foreign Relations Committee agreed with the administration's view that the conventions would provide greater protection to U.S. citizens in the face of increased violations of human rights in Tunisia and the suspension of elections in Algeria. The bilateral conventions obligate the other country to notify the U.S. consul without delay whenever a U.S. national is arrested, and to allow U.S. access to the national provisions more specific than the Vienna Convention. The committee stressed that approval did not constitute an endorsement of policies of those countries and repeated Bush Administration assurances that, "treaties that enhance a country's capacity to protect its nationals in other countries are not generally seen as representing an endorsement of the policies of those countries."<sup>101</sup>

#### TAX CONVENTIONS

Since January 1993, the ever-increasing globalization of economic activity has assured continued interest by the United States in negotiating and renegotiating income tax treaties with numerous other countries. Of the 53 income tax treaties presently in force between the United States and other countries, 22 new or renegotiated treaties (that is, more than 40 percent of the total) have entered into force during this period. Additional income tax treaties signed during the period have not yet entered into force. The major purpose of these treaties continues to be the avoidance of double taxation: that is, the object is to avoid taxation by both jurisdictions in instances where a resident of one earns income from sources within the other. Another important purpose of the treaties is to prevent evasion of income taxes through the exchange of relevant tax information.

A special consideration in the negotiation of tax treaties is the need to coordinate treaty provisions with relevant domestic legislation. Hence, procedures for the negotiation and ratification of tax

<sup>98</sup> Signed April 18, 1961, 23 UST 3227, entered into force for the United States on December 13, 1972.

<sup>99</sup> Public Law 95-393, as amended.

<sup>100</sup> Recent examples are Consular Conventions with the Republic of Tunisia, signed May 12, 1988 (Treaty Doc. 101-12); Algeria, signed January 12, 1989 (Treaty Doc. 101-13); and the Mongolian People's Republic, signed August 2, 1990 (Treaty Doc. 101-14). The Consular Conventions with Tunisia, Algeria, and Mongolia were approved by committee May 7, 1992, S. Exec. Rept. 102-25, 25, and 27, respectively, and by the Senate on May 13, 1992. Hearings were held April 8, 1992. U.S. Congress. Senate. Committee on Foreign Relations. Consular Conventions, Extradition Treaties, and Treaties Relating to Mutual Legal Assistance in Criminal Matters (MLATs). Hearing, April 8, 1992. S. Hrg. 102-674.

<sup>101</sup> S. Exec. Rept. 102-26, May 1, 1992.

treaties are somewhat different from those followed in the case of other types of treaties. While most treaties are negotiated primarily by the State Department, tax treaties are negotiated primarily by the International Tax Counsel of the Treasury Department with State Department assistance. While the Senate Foreign Relations Committee has jurisdiction over review of all treaties, both the House Committee on Ways and Means and the Senate Finance Committee expect to be consulted in the case of tax treaties because of their jurisdiction over congressional consideration of tax legislation. Thus, after a tax treaty has been signed and submitted to the Senate for ratification, the staff of the Joint Committee on Taxation prepares an explanation of its provisions and submits that explanation to the Senate Committee on Foreign Relations. The Joint Committee explanation summarizes the treaty's provisions, may examine specific issues raised by the treaty, presents an overview of relevant U.S. tax law, and supplies article-by-article explanations of each of the treaty's provisions.

Senate consideration of a tax treaty is also facilitated by comparison with two model income tax treaties: the model published in 1992 by the OECD and the U.S. model income tax treaty published in 1996.

Some of the specific issues which have been presented by tax treaties negotiated or renegotiated during the period under examination are described below.

### *Treaty shopping*

Treaty shopping has been a concern for a number of years and continued to be during the period under review. The expression is used to describe the situation where a treaty between the United States and some other country is relied on by a resident of some third country to reduce U.S. tax liability even though the third country concerned does not accord reciprocal benefits on U.S. residents earning income from sources within its territorial jurisdiction. The anti-treaty shopping provision of the U.S. model treaty is often used as a standard against which to compare the anti-treaty shopping provisions of specific actual treaties. The 1996 model treaty is more lenient in some respects than the prior model treaty<sup>102</sup> and more restrictive in other respects. All of the actual treaties which went into force during the period under review include anti-treaty shopping rules. However, there is no uniformity but indeed there is wide variation among the treaties with respect to such rules. Of course, continuing developments in the fashioning of complex financial instruments and specialized contracts likely will assure that future treaties will require more complex mechanisms for preventing, or at least limiting, treaty shopping.

---

<sup>102</sup>The 75 percent ownership rule of the older model treaty has been changed to a 50 percent ownership rule in the newer model treaty and thus coincides with all recently negotiated treaties (including several negotiated before the period under review). Furthermore, the most recent treaties include rules allowing a third-country resident to enjoy treaty benefits if a treaty between the United States and the third country has entered into force. In fact, there is even a special provision in the treaty with Mexico that would accord treaty benefits to residents of any other country which is a party to NAFTA.

*Exchange of information*

As noted above, preventing evasion of income tax is one of the two chief aims the United States has in negotiating income tax treaties. Treaty provisions regarding the exchange of fiscal information further that aim. A few treaties negotiated or renegotiated during the period under review assure the ability of the United States to obtain tax information from the other country to a more limited degree than either the model treaty or other recent treaties.<sup>103</sup>

*Allocation of income of multinational business enterprises*

Most U.S. income tax treaties include provisions which employ a so-called arm's-length standard to determine whether and to what extent the income of a multinational business must be reallocated in order to prevent evasion of tax in the United States or to clearly reflect the income of related enterprises. The leading industrialized countries use this same approach. Debate has occurred however with respect to whether a better approach might exist. One such approach used internally in the United States among the various states is formulary apportionment of the worldwide income of a juridical person or an affiliated group of related persons among the various jurisdictions claiming primary authority to tax portions of the whole.<sup>104</sup>

*Taxation of equipment rentals*

Although contrary to the general policy of the United States, certain treaties with developing countries allow a source country to impose a gross-basis tax on income from the rental of equipment in cases where the taxpayer does not maintain a permanent establishment in the source country. Three treaties negotiated during the period under review (that is, those with the Czech Republic, Kazakhstan, and the Slovak Republic) include provisions allowing the same.

*Arbitration of competent authority issues*

Some treaties negotiated or renegotiated during the period under review<sup>105</sup> follow a precedent established in the 1989 treaty with Germany by including provisions allowing the competent authorities of the treaty countries to resolve disputes with respect to interpretation of the treaties in question through arbitration.

<sup>103</sup>The treaty with France very significantly restricts the ability of the United States to conduct audits in France. The treaty with Ireland only affords the United States limited access to information in the case of criminal offenses and no information in the case of civil offenses. The treaty with the Netherlands only affords the United States access to information relating to income taxes.

<sup>104</sup>This matter was cited by the Joint Committee as an issue presented by several treaties negotiated or renegotiated during the period under review. In some instances, it was characterized as an issue of "transfer pricing" (that is, see the JCT explanations of the treaties with France, Kazakhstan, and Sweden). In other instances, it was described as an issue involving "associated enterprises and permanent establishments" (that is, see the JCT explanations of the treaties with the Czech Republic, Mexico, the Netherlands, the Russian Federation, and the Slovak Republic).

<sup>105</sup>The treaties in question are those concluded with France, Ireland, Kazakhstan, Mexico, and the Netherlands.

*Insurance excise tax*

The treaties between the United States and certain, but not all, other countries contain provisions that make the U.S. excise tax on insurance premiums paid to foreign insurers inapplicable to insurers resident in the other treaty country. Congress has expressed strong reservations about such treaty waivers of the insurance excise tax in the past on the ground that they may put U.S. insurers at a relative competitive disadvantage if the other treaty country does not impose any substantial tax burden on its insurers. In such instances, the waiver does not further the policy objective of avoiding double taxation but rather has the effect of eliminating taxation of foreign insurers that compete against U.S. insurers in the worldwide market. Two earlier treaties<sup>106</sup> in particular raised congressional concern since in at least one of the countries concerned<sup>107</sup> no tax whatever was imposed on resident insurers. Treasury has included so-called "anti-conduit" clauses in most<sup>108</sup> of the more recent treaties that include relevant waivers. Such clauses provide that if an insurer resident in the other treaty country reinsures a relevant risk with a juridical person not entitled to the benefits of the treaty or any other treaty allowing a relevant waiver (for example, a person subject to an anti-treaty shopping provision), then the tax is not waived.

## C. ENVIRONMENTAL TREATIES

The negotiation of environmental treaties to protect various aspects of the physical world and surrounding atmosphere is not new. For decades, the United States has concluded bilateral and multilateral agreements on such subjects as fisheries, ocean mammals, conservation of wildlife, and prevention of pollution of the seas.<sup>109</sup>

In recent years, especially since the U.N. Conference on the Human Environment held in Stockholm in 1972, international cooperation to protect the global environment has been sought through the conclusion of many more treaties, on broader subjects and wider scale. The International Trade Commission estimated in the early 1990s that two-thirds of 170 environmental agreements of significance to the United States have been concluded since 1972. It divided the agreements into eight categories: (1) Marine fishing and whaling; (2) Land animals (including birds) and plant species; (3) Marine pollution; (4) Pollution of air, land, and inland waters; (5) Boundary waters between the United States and Mexico and Canada; (6) Maritime and coastal waters matters; (7) Nuclear pollution; and (8) Other general agreements.<sup>110</sup>

In June 1992, the U.N. Conference on Environment and Development (UNCED) held in Rio de Janeiro, and referred to as the Earth

<sup>106</sup> Those treaties were the one with Barbados and the one with Bermuda.

<sup>107</sup> Bermuda.

<sup>108</sup> See the treaties with France, Ireland, Mexico, and Sweden but cf. the treaty with the Netherlands.

<sup>109</sup> U.S. Congress. Senate. Committee on Commerce, Science, and Transportation. *Treaties and Other International Agreements on Fisheries, Oceanographic Resources, and Wildlife Involving the United States*. Prepared by the Congressional Research Service, October 31, 1977.

<sup>110</sup> United States International Trade Commission. *International Agreements to Protect the Environment and Wildlife*. Report to the Committee on Finance, United States Senate, on Investigation No. 332-287 Under Section 332 of the Tariff Act of 1930. U.S. ITC Publication 2351, January 1991. p. 1-1.

Summit, brought together the largest summit of world leaders to date to conclude and plan for additional cooperation, including international agreements, concerning major environmental issues. Two conventions were presented for signature at the conference: the United Nations Framework Convention on Climate Change (UNFCCC), and the Convention on Biological Diversity. In addition, nations agreed at UNCED on non-legally binding documents that were expected to result in more international agreements in the future. These included Agenda 21, a program of action for sustainable economic development; the Rio Declaration on Environment and Development; and the Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of All Types of Forests.

In the period between the Stockholm Conference and the Earth Summit, the Senate was generally supportive of environmental treaties and encouraged their negotiation. In the period since the mid-1990s the Senate has evidenced concerns about some of the broader treaties, and confined approval to somewhat more limited measures on migratory birds, plants and fisheries issues. In the last few days of the 106th Congress, the Senate approved the Convention to Combat Desertification, the negotiation of which had emerged from the UNCED process. The Convention on Biological Diversity has remained pending in the Senate Committee on Foreign Relations since 1994. In 1997 the Senate passed a resolution, S. Res. 98, during negotiations on the Kyoto Protocol to the Climate Change Convention, warning it would not approve a treaty that did not meet certain conditions.

#### NO-RESERVATIONS CLAUSES

In approving three environmental treaties in the early 1990s—the Basel Convention, the Environmental Protocol to the Antarctic Treaty, and the United Nations Framework Convention on Climate Change—the Senate expressed its concern about articles limiting reservations. The Foreign Relations Committee has cautioned the administration that Senate consent in these cases should not be construed as a precedent. In addressing this concern, the administration transmitted the Convention on Biological Diversity to the Senate in 1994 with an interpretive statement of its “understandings” concerning the articles that it regarded as requiring clarification.

In the case of the Basel Convention, the chairman of the Foreign Relations Committee made a statement in the Senate regarding reservations. In the other two treaties that were approved, the Foreign Relations Committee expressed its concerns in its reports. Discussion of these actions follows.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal established a notice and consent system to control imports and exports of hazardous wastes. Article 26(1) provided:

1. No reservation or exception may be made to this Convention.
2. Paragraph 1 of this Article does not preclude a State or political and/or economic integration organization, when signing, ratifying, accepting, approving, formally confirming or ac-

ceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State.<sup>111</sup>

On August 11, 1992, the Senate gave its advice and consent to the Basel Convention with four understandings requested by the administration. In presenting the treaty to the Senate, the chairman of the Foreign Relations Committee, Claiborne Pell, stated his concern about including in treaties a provision which has the effect of inhibiting the Senate from attaching reservations deemed necessary or of preventing the Senate from exercising its right to give its advice and consent to all treaty commitments before they can have a binding effect. He said the Senate's approval of these treaties "should not be construed as a precedent for such clauses in future agreements with other nations requiring the Senate's advice and consent."<sup>112</sup> The Basel Convention has not yet been ratified by the United States, because of continuing debate in the Congress regarding the content of implementing legislation.

The Protocol on Environmental Protection to the Antarctic Treaty committed parties to comprehensive protection of the Antarctic environment and its associated and dependent ecosystems, and designated Antarctica as a natural reserve. Article 24 stated, "Reservations to this Protocol shall not be permitted."<sup>113</sup> It did not specifically permit understandings to harmonize the convention with national laws, as did the Basel Convention. When asked why the administration agreed to the provision, the Department of State replied that it was prepared to accept all the commitments in the protocol, subject to the adoption of appropriate implementing legislation and regulations, and that therefore reservations were not required.<sup>114</sup>

In reporting the protocol, the Foreign Relations Committee recorded its concern "of including in treaties a provision which has the purported effect of inhibiting the Senate from attaching reservations deemed necessary in the national interest or of preventing the Senate from exercising its constitutional duty to give its advice and consent to all treaty commitments before they can in any way have a binding effect upon the United States." It added:

Whatever justifications may have existed for inclusion of such a prohibition in the Antarctic protocol \* \* \* or the Basel Convention, in view of the peculiar circumstances there present, the Senate's approval of these treaties should not be construed as a precedent for such clauses in future agreements

<sup>111</sup>Treaty Doc. 102-5. Done March 22, 1989; submitted to the Senate May 20, 1991; reported May 28, 1992 (Exec. Rept. 102-36).

<sup>112</sup>Congressional Record, August 11, 1992, p. S12293. Chairman Pell pointed out the committee had made its position on this issue clear in the past, S. Exec. Rept. No. 3, 85th Cong., 1st Sess., p. 17, 1957.

<sup>113</sup>Article 24 of Protocol on Environmental Protection to the Antarctic Treaty (Treaty Doc. 102-22), done October 4, 1991, and submitted to the Senate February 18, 1992. Ordered reported June 11, 1992. Approved by Senate October 7, 1992.

<sup>114</sup>Protocol on Environmental Protection to the Antarctic Treaty (Treaty Doc. 102-22). Hearing, May 4, 1992. Responses of the State Department to Questions Asked by Senator Pell. Appendix, p. 37.



with other nations requiring the Senate's advice and consent. The committee has made its position on this issue clear in the past (S. Exec. Rept. No. 3, 85th Cong., 1st Sess., p. 17, 1957). The President's agreement to such a prohibition can not constrain the Senate's constitutional right and obligation to give its advice and consent to a treaty subject to any reservation it might determine is required by the national interest.<sup>115</sup>

The committee repeated this statement in its report on the UNFCCC, which had a similar no-reservations article.<sup>116</sup> This convention had the objective of stabilizing greenhouse gas concentrations in the atmosphere at the level that would prevent dangerous interference with the climate system, and established a framework for addressing relevant issues with different obligations for developed and developing countries.<sup>117</sup>

On the Climate Change Convention, the Foreign Relations Committee also noted that decisions by the parties to adopt targets and timetables for limiting emissions would have submitted to the Senate for advice and consent. It noted further:

that a decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the "shared understanding" of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent.<sup>118</sup>

In 1997 the parties to the UNFCCC agreed at their third Conference of the Parties to adopt the Kyoto Protocol to the UNFCCC, which outlined legally binding reductions in greenhouse gas emissions for all annex I parties (developed/industrialized countries), to cumulatively total a 5-percent reduction of greenhouse gas emissions below 1990 levels by these parties averaged over the period 2008–2012. In mid-1997, as these negotiations were underway, the Senate passed S. Res. 98, which stated that the Senate would not approve any agreement on binding reductions in greenhouse gases that did not include commitments by developing countries as well as developed/industrialized countries, or that would result in harm to the U.S. economy. The administration has not transmitted the Kyoto Protocol to the Senate because, among other reasons, developing countries have to date not been willing to consider making binding commitments regarding their greenhouse gas emissions.

#### FISHERY CONVENTIONS

Fishery treaties allocate rights to fish in specified coastal and ocean areas, limit the total allowable catch of various species to prevent depletion of stocks, or set international standards for harvesting and managing fishery resources.

Bilateral treaties have long been important for regulating international fisheries and fishing by foreign nations in coastal waters. One of the earliest U.S. fishery treaties was the 1818 Convention

<sup>115</sup> Exec. Rept. 102–54, September 22, 1992, p. 7.

<sup>116</sup> Exec. Rept. 102–55, October 1, 1992, p. 15.

<sup>117</sup> Treaty Doc. 102–38. Adopted May 9, 1992, and signed June 12, 1992. Submitted to the Senate September 8, 1992. Approved by the Senate October 7, 1992.

<sup>118</sup> Exec. Rept. 102–55, p. 14.

Respecting Fisheries, Boundary, and the Restoration of Slaves, concluded with Great Britain pertaining to Canada. It provided that the inhabitants of the United States, in common with the British subjects, "shall have forever \*\*\* the liberty to take fish of every kind" in a specified area, and to dry and cure them, while the United States renounced the liberty to take, dry, or cure fish within 3 miles of the coasts not included in the specified area.<sup>119</sup> The United States is now party to numerous bilateral treaties on fisheries, a recent example being the 1985 Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon.

Multilateral treaties on fisheries have largely developed since the Second World War, especially after technological advances enabled wideranging fishing fleets to increase their catch. These treaties aim to protect identified species or fisheries in general in a specific area, and establish a regime for regulating these fisheries and settling disputes.

A recent fishery convention was the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, sometimes called the Straddling Stocks Convention.<sup>120</sup> This treaty authorizes the adoption, monitoring, and enforcement of specific management and conservation measures to address problems of unregulated fishing, overcapitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases, and insufficient cooperation among nations.

In reporting the treaty, the Senate Foreign Relations Committee stated that the agreement provides additional tools to increase the compliance and enforcement mechanisms necessary for managing fish stocks that migrate beyond a country's sovereign jurisdiction. The report noted the special significance of the agreement's emphasis on the precautionary approach to fishery management, with a description in an annex to the agreement outlining how this precautionary approach is to be applied. The committee expressed concern that this agreement, in Article 42, contained a "no-reservations" clause that would impinge upon Senate prerogative, and reported the agreement with the declaration that Senate approval of this agreement not be construed as a precedent for acquiescence to future treaties containing such a provision.<sup>121</sup>

In recommending approval, Foreign Relations Committee Ranking Minority Member Claiborne Pell noted that the convention confirms the U.S. approach to fisheries management and reflects the acceptance by other nations of that approach, with the Magnuson-Stevens Fishery Conservation and Management Act providing the

<sup>119</sup> Convention Respecting Fisheries, Boundary, and the Restoration of Slaves, October 20, 1818, TS 112.

<sup>120</sup> Treaty Doc. 104-24, signed by the United States and 26 other nations on December 4, 1995. Submitted to the Senate for advice and consent on February 20, 1996; reported on June 26, 1996, Exec. Rept. 104-20; and approved on June 27, 1996.

<sup>121</sup> Exec. Rept. 104-20, June 26, 1996.

necessary legislative authority for the United States to carry out its obligations under this convention.<sup>122</sup>

International agreements concerning fisheries are done by both treaties and statutory agreements. The Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended,<sup>123</sup> enacted exclusive fishery management by the United States within a 200 nautical mile fishery conservation zone extending seaward from the coast.<sup>124</sup> It authorized foreign fishing within this zone under Governing International Fishery Agreements (GIFAs) which would not require submission to the Senate but would require transmittal to Congress. These agreements would not become effective until after 60 calendar days of continuous session of Congress following the transmittal. Congress thus gave itself an opportunity to prevent GIFAs from entering into force.<sup>125</sup> The Act also called for renegotiation of any treaty which pertained to fishing within the EEZ, or for certain resources outside the zone.

#### D. LEGAL COOPERATION

Treaties providing for cooperation in bringing suspected criminals to trial have become increasingly important with the growth of transborder criminal activity, including narcotics trafficking, terrorism, money laundering, and export control violations. The two chief types are extradition and mutual legal assistance treaties (MLATs).<sup>126</sup>

#### EXTRADITION TREATIES

With dramatic increases in transnational crime, personal mobility, and technological innovation, the United States has been actively seeking new treaty relationships to meet the challenges of modern law enforcement. Renegotiation of existing extradition treaties and the adoption of new extradition agreements are very much part of this undertaking. The goal is to facilitate the transfer of fugitives from a broader range of crimes, while still protecting national interests of the parties to them.

International extradition is the juridical process for the transfer of individuals between sovereign states for criminal trial or punishment.<sup>127</sup> Though extradition often is characterized as part law, part diplomacy, the United States will not transfer an individual abroad for trial or punishment unless the transfer is authorized by treaty or statute.<sup>128</sup>

<sup>122</sup> Congressional Record, June 27, 1996, p. S7209 (daily ed.).

<sup>123</sup> Public Law 94-265, as amended. 16 U.S.C. 1801 et seq.

<sup>124</sup> The fishery conservation zone was modified by Presidential Executive Order No. 5030 (March 10, 1983) to become the EEZ.

<sup>125</sup> H.R. 1653 (106th Congress) on approving a GIFA with the Russian Federation is an example of recent legislation of this nature.

<sup>126</sup> For a general discussion see: U.S. Congress. Senate. Committee on Foreign Relations. Consular Conventions, Extradition Treaties, and Treaties Relating to Mutual Legal Assistance in Criminal Matters (MLATS). Hearing, April 8, 1992. Washington, U.S. Government Printing Office, 1992; and Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties. Hearing, October 29, 1987.

<sup>127</sup> While extradition treaties cover both obtaining suspects for trial and obtaining previously convicted individuals for punishment, they are most commonly used for the former purpose.

<sup>128</sup> *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5, 8-9 (1936).

U.S. courts do not require a similar legal predicate for trying or punishing a person brought before them from abroad.<sup>129</sup> Nevertheless, extradition remains the primary process for obtaining wanted individuals.

Extradition for a limited number of crimes is governed by multilateral treaties, but extradition generally proceeds under bilateral treaties, as implemented under Federal statute.<sup>130</sup> The United States is now party to approximately 115 bilateral extradition agreements. Of our current treaties, only about half came into force, in whole or in part, after 1970. Treaties that pre-date 1945 still govern extradition with many of our treaty partners.

The substantive issues addressed in our bilateral extradition treaties have remained substantially constant over time. Each treaty establishes a mutual obligation of the parties to extradite in accordance with the treaty's terms. Each treaty identifies the types of criminal conduct to which the duty to extradite applies. Each treaty includes various exceptions and modifications to the duty to extradite. These commonly concern politically motivated offenses, nationals of the requested state, and, more recently, capital crimes. Prior proceedings against an individual in the requested state also may affect whether he or she may be extradited. Under provisions known as the rule of specialty, further limitations are placed on what a party may do once an individual has been extradited to it. For example, restrictions are placed on trying an extradited individual for additional crimes and on transferring such an individual to a third country.

Extradition agreements limit their application to the offenses designated in them. The older agreements designate extraditable offenses through inclusion of a list of covered crimes. Some, but not all, of these agreements include an additional requirement that a listed offense be considered a felony by both the requesting and the requested states. The more recent extradition agreements either supplement or supplant the list method with a general dual criminality test. Under this test, extradition may be had for any offense that is punishable by imprisonment of at least 1 year by both the requesting state and the requested state.<sup>131</sup>

Limiting coverage to specifically listed offenses has lost favor because of its inflexibility. While the domestic criminal laws of most countries expand their reach over time—to cover drug trafficking, money laundering, computer crimes, and securities fraud, for example—extradition practice under a “listed offense” treaty can adjust correspondingly only through renegotiation. Consequently, the United States has sought over the past 20 years to negotiate agreements that define covered offenses solely in terms of dual criminality without specific reference to the nature of the underlying conduct.

Also, U.S. extradition agreements concluded before 1960 typically limit the obligation to extradite to crimes committed within the “jurisdiction” of the requesting state. “Jurisdiction” in the context of

<sup>129</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (upholding the Ker-Frisbie doctrine by reiterating that U.S. courts may try an individual brought here after forcible abduction abroad).

<sup>130</sup> 18 U.S.C. §§ 3181 et seq.

<sup>131</sup> See M. Abbell & B. Ristau, 4 *International Judicial Assistance* § 13-2-4(2) (1990).

these agreements is interpreted to mean territorial jurisdiction only, not criminal jurisdiction. As U.S. criminal law increasingly addresses extraterritorial acts, a disparity arises under older agreements between the reach of U.S. law and our ability to bring suspects to trial.

Over the past 25 years, the United States has sought to negotiate extradition agreements that better accommodate the longer reach of our criminal laws. With very limited exception, all recent agreements make express provision for extraterritorial crimes. Most commonly, the agreements either allow or mandate extradition for extraterritorial acts if the criminal law of the requested state would punish extraterritorial acts under similar circumstances. Some agreements further permit or require extradition where the requesting state is basing its extraterritorial criminal jurisdiction on the nationality of the offender. A few newer agreements state that the location of the crime is irrelevant so long as the offense otherwise meets dual criminality requirements.

The political offense exception in international extradition practice protects an individual from being sent abroad to stand trial or face punishment for an offense of a political nature. This exception has been a fundamental component of U.S. extradition practice from its inception. Indeed, even though all bilateral extradition treaties to which the United States is a party now apparently contain an express exception for political offenses, the United States early recognized the exception even absent a political offense clause in the pertinent treaty.<sup>132</sup>

The existence of the political offense exception often has been clearer than its bounds. Political offenses may fall within either of two categories.<sup>133</sup> The first category is that of pure political offenses, consisting of treason, espionage, sedition, and other acts directed against the state as such and not against individuals. The second category, that of relative political offenses, consists of common crimes that are so connected with political activity that the entire offense is regarded as political. Determining the requisite connection between a common crime and political activity often has proved troublesome under this second category.

Even though U.S. extradition practice universally has barred extradition for political offenses, there has been a trend over the past 20 years toward narrowing the scope of the political offense exception, particularly with respect to relative political offenses. Newer extradition treaties have excluded from consideration as political offenses (either by specific listing or by general reference) certain universally condemned crimes that are the subject of multilateral agreements. Under these agreements, covering such crimes as hostage taking, air hijacking, aircraft sabotage, and attacks on inter-

<sup>132</sup> John Bassett Moore cited the following letter in his 1906 *Digest of International Law*: "Neither the extradition clause in the treaty of 1794 nor in that of 1842 contains any reference to immunity for political offenses or to the protection of asylum for political or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible \*\*\*." 4 J.B. Moore, *A Digest of International Law* 334 (1906) (Letter of May 22, 1876, from Mr. Fish to Mr. Hoffman). See also Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 *Am. Int. L.J.* 247, 249 (1982).

<sup>133</sup> See, for example, discussion of the exception in *Quinn v. Robinson*, 783 F. 2d 776, 793-803 (9th Cir. 1986).

nationally protected persons, a party state must either prosecute a person accused of a covered crime or extradite the person for trial elsewhere. Flowing from an older tradition, attacks on a head of state or the head of state's family also are generally excluded from political offenses.

The United States significantly departed from previous political offense practice in 1986 with the adoption of a new supplementary extradition treaty with the United Kingdom.<sup>134</sup> Under the supplementary treaty, most serious violent crimes against individuals are excluded from consideration as political offenses. The U.K. model subsequently was used in some treaties concluded with democratic allies (for example, Canada and Germany), but other recent treaties with democratic allies (for example, Australia) have not narrowed the political offense exception in line with the U.K. treaty.

The United States, like many common law countries, does not object to extraditing its own nationals, and we have sought to negotiate treaties without nationality restrictions. However, to the frustration of U.S. law enforcement, many civil law countries, particularly Latin American countries, still restrict extradition of their nationals under their extradition agreements, their domestic law,<sup>135</sup> or both.

Most recent agreements continue to place some restrictions on the extradition of nationals of the requested state, but these restrictions generally do not outright bar extradition. More commonly, the requested state has discretion to refuse extradition, but the exercise of this discretion often is conditioned on the requested state prosecuting the individual itself. In what may signal diminished insistence by our treaty partners on nationality restrictions, none of the four most recent treaties considered by the Foreign Relations Committee—including one with Paraguay—contains a nationality clause.

Death penalty provisions have become standard in recent U.S. extradition agreements.<sup>136</sup> Among their advantages, these provisions permit states with capital punishment to obtain extradition for serious crimes from states whose laws do not permit capital punishment and who thereby might otherwise withhold surrender.

Most capital punishment provisions expressly authorize the requested state to take the possibility of capital punishment in the requesting state into account in determining whether to grant extradition. Of the approximately 30 capital punishment provisions, none categorically bars extradition whenever the person being sought might face capital punishment if extradited. Rather, the capital punishment provisions generally authorize the requested state to refuse extradition whenever the extraditable offense is punishable by death in the requesting state, but not in the requested state, unless the requesting state furnishes such assurances as the requested state considers sufficient that the death sentence will not be imposed and executed.

<sup>134</sup> Supplementary Extradition Treaty, June 25, 1985, U.S.-U.K., T.I.A.S. No. 12050.

<sup>135</sup> An example of denying extradition on the basis of nationality in domestic law—treaty obligations, notwithstanding—is Israel's refusal to extradite Samuel Sheinbein, a Maryland resident indicted in that state murder. Israel has subsequently modified its nationality restrictions.

<sup>136</sup> The primary exceptions are some of our recent treaties with former British colonies in the Caribbean, many of which authorize capital punishment under their criminal laws.

Controversy over restricting the transfer of an extradited individual to a third party has arisen in the context of the International Criminal Court (ICC). Beginning in 1998, the Senate has made its advice and consent subject to an understanding on the application of the rule of specialty provisions in the respective extradition treaties it has approved. These understandings state that third-party transfer restrictions shall preclude the resurrender of any person from the United States to the ICC agreed to in Rome on July 17, 1998 without the consent of the United States and that the United States is to withhold consent until the Senate gives its advice and consent to the treaty that establishes the court. Of broader, though more time limited, application are provisions in the Consolidated Appropriations Act, 2000<sup>137</sup> that bar the use of funds to extradite a U.S. citizen to any country that does not confirm that it will not transfer the person to the ICC. The Act further bars the use of funds to consent to the extradition of a citizen to any country that is under an obligation to surrender persons to the court unless the requesting state assures that no such surrender will occur.

#### MUTUAL LEGAL ASSISTANCE TREATIES

Mutual legal assistance treaties (MLATs) are a more recent type of treaty designed to obtain evidence needed from other countries for criminal cases and promote cooperation among law enforcement authorities in different countries. They have proven particularly useful in investigating and prosecuting multinational drug, money laundering and organized crime cases.

The traditional procedure for obtaining evidence from foreign countries has been by letters rogatory, a written request from a court of one country to a court of another asking the court to provide evidence or some other assistance. U.S. officials have found the letters rogatory time consuming and less satisfactory because they were not compulsory and often produced evidence which was inadmissible in the recipient country's courts.

Although individual MLATs vary, they obligate each country to provide evidence and other forms of assistance needed in criminal cases and have certain other general characteristics. They include procedures permitting the United States to obtain evidence in a form admissible in U.S. courts, such as the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad, and state that the compelling of testimony and documents and the execution of the requests is to occur in accordance with the laws of the responding state. The treaties are administered by a central authority, the Justice Department in the case of the United States, to be responsible for making and carrying out requests under the treaties. They provide the means for tracking, freezing and confiscating crime-tainted assets found beyond the borders of the country which the crime occurred. Finally, they usually include an "escape clause," under which a party may deny assistance if the request does not conform to the treaty, relates to a political or military offense not recognized by ordinary criminal law, or if the provision of assistance would prejudice the security

<sup>137</sup>Public Law 106-113, App. H.R. 3427, § 706, 113 Stat. 1537-453.

or essential public interests of the state to which the request was made.

Negotiations on the first MLAT began in 1972 because of increasing evidence that Swiss banks were being used to launder and hide organized crime money. The resulting MLAT entered into force in 1977. By September 1999, MLATs entered into force with Switzerland, the Netherlands, Turkey, Italy, Canada, the United Kingdom concerning the Cayman Islands, the Bahamas, Mexico, Argentina, Thailand, Morocco, Spain, Uruguay, Jamaica, Panama, the United Kingdom, the Philippines, Hungary, South Korea, Austria, Israel, Antigua and Barbuda, Lithuania, St. Vincent and the Grenadines, Grenada, and Poland.

The Foreign Relations Committee has concurred that MLATs add an element of standardization and uniformity to criminal procedures worldwide, and that the ability of criminals to hide the evidence and fruits of their crimes would be diminished with the enhancement of international cooperation in the investigation and prosecution of crimes. Congress has on occasion encouraged negotiation of MLATs. For example, in a May 1990 conference report, it recommended that a portion of Panama's fiscal year 1990-1991 assistance be withheld pending "significant progress toward concluding an MLAT."<sup>138</sup> And it insists that the annual International Narcotics Control Strategy Reports include a statement of the status of MLAT negotiations for each country with whom we have no such treaty.<sup>139</sup>

The Senate has sometimes inserted conditions or provisos in the resolutions of ratification. In the 1989 MLATs with Mexico, the Bahamas, Canada, Belgium, Thailand, and the United Kingdom, the Senate adopted an understanding proposed by Senator Helms aimed at preventing the granting of assistance to foreign officials who engage in, encourage, or facilitate the production or distribution of illegal drugs. Senator Helms expressed the view that the treaties could require giving assistance to corrupt officials and thus encourage narcotics trafficking. Executive branch officials complained that this understanding delayed entry into force of the treaties because other countries took it as an accusation that their officials were engaged in the drug trade.

Senator Helms also proposed a reservation to the MLATs considered in 1989 asserting that nothing in the treaty required or authorized legislation or action by the United States prohibited by the Constitution as interpreted by the United States. The majority of the committee rejected the reservation as unnecessary, holding that the MLATs do not create new grounds for which U.S. citizens could be tried.<sup>140</sup> In floor consideration on October 24, 1989, however, the Senate adopted the statement as an understanding, but without the phrase "as interpreted by the United States."<sup>141</sup>

<sup>138</sup>H. Rept. 101-493 at 46 (1990).

<sup>139</sup>22 U.S.C. 2291h(a)(2)(A).

<sup>140</sup>Mutual Legal Assistance Treaty Concerning the Cayman Islands. S. Exec. Rept. 101-8 (1989).

<sup>141</sup>Senate consideration of Treaty Docs. No. 100-8 (Cayman Islands), 100-13 (Mexico), 100-14 (Canada), 100-16 (Belgium) and 100-17 (Bahamas); 135 Cong. Rec. 25629-25637 (1989). For resolutions of ratification, see Journal of the Executive Proceedings of the Senate, Vol. 131, 101st Cong., 1st Sess. (S. Pub. 101-10) pp. 745-747.



In approving MLATs with Jamaica, Argentina, Uruguay, and Spain on May 21, 1992, the committee reported both the understandings discussed above, but including the phrase “as interpreted by the United States,” as provisos in the resolution of ratification. The provisos specified they were not to be included in the instrument of ratification signed by the President. The two provisos stated:

Nothing in this treaty requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Pursuant to the rights of the United States under this treaty to deny requests which prejudice its essential public policy or interest, the United States shall deny a request for assistance when the Central Authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this treaty is engaged in or facilitates the production or distribution of illegal drugs.<sup>142</sup>

The two provisos, with the specification that they were not to be included in the instrument of ratification, appear in the resolutions of ratification for the MLATs approved by the committee on October 14, 1998 for Australia, Barbados, Brazil, the Czech Republic, Estonia, Hong Kong, Israel, Latvia, Lithuania, Luxembourg, Poland, Trinidad and Tobago, Venezuela, Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines.<sup>143</sup> Each of the resolutions also featured a declaration of interpretive principles and an understanding that treaty assistance may not be transferred or used to assist the International Criminal Code unless the Senate has given its advice and consent to the treaty establishing the court.<sup>144</sup>

<sup>142</sup>Treaty Docs. Nos. 102-16 (Jamaica), 102-18 (Argentina), 102-34 (Uruguay), and 102-21 (Spain); Ex. Repts. 102-18, 102-19, and 102-35. Advice and consent given on July 2, 1992. Congressional Record (daily edition), May 21, 1992.

<sup>143</sup>S. Exec. Rept. 105-22, advice and consent of the Senate given on November 12, 1998, 144 Cong. Rec. S12985-S12992 (daily ed. Nov. 12, 1998).

<sup>144</sup>For example, Resolution of Ratification, U.S.-Hong Kong Mutual Legal Assistance Treaty, reprinted in, S. Exec. Rept. 105-22 at 367 (1998): “(a) UNDERSTANDING.—The Senate’s advice and consent is subject to the following understanding, which shall be included in the instrument of ratification: PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

“(b) DECLARATION.—The Senate’s advice and consent is subject to the following declaration, which shall be binding on the President: TREATY INTERPRETATION.—The Senate affirms the application of all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.”

These interpretative principles hold that: “(A) the United States shall interpret a treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification; (B) such common understanding is based on: (i) first, the text of the Treaty and the provisions of this resolution of ratification; and (ii) second, the authoritative representations which were provided by the President and his representatives to the Senate and its Committees, in seeking Senate consent to the ratification, insofar as such representations were directed to the meaning and legal effect of the text of the Treaty; (C) the United States shall not agree to or adopt an interpretation different

Some agreements on mutual legal assistance have been concluded as executive agreements. The executive agreements have frequently been limited to a particular investigation or to a particular type of crime and have often served as the first step toward a more expansive MLAT. A drug information agreement with the United Kingdom and Cayman Island authorities on access to evidence needed in narcotics cases, signed July 26, 1984, contained a section stating that if all parties were satisfied that the agreement worked satisfactorily, the negotiation of a full mutual legal assistance treaty would begin 9 months later. The treaty subsequently concerning the Cayman Islands were extended by diplomatic notes, constituting executive agreements, to the British Virgin Islands, Anguilla, Turks and Caicos Islands, on November 9, 1990, and to Montserrat on April 26, 1991.

#### E. HUMAN RIGHTS CONVENTIONS

Since the end of the Second World War, a growing number of treaties have aimed at promoting human rights. On December 10, 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights as a non-binding standard for all countries.<sup>145</sup> Later, nations negotiated human rights covenants, or treaties, to make achievement of selected human rights a binding commitment.

Although the United States has been in the vanguard of observance of human rights, the issue of entering into legally binding human rights treaties has been controversial. While sometimes there is a difference on the nature of human rights to be guaranteed, often the controversy has extended to treaties guaranteeing human rights on which there is wide agreement. Various administration officials and Senators have contended that human rights should remain a matter of domestic jurisdiction and have expressed concern that internationally determined human rights could have an impact on rights of American citizens under the U.S. Constitution. They feared that since in the United States treaties are the law of the land, human rights treaties could supersede national and state laws. Other administration officials and Senators emphasized the value of the conventions in promoting human rights in other countries and believed that the United States should become a party to maintain its leadership in the human rights fields. They contended the United States usually had a higher standard of human rights than called for in the treaties, and in any event no international agreement could supersede rights guaranteed by the Constitution.

Because of this controversy, the United States has not signed or ratified many human rights treaties, and some human rights treaties have been dormant in the Senate Foreign Relations Committee for many years. Of 50 multilateral treaties relating to human rights concluded in organizations such as the United Nations, the

---

from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute; and (D) if, subsequent to ratification of the Treaty, a question arises as to the interpretation of a provision of the Treaty on which no common understanding was reached in accordance with paragraph [B], that provision shall be interpreted in accordance with applicable United States law." Flank Document Agreement to the CRE Treaty, S. Exec. Rept. 105-1 at 23 (1997).

<sup>145</sup> General Assembly Resolution 217 (III).

International Labor Organization (ILO), and the Organization of American States, the United States has ratified or acceded to 19.<sup>146</sup> The United States has not signed or taken any action toward ratifying another 20. Three have been signed but not yet submitted to the Senate.<sup>147</sup> Table XI-1 shows the seven human rights treaties still pending on the Foreign Relations Committee calendars, six pending for more than 10 years, and one of them the longest pending treaty on the calendar.

Table XI-1.—Human Rights Treaties Pending on the Senate Foreign Relations Committee Calendar

Treaty No.	Date Pending	Treaty
81-19	August 27, 1949.	ILO Convention No. 87 concerning freedom of association and protection of the right to organize, adopted July 10, 1948
89-16	June 2, 1966 ...	ILO Employment Policy Convention, adopted July 9, 1964
95-19	February 23, 1978.	International Covenant on Economic, Social and Cultural Rights, signed by the United States October 5, 1977
95-21	February 23, 1977.	American Convention on Human Rights, signed by the United States June 1, 1977
96-53	November 12, 1980.	Convention on the Elimination of All Forms of Discrimination Against Women, signed by the United States July 17, 1980
100-2	January 29 1987.	Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, concluded June 10, 1977
106-37	July 25, 2000 ..	Protocols to the Convention on the Rights of the Child, signed by the United States on July 5, 2000

Many observers felt that the approval of the Genocide Convention on February 19, 1986, the Convention Against Torture on October 27, 1990, and the International Covenant on Civil and Political Rights on April 2, 1992, signaled new progress in this area. Senate approval of these and other human rights treaties was achieved after negotiations among Senators and between the administration and the Senate Foreign Relations Committee on the types of conditions to be adopted.

U.S. ratification of human rights treaties, more often than most other subject areas, has been subject to conditions, some added by the Senate but many proposed by the executive branch. In areas in which rights guaranteed in international conventions diverge from U.S. law, administrations usually propose specific conditions to clarify, and often limit, the obligation of the United States in

<sup>146</sup>For list and additional information, see The United States and International Human Rights Treaties: A Summary of Provisions and Status in the Ratification Process, by Vita Bite. CRS Report 95-191 F, January 20, 1995.

<sup>147</sup>Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted November 7, 1962, and signed December 10, 1962; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 10, 1977, and signed December 12, 1977; and Convention on the Rights of the Child, adopted November 20, 1989, and signed February 16, 1995.

these instances. While this usually facilitates Senate approval, and sometimes the Senate adds additional conditions of this nature, some observers in the human rights field contend that instead of adding a limiting condition, U.S. law should be brought into conformance with the international standard in those areas in which they believe the international standard is higher. For example, the Covenant on Civil and Political Rights prohibits the imposition of the death penalty for crimes committed by persons below the age of 18, and Amnesty International protested a reservation made at the request of the Bush Administration to permit capital punishment of juveniles.<sup>148</sup>

In addition to conditions specific to each human rights treaty, general conditions have been adopted to alleviate the broader concern of the effect of treaties on domestic law, sometimes in response to administration request and sometimes on the initiative of the Senate.

One general condition has often been added to deal with the Federal-state structure of the United States. This makes clear that the Federal Government will fulfill the U.S. obligation where it exercises jurisdiction and that it will take appropriate measures to ensure that states and localities take steps to fulfill the provisions.

A second frequently added general condition is a declaration regarding the non-self-executing nature of the convention or parts of the convention. In this the United States declares that certain provisions are not self-executing, thus clarifying that the provisions of the convention would not of themselves become effective as domestic law.

A third general condition sometimes added is a declaration that the United States will not deposit its instrument of ratification until after the implementing legislation has been enacted.

Finally, the Senate has sometimes added a general condition "That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The "as interpreted by the United States" was intended to assure that the reservation would not permit the International Court of Justice or any other tribunal to determine what is permitted by U.S. constitutional law. This was incorporated in the resolution of ratification for the Genocide Convention, and 12 Western European nations filed written objections to the reservation.<sup>149</sup> In the U.N. Convention Against Torture and the International Covenant on Civil and Political Rights, the Senate added the same statement as a proviso that was not to be included in the resolution of ratification, rather than a reservation.

#### GENOCIDE CONVENTION

The Genocide Convention is an example of a treaty that encountered difficulty in obtaining Senate approval even though unanimity existed that genocide was an abhorrent crime. Pending in the Senate for 37 years, the Genocide Convention was approved on

<sup>148</sup> Congressional Record, April 2, 1992, p. S4781 (daily ed.).

<sup>149</sup> See also discussion of Mutual Legal Assistance Treaties, above.

February 19, 1986.<sup>150</sup> The Foreign Relations Committee reported the convention favorably with conditions in 1970, 1971, 1973, 1976, and 1984. The Senate debated the convention on four occasions but did not vote on it, and twice cloture motions to bring it to a vote failed.

The logjam was broken in 1985 when the Foreign Relations Committee adopted four new conditions in addition to four that had been previously recommended. The four previously recommended conditions were understandings on the meaning of specific provisions and a declaration that ratification would not be deposited until implementing legislation had been enacted. The new conditions were:

[Reservations]

(1) That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

[Understandings (1, 2, and 3 omitted)]

(4) That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined in the convention.

(5) That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.

Upon approval, the Senate also adopted S. Res. 347 stating the sense of the Senate that the President should seek to amend the convention by obtaining agreement to include politically motivated genocide. The resolution was adopted in lieu of adding this as a condition in the resolution of ratification. Implementation legislation was enacted in 1988. The convention entered into force for the United States on February 23, 1989.<sup>151</sup>

#### LABOR CONVENTIONS

The International Labor Organization (ILO), which was founded in 1919 and is now a specialized agency of the United Nations, has adopted more than 170 conventions. While some of these are technical and limited to a narrow sphere, many may be considered human rights treaties because they have the broad purpose of promoting the rights and welfare of labor.

<sup>150</sup> Congressional Record, February 19, 1986, pp. S1355-S1381 (daily ed.). Ex. O, 81st Cong., 1st Sess. Exec. Rept. 99-2, July 18, 1985. The convention was adopted by the U.N. General Assembly on December 9, 1948, and submitted to the Senate by President Truman on June 16, 1949.

<sup>151</sup> Genocide Convention Implementation Act, Public Law 100-602, signed November 4, 1988. The resolution of advice and consent, instrument of ratification, and proclamation of the Genocide Convention are reprinted in Appendix 9.

The United States has ratified about a dozen of these conventions, primarily maritime conventions. In 1980, President Carter established a Federal Advisory Committee to guide U.S. participation in the ILO including ratification of ILO conventions. That advisory committee established the Tripartite Advisory Panel on International Labor Standards (TAPILS) to advise on any legal impediments to U.S. ratification. In 1985 the advisory committee adopted three rules to “ensure that ratification of ILO conventions would not be used to change domestic labor law outside the normal legislative process.” The rules provided:

- (1) Each ILO Convention will be examined on its merits on a tripartite (labor, business, and government) basis;
- (2) Any differences between the convention and Federal law and practice will be dealt with in the normal legislative process;
- (3) There is no intention to change State law and practice through ratification of ILO conventions, and examination of conventions will include possible conflicts between Federal and State law caused by ratification.

Subsequently, the administration submitted and the Senate approved two ILO conventions, one with a declaration and one with five understandings, the first time since February 1953 that the full Senate had considered an ILO convention.<sup>152</sup>

On May 14, 1991, the Senate approved the Convention Concerning the Abolition of Forced Labor which had been adopted by the International Labor Conference on June 25, 1957, and submitted to the Senate by President Kennedy in July 1963.<sup>153</sup> Parties undertake to suppress and not use any form of forced labor as a means of political coercion, for economic development, for labor discipline, as a punishment for participation in strikes, or as a means of racial or religious discrimination. The Senate approved the convention with two understandings recommended by the Bush Administration. One, to deal with concerns about prison labor, stated that ratification was based on interpretations of the ILO Committee of Experts prior to that time, and subsequent interpretations would not be binding. The other, to deal with concern about strikes considered legal by the ILO but illegal under U.S. law, stated that the convention did not limit the contempt powers of courts under Federal and state law.

On November 5, 1999, the Senate approved ILO Convention 182, for elimination of the worst forms of child labor. The treaty had been adopted by the ILO in June 1999 and submitted to the Foreign Relations Committee in August. After a hearing in October, the committee reported the convention on November 3. The speed of consideration and approval by the Senate Foreign Relations Committee and the Senate was unprecedented for ILO conventions.

<sup>152</sup>Treaty Doc. 99-20, ILO Convention No. 144 concerning Tripartite Consultations to Promote the Implementation of International Labor Standards, adopted June 21, 1976. Submitted April 11, 1986. Reported with a declaration December 17, 1987, Exec. Rept. 100-11. Approved February 1, 1988. Treaty Doc. 99-21, ILO Convention No. 147 Concerning Minimum Standards in Merchant Ships, adopted October 13, 1976. Submitted April 11, 1986. Reported with five understandings, 18-0, Exec. Rept. 100-12. Approved February 1, 1988.

<sup>153</sup>Ex. K. 88-1, ILO Convention No. 105 concerning the abolition of forced labor, adopted June 25, 1957. Reported May 7, 1991, with two understandings. Exec. Rept. 102-7. Approved May 14, 1991.

During the hearing on the treaty, Chairman Helms gave credit to the treaty's negotiators who consulted regularly with members of the committee and committee staff. This ensured, according to the chairman, that the treaty was consistent with the U.S. Fair Labor Standards Act. ILO Convention 182 was the second of the eight "core" ILO labor standards conventions ratified by the United States.

#### CONVENTION AGAINST TORTURE

The Senate approved the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on October 27, 1990.<sup>154</sup> The U.N. General Assembly adopted the convention on December 10, 1985. The convention requires parties to prevent torture within their jurisdiction and make it a punishable offense, and established a Committee Against Torture to investigate complaints if a state has recognized its competence. The United States had been active in its negotiation, and in 1984 Congress had passed a joint resolution sponsored by Senators Pell and Percy supporting U.S. participation in formulating international standards and effective implementing mechanisms against torture.

President Reagan submitted the convention to the Senate on May 20, 1988, with several proposed conditions. The Senate Foreign Relations Committee considered that the number and substance of the conditions recommended created the impression that the United States was not serious in its commitment to the convention, and on July 24, 1989, Chairman Pell expressed this concern. In January 1990, President Bush submitted a revised and reduced package that was a product of negotiations between the executive branch, the committee, and interested private groups. The proposed package consisted of three reservations, five understandings, and two declarations.

The three reservations were a clause dealing with Federal-state relations, a limitation of the meaning of "cruel, inhuman or degrading treatment or punishment" to punishment prohibited by the 5th, 8th, and/or 14th amendments of the U.S. Constitution, and a provision aimed at not accepting the compulsory jurisdiction of the International Court of Justice. The understandings dealt with specific obligations including that the United States did not understand the treaty to prohibit the death penalty. One of the two statements was that Articles 1 through 16 were not self-executing.

Prior to the Senate vote on the convention, Senators Pell and Helms, the chairman and ranking minority member of the Foreign Relations Committee, reached agreement on four amendments to the resolution of ratification reported by the committee.

Two amendments dealt with Federal-state relations. One eliminated the Federal-state reservation and another added the following as an understanding:

- (5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the

<sup>154</sup>Treaty Doc. 100-20. Signed by the United States on April 18, 1988; submitted to the Senate May 20, 1988. Reported August 30, 1990, Exec. Rept. 101-30. Approved October 27, 1990.

state and local governments. Accordingly, in implementing Articles 10–14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

In another floor amendment, the Senate added the constitutional provision as a proviso, but not as a reservation. A reservation had been opposed by the administration and many members of the committee. The proviso stated that the President “shall not deposit the instrument of ratification until such time as he has notified all prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”<sup>155</sup>

Legislation implementing the convention was included in the Foreign Relations Authorizations Act, fiscal years 1994 and 1995 (Public Law 103–236) signed into law on April 30, 1994. The United States ratified the convention on October 21, 1994, and it entered into force for the United States on November 20, 1994. The United States submitted its initial report on its compliance with the Convention to the Committee Against Torture on October 15, 1999.

#### CIVIL AND POLITICAL RIGHTS COVENANT

On April 2, 1992, the Senate gave its advice and consent to the International Covenant on Civil and Political Rights. In the covenant, parties undertake to respect and ensure rights including life, freedom of thought and religion, and freedom of expression. The covenant also establishes a Human Rights Committee to oversee compliance with the covenant’s provisions and to receive and consider complaints from one party that another party has failed to fulfill its obligations.<sup>156</sup>

When President Carter submitted the covenant to the Senate on February 23, 1978, the administration recommended several statements, understandings, and reservations. The Senate Foreign Relations Committee held hearings in 1979, but took no further action at that time. In 1991, the Bush Administration proposed a new package of five reservations, five understandings, and four declarations similar in many respects to those suggested by the Carter Administration. These were included by the Senate in its resolution of ratification. To illustrate, the United States reserved the right, in exceptional circumstances, to treat juveniles as adults in the criminal justice system. Regarding Article 50, which stated that the provisions of the covenant “shall extend to all parts of federal States without any limitations or exceptions,” the United States expressed the following understanding:

The United States understands that this Covenant shall be implemented by the Federal Government to the extent that it

<sup>155</sup> Congressional Record, October 27, 1990, p. S17492 (daily ed.).

<sup>156</sup> Ex. E, 95–2. The United Nations adopted the covenant on December 1, 1966, and the United States signed it on October 5, 1977. President Carter transmitted it to the Senate on February 23, 1978. Approved by the Senate September 8, 1992. When the Senate approved the covenant, 103 nations had become parties.



exercises jurisdiction over the matters covered therein, and otherwise by the State and local governments; to the extent that State and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

Among the declarations, the United States declared that the provisions of Articles 1 through 27, dealing with rights guaranteed and activities prohibited by the covenant, were not self-executing.

The Foreign Relations Committee, and later the Senate, also accepted the following proviso, offered by Senator Helms, with the explicit statement that it was not to be included in the instrument of ratification deposited by the President:

Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

The United States ratified the covenant on June 1, 1992, and it entered into force for the United States on September 8, 1992. The United States submitted its initial report to the Committee on Human Rights on Compliance with the Covenant on July 29, 1994.

#### RACIAL DISCRIMINATION CONVENTION

The Senate approved the International Convention on the Elimination of All Forms of Racial Discrimination on June 24, 1994.<sup>157</sup> The U.N. General Assembly adopted the convention on December 21, 1965. The convention requires parties to condemn and work to eliminate racial discrimination in all its forms. The convention also establishes a Committee on the Elimination of Racial Discrimination to review reports from parties about their implementation of the convention's provisions and to examine complaints by one party against another.

President Carter's submission of the convention to the Senate on February 23, 1978 recommended two reservations, one statement and one understanding. The Senate Committee on Foreign Relations held hearings in 1979, but took no further action on this treaty at that time. In 1994 the Clinton Administration proposed a new package of three reservations, one understanding and one declaration. On May 25, 1994, the committee favorably reported (S. Exec. Rept. 103-29) the convention with the conditions recommended by the administration, and added a proviso offered by Senator Helms which was to be included in the resolution of ratification, but not in the instrument of ratification. On June 24, 1994, the Senate approved ratification subject to three reservations: on free speech, private conduct, and the International Court of Justice; an understanding on Federal-state and local jurisdiction; a declaration that the treaty is not self-executing; and a proviso on the U.S. Constitution.

<sup>157</sup>Treaty Doc. 95-118. Signed by the United States on September 28, 1966; submitted to the Senate on February 23, 1978. Reported May 25, 1994, S. Exec. Rept. 103-29. Approved June 24, 1994.

The United States ratified the convention on October 21, 1994, and it entered into force for the United States on November 20, 1994. The United States submitted its initial report on U.S. implementation of the convention to the Committee on the Elimination of Racial Discrimination on September 21, 2000.

#### OTHER HUMAN RIGHTS TREATIES

The Clinton Administration signed the Convention on the Rights of the Child on February 16, 1995, but withheld submission to the Senate. Later the administration signed and submitted to the Senate two subsequently negotiated protocols to the Convention on the Rights of the Child: Optional Protocol on the Involvement of Children in Armed Conflict and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.<sup>158</sup>

The Clinton Administration signed the Statute of the International Criminal Court (ICC) on December 31, 2000, but did not submit it to the Senate.<sup>159</sup> Congress has expressed its views on this treaty.<sup>160</sup> Section 705 of Public Law 106–113 prohibits U.S. adherence to the court except pursuant to a treaty, and also prohibits funding for use by, or in support of the court without Senate advice and consent to the treaty. Section 706 of this measure prohibits use of funds to extradite any U.S. citizen to a foreign country or third country that is under obligation to surrender individuals to the ICC unless such country can assure the United States that it will not transfer the individual to the court.

---

<sup>158</sup>The protocols are open to signature by countries which have ratified or signed the Convention on the Rights of the Child.

<sup>159</sup>Statement by the President regarding signature of the International Criminal Court Treaty. The White House. Office of the Press Secretary (Camp David, Maryland). December 31, 2000.

<sup>160</sup>This treaty requires ratifications (27 countries have ratified as of December 31, 2000) before it enters into force. Once established, the court will be empowered to investigate and try individuals for war crimes, crimes against humanity, and genocide. On July 17, 1998, at the conclusion of negotiations to draft an agreement on the court, the United States voted against adoption of the final text.



## APPENDIX 1.—TREATIES AND OTHER INTERNATIONAL AGREEMENTS: AN ANNOTATED BIBLIOGRAPHY <sup>1</sup>

### A. INTRODUCTION

This selective, annotated bibliography lists English language books, articles, Federal and international documents, and other publications on issues regarding the making, implementation, and termination of treaties in light of U.S. and international law. With respect to international law, special attention is given to the Vienna Convention on the Law of Treaties and debate over its provisions. Concerning U.S. law, the emphasis is on executive-congressional relations in the making and termination of treaties and international agreements. A section on treaties and treaty collections focuses on resources useful in locating information on U.S. treaties throughout the treaty-making process, although a few selected compilations international in scope are identified. Guides to treaty collections and treaty research, which may be helpful in identifying additional resources, are also described.

### B. INTERNATIONAL AGREEMENTS AND INTERNATIONAL LAW

#### 1. OVERVIEW

##### *a. General*

Briggs, Herbert W. The travaux preparatoires of the Vienna Convention on the Law of Treaties. *American journal of international law*, v. 65, Oct. 1971: 705-712.

Briggs discusses the importance of records pertaining to the Vienna Convention on the Law of Treaties and reviews Shabtai Rosenne's book: *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention*. Briggs also considers the extent to which travaux preparatoires, including records of the International Law Commission, might be used in interpreting the provisions of the Vienna Convention.

Charme, Joni S. The interim obligation of article 18 of the Vienna Convention on the Law of Treaties: making sense of an enigma. *George Washington journal of international law and economics*, v. 25, no. 1, 1991: 71-114.

"This article is an attempt to provide a constructive understanding of the purpose, content and force of this enigmatic provision. More specifically, the article first inquires into the binding quality of article 18. Next, the article explores the operative motivations and intentions of the drafters of article 18."

Deutsch, Eberhard P. Vienna Convention on the Law of Treaties. *Notre Dame lawyer*, v. 47, Dec. 1971: 297-303.

In concluding this brief survey, Deutsch writes: "The foregoing brief outline of the more important phases of the Vienna Convention on the Law of Treaties, and of a few of the interesting problems to which it may well give rise, should suffice to indicate its overall vast scope and significance."

Elias, T.D. *The modern law of treaties*. Dobbs Ferry, N.Y., Ocean Publications, 1974. 272 p.

The author explains: Each chapter first examines the "evolution of the underlying juristic notions as adumbrated by publicists, then \*\*\* consider [s] any relevant judicial or arbitral decisions, and finally \*\*\* summarize [s] the position taken by the International Law Commission after a full and careful consideration of the comments of Governments."

<sup>1</sup>Prepared by Sherry B. Shapiro, Information Resources Specialist of the Office of Information Resources Management. Ann Eschete of the Office of Information Resources Management produced the bibliography in its present form.

- Frankowska, Maria. The Vienna Convention on the Law of Treaties before United States courts. *Virginia journal of international law*, v. 28, winter 1988: 281-391.
- "This Article addresses the national courts' role in applying international law \* \* \*. The law of treaties plays a significant role on the domestic level \* \* \*. It is applied by national courts more often than any other rules of international law."
- Kearney, Richard D. Dalton, Robert E. The treaty on treaties. *American journal of international law*, v. 64, July 1970: 495-561.
- Ambassador Kearney, who led the United States delegation at the Vienna Conference, and Dalton identify the Vienna Convention on the Law of Treaties as "the first essential element of infrastructure that has been worked out in the enormous task of codifying international law pursuant to Article 13 of the United Nations Charter." They review the development, by the International Legal Commission, of the 75 draft articles which served as the working text for the Vienna Conference. Kearney and Dalton then examine consideration of the draft by representatives at the conference. They analyze the provisions of the Vienna Convention, tracing the development of specific articles by discussing the debates which influenced their content and form, examining the purpose and interpretation of those articles, and evaluating the achievements of the Convention as a whole.
- McNair, Arnold Duncan. *The law of treaties*. Oxford, Clarendon Press, 1961. 789 p.
- Partial contents.—The conclusion of treaties.—The scope and operation of treaties.—Interpretation and application of treaties.—Termination of treaties.—Breach of treaty.—State succession and other changes.—Effects of war.
- Menon, P.K. *The law of treaties between states and international organizations*. Lewiston, N.Y., Edwin Mellen Press, © 1992. 259 p.
- Morgenstern, Felice. International legislation at the crossroads. *British year book of international law*, v. 49, 1978: 101-117.
- Morgenstern discusses the scope of international legislation, as well as its appropriateness and importance. The term international legislation "is used loosely, to cover all international instruments susceptible of creating legal obligations by virtue of their adoption, signature or ratification (or accession thereto), which establish uniform, harmonized or minimum principles or rules of conduct rather than contractual mutuality between parties, and which are applicable or potentially applicable to a plurality of States." Morgenstern also considers amendment, revision, consolidation and abrogation of international legislation, means of avoiding conflict among international law—creating instruments, and problems of unilateral withdrawal from international obligations.
- Rosenne, Shabtai. Bilateralism and community interest in the codified law of treaties. In *Transnational law in a changing society; essays in honor of Philip C. Jessup*. Edited by Wolfgang Friedman, Louis Henkin, and Olifver Lissitzyn. New York, Columbia University Press, 1972. pp. 202-227.
- "In this article, an attempt will be made to survey the codified law of treaties, now embodied in the Vienna Convention on the Law of Treaties of May 23, 1969, and to evaluate it in terms of the balance struck between the interrelation inter se of the mutual interests of the parties to a treaty on the one hand, and the community interest in that treaty, its object and purpose, its application, and the resolution of differences arising out of it on the other hand."
- . *Developments in the law of treaties, 1945-1986*. New York, Cambridge University Press, 1989. 535 p. (Cambridge studies in international and comparative law. New series)
- . *The law of treaties; a guide to the legislative history of the Vienna Convention*. Dobbs Ferry, N.Y., Oceana Publications, 1970. 443 p.
- Rosenne was Deputy Permanent Representative of Israel to the United Nations, Chairman of the Delegation to the Conference on the Law of Treaties, and a member of the International Law Commission. In the introduction to this work, he discusses the codification of the law of treaties, considering "i) how the topic ever came to be chosen in the first place; ii) its scope; iii) what kind of problems confronted the political organs after the International Law Commission had finished its work; and iv) the organization and functioning of the Vienna Conference."
- Rosenne provides, in parallel columns, the final text of the International Law Commission's 1966 draft articles on the Law of Treaties and the text of the articles of the Vienna Convention in English, French, and Spanish, so readers can note changes introduced during the Vienna Conference and can compare different language versions. Rosenne also provides the legislative history of each article of the Vienna Convention indicating the introduction of each theme, the meetings at which it was discussed, and the outcome. "References are made ex-

- clusively to the meeting and paragraph numbers as these appear in the appropriate volumes of the Yearbook of the International Law Commission, the Official Records of the General Assembly, and the Official records of the Vienna Conference on the Law of Treaties."
- Sinclair, Ian McTaggart. *The Vienna Convention on the Law of Treaties*. Dobbs Ferry, N.Y., Ocean Publications, 1973. 150 p. (The Melland Schill lectures)
- Contents.—The scope of the Convention and its relationship to customary law.—The conclusion and entry into force of treaties.—The application, interpretation, amendment and modification of treaties.—The invalidity, termination and suspension of operation of treaties.—Jus cogens and the settlement of disputes.
- Stanford, J.S. *The Vienna Convention on the Law of Treaties*. University of Toronto law journal, v. 20, no. 1, 1970: 18–47.
- This article "first discusses the major political issues confronted by the conference, for it was upon the resolution of these issues that the success or failure of the conference turned. The article then examines the Convention itself, with particular reference to the changes made by the conference to the draft articles proposed by the International Law Commission. While most of the time of the conference was devoted to resolving the legal issues raised by the various draft articles, two major political issues dominated the conference, particularly at the second session, and came within a hair's breadth of bringing about its failure. These issues were: first, universal participation in general multilateral treaties, and second, the procedures for the peaceful settlement of disputes arising out of the application of the articles in the Convention which establish grounds for the invalidity, termination, suspension, or withdrawal from treaties."
- United Nations. International Law Commission. *Yearbook of the International Law Commission*. New York, The Commission, 1949.
- United Nations Conference on the Law of Treaties, 2d Vienna, 1969.
- Official records; summary records of the plenary meetings and of the meetings of the Committee of the Whole. New York, United Nations, 1970. 350 p. (United Nations. Document A/CONF.39/11Add.1) "United Nations publication. Sales no.: E. 70. v. 6"
- U.S. President, 1969–1974 (Nixon). *Vienna Convention on the Law of Treaties*. Message from the President of the United States, transmitting the Vienna Convention on the Law of Treaties signed for the United States on April 24, 1970. Washington, U.S. Government Printing Office, 1971. 40 p.
- At head of title: 92d Congress, 1st Session. Senate. Executive L
- Includes the report of the Secretary of State, Oct. 18, 1971, describing the major provisions of the Vienna Convention, as well as a copy of the Convention.
- The Vienna Convention on the Law of Treaties: travaux préparatoires—Die Wiener Vertragsrechtskonvention: Materialien zur Entstehung d. einzelnen Vorschr. Hrsg., Inst. für Internat. Angelegenheiten d. Univ. Hamburg; Inst. für Internat. Recht an d. Univ. Kiel; Inst. für Völkerrecht d. Univ. Göttingen. Compiled by Ralf Gunter Wetzel; edited and prefaced by Dietrich Rauschning. Frankfurt am Main, Metzner, 1978. 543 p. (Dokumente-Institut für Internationale Angelegenheiten der Universität Hamburg; Bd. 44)
- "The present documentation aims at providing those materials essential for the theoretical study and practical use of the individual articles [of the Vienna Convention]: in order to elucidate the history of the laborious development of the Convention text, each article is followed by the full text of all previous versions since the Waldock Report. The general attitude of the individual States during the ILC [International Law Commission] phase is documented in the summaries of the second series of Waldock Reports. The ILC interpretation of the contents of the Convention is found in the Commentary to the articles of the Final Draft which the ILC itself adopted. Outlines, a synopsis and a bibliography should facilitate the scholarly and practical use" of this documentation. The text is in English, with German translations provided for some documents.
- Villiger, Mark Eugen. *Customary international law and treaties: a study of their interactions and interrelations, with special consideration of the 1969 Vienna Convention on the Law of Treaties*. Boston, M. Nijhoff; Hingham, Mass., Distributors for the U.S. and Canada, Kluwer Academic, 1985. 432 p. (Developments in international law)
- Originally presented as the author's Habilitationsschrift (University of Zurich).
- Widdows, Kelvin. *What is an agreement in international law?* British year book of international law, v. 50, 1979: 117–149.
- This article "is concerned with the term 'treaty' in its broadest sense. It is an enquiry into the elements comprising a binding international agreement."

Wilson, Robert R. The international law standard in recent treaties and agreements of the United States. *American journal of international law*, v. 66, July 1972: 526-536.

"The record of treaties and other international agreements which the United States has concluded in the period of two decades ending in 1971 provides much evidence of the specification of international law as a basic standard \*\*\*. For the present purpose it is proposed to consider briefly 1) types of compromissory clauses in agreements to which the United States is a party and in which there are specific references to international law, 2) illustrative agreements in bilateral form concerning the guaranty of foreign investments, 3) multilateral agreements concerning the application of international law as a standard, without statement as to what the law is, 4) bilateral agreements other than those related to the guaranty of foreign investment, and 5) the possible relevance of such agreement-making to the better understanding and development of international law."

Wozencraft, Frank M. United Nations arithmetic and the Vienna Conference on the Law of Treaties. *International lawyer*, v. 6, Apr. 1972: 205-218.

Wozencraft, a member of the U.S. delegation to the 1968 session of the Vienna Conference on the Law of Treaties, reports on the negotiating and decisionmaking process at the Vienna Conference and describes a day in the life of a U.S. delegate to the Conference. He considers controversies which arise from the U.N. principle that each sovereign nation has an equal vote, regardless of size or importance. Wozencraft also reviews U.S. policymaking procedures and assesses the importance of the Conference. This article is based on an address Wozencraft gave on June 6, 1969 at the Institute on the Law of Treaties, co-sponsored by the Division of International Law and Foreign Trade at the Law Center of the University of Missouri-Kansas City, and the American Society of International Law.

*b. Treaties and agreements involving international organizations*

Agreements of international organizations and the Vienna Convention on the Law of Treaties. Edited by K. Zemanek, assisted by L.R. Behrmann. New York, Springer-Verlag, 1971. 268 p.

Papers prepared as a result of research conducted at the 1969 session of the Center for Studies and Research, Hague Academy of International Law.

Contents.—Co-operation agreements and the law relating to agreements concluded by international organizations, by D. McRae.—The capacity of international organizations to conclude headquarter agreements, and some features of these agreements, by L. Bota.—Formal aspects of the technical assistance agreements concluded by the UN family of organizations, by J. van Wouw.—The capacity of international organizations to conclude treaties, by G. Hartmann.—The concept and forms of treaties concluded by international organizations, by C. Osakwe.—Organs competent to conclude treaties for international organizations and the internal procedure leading to the decision to be bound by a treaty; Negotiation and conclusion of treaties by international organizations, by H. Neuhold.

Reuter, Paul. First report on the question of treaties concluded between states and international organizations or between two or more international organizations. New York, United Nations, 1972. 61 p. (United Nations. Document A/CN.4/258)

At head of title: United Nations General Assembly.

United Nations. International Law Commission. The question of treaties concluded between states and international organizations or between two or more international organizations. [New York] United Nations, 1970. 116 p. (United Nations. Document A/CN.4/L.161)

Working paper submitted by the Secretary-General containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations treaty series.

United Nations. Secretariat. Question of treaties concluded between states and international organizations or between two or more international organizations; possibilities of participation by the United Nations in international agreements on behalf of a territory. New York, United Nations, 1974. 56 p. (United Nations. Document A/CN.4/281)

At head of title: United Nations General Assembly.

United Nations. Secretary-General, 1961-1971 (Thant). The question of treaties concluded between states and international organizations or between two or more international organizations. [New York] United Nations, 1971. 70 p. (United Nations. Document A/CN.4/L.161/Add.1)

"Working paper submitted by the Secretary-General, containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations Treaty Series."

## 2. NEGOTIATION AND CONCLUSION OF TREATIES AND INTERNATIONAL AGREEMENTS

### a. *Negotiation and the treatymaking process*

#### (1) *General*

Guzman, Andrew T. Why LDCs sign treaties that hurt them: explaining the popularity of bilateral investment treaties. *Virginia journal of international law*, v. 47, summer 1998: 639–688.

Says there has been little analysis of the impact of bilateral investment treaties (BITs) "on the welfare of the countries that have signed them. This article seeks to address this large gap in the literature and contribute to a more coherent understanding of BITs, their impact on foreign investment, and their effect on the welfare of nations."

Hassan, Tariq. Good faith in treaty formation. *Virginia journal of international law*, v. 21, spring 1981: 443–481.

In this article the author "examines the content and limitations of good faith in international law as well as the developments leading up to its inclusion in the 1969 Vienna Convention on the Law of Treaties. The article next analyzes the application of this principle to the treaty formation process."

Kearney, Richard D. International legislation: the negotiation process. *California Western international law journal*, v. 9, summer 1979: 504–513.

"The United States should view the development of world law as important to our nation's interests and take into account the necessity of preventing world law from slipping into procedures and forms which may later prove to be intolerable to us. The negotiating process is one of the areas in which care must be taken to ensure that the development of world law is not undermined for short-range and dubious objectives."

Sanders, David. Changing role of parliament: international treaties to be examined before ratification. *Parliamentarian*, v. 79, Oct. 1998: 385–387.

"The Clerk of the New Zealand Foreign Affairs, Defense and Trade Committee describes a new process whereby international treaties can now be scrutinized by Parliament before they are ratified, and highlights the problem of secrecy by international organizations when scrutiny is attempted."

The Treaty maker's handbook. Hans Blix and Jirina H. Emerson, editors. Dobbs Ferry, N.Y., Oceana Publications, 1973. 355 p.

This is an expanded and revised edition of a compilation of passages from treaties which exemplify several types of constitutional rules relating to formal treaty provisions. The material was originally prepared for use at seminars on the law of treaties. The seminars were arranged by the Dag Hammarskjöld Foundation and held in Uppsala in 1966 and 1967.

Partial contents.—Constitutional provisions on the conclusion and application of treaties.—Full powers.—Preambles.—Consent to be bound.—State succession.—Entry into force.—Participation clauses.—Duration.—Withdrawal, denunciation and termination. Clauses on interpretation, application and settlement of disputes.—Clauses on enforcement, breach, suspension and expulsion.—Territorial application.—Internal application.—Reservations.—Clauses on relationship to other treaties.—Amendment clauses.—Revision clauses.—Depositary functions.—Types of treaties and instruments resembling treaties.—Vienna Convention on the Law of Treaties.

#### (2) *Multilateral treaties*

Bourguignon, Henry J. The Belilos case: new light on reservations to multilateral treaties. *Virginia journal of international law*, v. 29, winter 1989: 347–386.

"This article first discusses the historical context of reservations in international law and its influence on the drafters of the European Convention on Human Rights. It then discusses the Belilos Case, the arguments of the Swiss government and the decision of the court. The article concludes with a discussion of the effects this decision will have on future disputes on the status of treaty reservations in international law."

Gamble, John King, Jr. Multilateral treaties: the significance of the name of the instrument. *California Western international law journal*, v. 10, winter 1980: 1–24.

"The Vienna Convention on the Law of Treaties \*\*\* addresses the law of treaties and hence de-emphasizes state practice, which is an important aspect of treaty-making \*\*\*. The focus here will be on all multilateral treaties enter-



ing into force between 1919 and 1971, specifically those appearing in the League of Nations Treaty Series and the United Nations Treaty Series. The ability to look macroscopically at fifty years of multilateral treaty-making permits certain questions to be addressed \*\*\*. One example of this macroscopic perspective concerns the name of the instrument in the case of multilateral treaties.”

Multilateral treaties: index and current status. Compiled and annotated within the University of Nottingham Treaty Centre by M.J. Bowman and D.J. Harris. St. Paul, Minn., Mason Pub. Co., 1984. 516 p.

United Nations. Secretary-General, 1972–1981 (Waldheim). Review of the multilateral treaty-making process. [New York] United Nations, 1981. 66, 7, 2, 18, 4 p.

At head of title: United Nations General Assembly.

———. Review of the multilateral treaty-making process. [New York] United Nations, 1980. 37, 41, 54 p. (United Nations. Document[s] A/35/312; A/35/312/Add.1; A/35/312/Add.2)

World Peace Through Law Center. Multilateral treaties, conventions, protocols and agreements of the United Nations and the specialized agencies. (List) prepared to accompany the address of Earl Warren \*\*\* to the Geneva World Conference on World Peace through Law, July 9–14, 1967. Geneva, World Peace through Law Center, [1967] 44 p.

*b. Amendments, interpretive declarations, and reservations*

Adede, A.O. Amendment procedures for conventions with technical annexes: the IMCO experience. *Virginia journal of international law*, v. 17, winter 1977: 201–215.

This article examines the experience of the Intergovernmental Maritime Consultative Organization with technical conventions in the maritime field which “led it to conclude that different procedures should be established to amend the technical annexes or appendices to a convention than those used to amend the basic provisions contained in the main articles of a convention.”

Gamble, John King, Jr. Reservations to multilateral treaties: a macroscopic view of state practice. *American journal of international law*, v. 74, Apr. 1980: 372–394.

“State practice in the area of reservations is surveyed, in very general terms, for the period from 1919 to 1971. The post-World War II period (1947–1971) will be examined in somewhat more detail in order to classify and categorize reservations. Adopting a broad (rather than a narrow) view of all multilateral treaties permits a more accurate overall assessment of the constructiveness of the role played by reservations.”

Gormley, W. Paul. The modification of multilateral conventions by means of “negotiated reservations” and other “alternatives”: a comparative study of the ILO and Council of Europe. *Fordham law review*, v. 34, Oct. 1970: 59–80; v. 39, Mar. 1971: 413–446.

“Although the special techniques developed within the ILO [International Labour Organization] and Council of Europe will not be adopted by the world community, it is possible that some help, or at least insight, may be gained from an examination of the unique procedures used by these two organizations \*\*\*.

“The specific purpose of this study is first, to examine the use of the flexibility device as an alternative (to the typical reservation) originally developed by ILO but later adopted by the Council; and secondly, to trace the evolution of the negotiated reservation subsequently emerging in the Council of Europe, which grew out of earlier concepts.”

Inter-American Juridical Committee. Reservation of theoretical adherence to multilateral treaties. Report prepared in accordance with Resolution XI of the fourth meeting of the Inter-American Council of Jurists. Washington, Pan American Union, 1961. 5 p.

Koh, Jean Kyongun. Reservations to multilateral treaties: how international legal doctrine reflects world vision. *Harvard international law journal*, v. 23, spring 1982: 71–116.

“By examining the evolution of the doctrine of reservations in this century, this Comment \*\*\* [explores] how the successive versions of the doctrine reflect the changing conception of multilateral conventions, and \*\*\* [illustrates] how a tiny nugget of treaty law provides a battleground for the clash between two basic opposing visions of the world: a world composed of autonomous states versus an integrated world order.”

McRae, D.M. The legal effect of interpretative declarations. *British year book of international law*, v. 49, 1978: 155–173.

“The issue, then, is whether an interpretative declaration, which by virtue of Article 2(1)(d) of the Vienna Convention is not a ‘reservation,’ has any legal sig-

nificance. Should other parties to the treaty, faced with an interpretative declaration attached to an instrument of ratification or accession, ignore it, or accept or reject it, depending on whether they agree or disagree with it? What is the consequences of any of these actions?"

Mendelson, M. H. Reservations to the constitutions of international organizations. *British year book of international law*, v. 42, 1971: 137-171.

"It is the purpose of this article to explore the law and practice on reservations to the constitutions of the relatively homogeneous group of organizations: the League of Nations, the United Nations and the Specialized Agencies of the United Nations."

Sztucki, Jerzy. Some questions arising from reservations to the Vienna Convention on the Law of Treaties. *German yearbook of international law*, v. 20, 1977: 277-305.

"Space limits compel the author to confine the present remarks to some selected questions which either are specific for the Convention under consideration or appear to have come into prominence in its context, namely: the question of self-applicability of the Convention regime of reservations, questions arising from reservations to Art. 66, and the question of separability of treaty provisions in the process of concluding treaties."

*c. Acceptance, depositary, registration and publication*

*(1) Acceptance*

Ruda, Jose Maria. The final acceptance of international conventions. Muscatine, Iowa, Stanley Foundation, 1976. 29 p.

The author, a Justice on the International Court of Justice, discusses the pace accomplished in securing final acceptance of treaties. He writes, "States get actively engaged in the preparation of conferences or in long debates in international organizations drawing up multilateral conventions. They even sign the documents without much hesitation; however the same States are reluctant or slow in assuming international obligations by ratifying or acceding to the instruments, except in cases where a direct political interest of the State is at stake." Ruda reviews why there are delays in securing acceptance of treaties, and he proposes actions on the international and national level which might facilitate treaty acceptance.

United Nations Institute for Training and Research. Wider acceptance of multilateral treaties. New York, The Institute, 1969. 213 p.

"This study ascertains empirically to what extent the extrinsic factors, such as constitutional-parliamentary procedures, administrative mechanics, personnel requirements, translation facilities, 'final' clauses, and others operate as impediments to acceptance. It also describe to what extent lack of 'definitive succession' has impaired the continued application of treaties extended by the predecessor Governments \*\*\*. The study analyzes and describes the range of national and international measures for the wider acceptance of treaties which include, among others, appeals and exhortation, provision of advisory services and technical assistance, wider dissemination of information, revision of treaties and special national administrative machinery for treaty work."

*(2) Depositary*

Rosenne, Shabtai. The depositary of international treaties. *American journal of international law*, v. 61, Oct. 1967: 923-945.

The "International Law Commission's Draft Articles on the Law of Treaties contain three articles—articles 71, 72, and 73—dealing directly with the depositary of an international treaty; and throughout the Draft Articles are to be found other provisions which directly or indirectly relate to the same institution of contemporary international law and relations \*\*\*. This is of particular significance in relation to the very important and practical matter of the time from which a treaty enters into force or terminates, whether generally or in relation to a particular state, or as from which other action relating to a treaty takes legal effect in relation to the other parties to that treaty. Taken together, all these provisions place into a sharper focus than previously the juridical characteristics of the role and functions of the depositary in modern international law, and the prolonged discussions in the International Law Commission, especially on what is now Article 73, brought to light many difficult practical questions requiring solution."

———. More on the depositary of international treaties. *American journal of international law*, v. 64, Oct. 1970: 838-852.

"The purpose of this article is to bring up to date \*\*\* The Depositary of International Treaties \*\*\* in the light of the deliberations of the United Na-

tions Conference on the Law of Treaties in 1968 and 1969 and the changes there made in the texts. The relevant provisions now appear as Articles 76, 77, and 78 of the so-called Vienna Convention on the Law of Treaties, corresponding to Articles 71, 72 and 73 of the draft articles on the Law of Treaties of the International Law Commission."

(3) *Registration and publication*

Tabory, Mala. Recent developments in United Nations treaty registration and publication practices. *American journal of international law*, v. 76, Apr. 1982: 350-363.

"The framework for the systematic registration and publication of international agreements on an intergovernmental level was set \*\*\* in Article 102 of the United Nations Charter \*\*\*. The United Nations has devoted considerable effort to the implementation of Article 102 by developing a set of Regulations to put into operation the registration and publication functions \*\*\*. The Treaty Section of the Office of Legal Affairs in the UN Secretariat carries out the functions of registration and publication of treaties and international agreements."

3. ENTRY INTO FORCE

Reiff, Henry. The proclaiming of treaties in the United States. *American journal of international law*, v. 44, July 1940: 572-576.

"The present writer in an article in the journal in January, 1936, concluded that the proclaiming of treaties is not essential to their validity as law of the land; that treaties become effective domestically when they come into force internationally; and that the President's proclamation serves to announce facts with regard to the perfecting of the treaty internationally and to enjoin obedience. Dr. [Hunter] Miller concurred in those conclusions and not only supplied additional historical data in support of them but also extended the discussion of the central problem, examined in that article. The gist of these data and observations is given" in this article.

Rogoff, Martin A. The international legal obligations of signatories to an unratified treaty. *Maine law review*, v. 32, no. 2, 1980: 263-299.

"It is the thesis of this Article that general international law imposes on the signatories to a treaty the obligation not to defeat the object and purpose of that treaty prior to its entry into force \*\*\*. After examining the existence and nature of the obligation, the Article concludes with a discussion of the content of the obligation and attempts to discern its contours and extent."

Rosenne, Shabtai. The temporal application of the Vienna Convention on the Law of Treaties. *Cornell international law journal*, v. 4, fall 1970: 1-24.

"Any examination of the Vienna Convention on the Law of Treaties of 23 May 1969 must commence by recalling the obvious truism that this Convention is never applied alone, but always in conjunction with another treaty for which it may supply residual rules \*\*\*. Our major concern here is the temporal relativity of the Vienna Convention in relation to another treaty, the rules for the temporal conflict of laws. An examination of this aspect will demonstrate that it is insufficient to speak merely of the retroactivity or the non-retroactivity of the Vienna Convention. In each case, one must establish the space of time within which any one of the rules contained in the Convention controls another treaty, whether absolutely, as a residual rule, or as a matter of procedure.

"The foregoing leads to the conclusion that the Vienna Convention on the whole speaks not *ex tunc*, from some unascertainable date in the future, but from the date of its formulation. The nature, object and purpose of the Vienna Convention, together with the specific terms of article 4, require minimizing and not maximizing the negating effect of that article, to the extent consonant with good faith and the intention of the negotiating states."

Rubin, Alfred P. The international legal effects of unilateral declarations. *American journal of international law*, v. 71, Jan. 1977: 1-30.

"When the ICJ [International Court of Justice] formulates a rule of international law giving binding force to a unilateral declaration of a state's future intentions, statesmen may be expected to refer to that formulation for guidance whenever they consider the possibility of issuing a declaration of future policy \*\*\*.

"The Court applied the asserted rule to a series of unilateral declarations by France concerning the French intention to abstain from future atmospheric nuclear tests in the South Pacific area, holding that the Australian application, asking the Court to adjudge that 'the carrying out of further atmospheric nu-

clear weapons tests in the South Pacific Ocean is not consistent with applicable rules of international law,' and the New Zealand application asking the Court to adjudge 'that the conduct by the French government of nuclear tests in the South Pacific region that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law,' each presented a 'claim \*\*\* [that] no longer has any object.'

"This article will examine the asserted rule in some detail as a statement of a purported norm of general international law and as applied to the facts in the Nuclear Tests cases, and will conclude by pointing out some implications of these cases for the future of the Court."

Schachter, Oscar. The twilight existence of nonbinding international agreements. *American journal of international law*, v. 71, Apr. 1977: 296-304.

This editorial comment urges recognition of the role that nonbinding agreements, such as the Final Act of the Conference on Security and Cooperation in Europe, can play in the international legal order, since nonbinding agreements are sometimes attainable when binding treaties are not.

Schmidt, Markus G. Individual human rights complaints procedures based on United Nations treaties and the need for reform. *International and comparative law quarterly*, v. 41, July 1992: 645-659.

"The right of individuals to complain about alleged violations of their human rights to expert bodies established under United Nations human rights instruments is one of the major achievements of UN efforts \*\*\*. Three expert committees currently implement treaty-based individual complaints procedures: the Human Rights Committee, the Committee on the Elimination of Racial Discrimination \*\*\* and the Committee against Torture \*\*\*. With some degree of simplification, individual complaints registered under one of the above procedures are considered in three stages."

Vazquez, Carlos Manuel. Treaty-based rights and remedies of individuals. *Columbia law review*, v. 92, June 1992: 1082-1163.

"This article examines what is meant by the statement that individuals do not have rights under treaties as a matter of international law \*\*\*. Individuals lack the power to set in motion the machinery of international law for enforcing treaty obligations."

Vierdag, E. W. The law governing treaty relations between parties to the Vienna Convention on the Law of Treaties and states not party to the Convention. *American journal of international law*, v. 76, Oct. 1982: 779-801.

"The likelihood that numerous treaties will be concluded between states that are not parties to the Convention poses the following question: if Article 4 is not a general participation clause, then what law does govern such treaties? We will attempt to answer this question by examining the meaning of article 4, and to that end, by first tracing its origins. We will then consider the provision, hypothetically, as a general participation clause and point out some of the consequences of this interpretation. Next we will inquire whether Article 4 should rather be understood as allowing the application of the convention to a treaty as regards some parties inter se, even though other parties to the treaty would not be bound by the convention, and their participation would thus be governed by customary law. It must then be asked whether the provisions of the Convention and rules of customary treaty law are compatible. Finally, we will attempt to indicate a possible solution to these problems."

#### 4. INTERPRETATION

Chang, I-ting. *The interpretation of treaties by judicial tribunals*. New York, AMS Press [1968] 196 p. (Studies in history, economics, and public law, no. 389)

Series statement also appears as: *Columbia University studies in the social sciences*, 389, reprint of the 1933 ed.

"The interpretation of treaties is, perhaps, one of the most confused subjects in international law. The author proposes in this study to treat the subject scientifically by analyzing the decisions of international tribunals and also a few instructive cases decided by national courts on interpretation of treaties, to see, in each case, what issues were actually involved, how they were decided, and what methods of approach were used by the tribunal in handling the case. The author hopes that by this method he may be able to draw from judicial practices accurate conclusions on the interpretation of treaties. Before examining the cases, it is useful, as a preliminary, to study the nature of legal interpretation." A bibliography of articles, books, and documents relating to the judicial interpretation of treaties is provided.

- Friesen, Jeffrey L. The distribution of treaty-implementing powers in constitutional federations: thoughts on the American and Canadian models. *Columbia law review*, v. 94, May 1994: 1415-1450.  
 Comment "examines the United States treaty-implementation framework and criticisms of it \*\*\* presents the Canadian scheme and its critics \*\*\* suggests how the comparison of the American and Canadian models may guide those who seek to effect new or changing federations."
- Germer, Peter. Interpretation of plurilingual treaties: a study of art. 33 of the Vienna Convention on the Law of Treaties. *Harvard international law journal*, v. 11, 1970: 400-427.  
 Germer discusses the drafting, meaning, and operation of Article 33 of the Vienna Convention. "The Vienna Convention does not set forth a rigid formula for the interpretation of plurilingual treaties, but adheres to the idea that whether the obscurity is found in all texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties."
- Halberstam, Malvina. A treaty is a treaty is a treaty. *Virginia journal of international law*, v. 33, fall 1992: 51-68.  
 "While questions concerning the ABM Treaty and the INF Treaty no longer have the pressing immediacy they had at the time they arose, the question whether a treaty can have different meanings domestically and internationally has continuing importance far beyond the proper interpretation of the treaties \*\*\*. This article takes the position that a treaty cannot have different meanings domestically and internationally."
- Jacobs, Francis G. Varieties of approach to treaty interpretation with special reference to the draft convention on the law of treaties before the Vienna Diplomatic Conference. *International and comparative law quarterly*, v. 18, 1969: 318-346.  
 "There has been a continuing controversy over the principles of treaty interpretation culminating in considerable criticism of the articles on interpretation formulated by the International Law Commission in its Draft Convention." "The object of this paper is to analyse and assess the approach of the International Law Commission in the light of this controversy \*\*\*. A detailed comparison with rival approaches is necessary to appreciate the precise implications of the articles in the Convention. But there is also room for argument about the proper functions of roles of interpretation in international law. The paper ends, therefore, with an attempt to clarify the relevant issues of policy."
- Lipstein, Kurt. Some practical comparative law: the interpretation of multi-lingual treaties with special regard to the EEC treaties. *Tulane law review*, v. 48, June 1974: 907-915.  
 The author examines a "problem that requires both legal and linguistic techniques derived from foreign law. This is the problem of interpreting bilingual or multi-lingual treaties."
- McDougal, Myres S. The International Law Commission's Draft Articles upon Interpretation: textuality redivivus. *American journal of international law*, v. 61, Oct. 1967: 992-1000.  
 "The great defeat, and tragedy, in the International Law Commission's final recommendations about the interpretation of treaties is in their insistent emphasis upon an impossible, conformity-imposing textuality. This unhappy emphasis makes an appearance in, and dominated, the goal for interpretation which the Commission implicitly postulates but never critically examines; the deprecatory appraisal which the commission offers of the potentialities that inhere in the rational employment of principles of interpretation; and the content and ordering of the particular principles which the Commission puts forward for canonization as 'obligatory' rules of law." "In explicit rejection of a quest for the 'intentions of the parties as subjective element distinct from the text,' the Commission adopts a basic approach which demands merely the ascription of a meaning to a text."
- Munday, R.J.C. The uniform interpretation of international conventions. *International and comparative law quarterly*, v. 27, Apr. 1978: 450-459.  
 "The House of Lords denial in *Buchanan [James Buchanan & Co. Ltd v. Babco Forwarding & Shipping (U.K.) Ltd.* that there exists any initial presumption in favour of adopting a liberal interpretation of international conventions is calculated to assist in restricting the scope for national variations \*\*\*. The more closely courts adhere to the ordinary and natural meaning of the words of the agreed text, the less opportunity there will be for wide divergences in their construction at home and abroad \*\*\*. In the absence of any supreme

- international jurisdiction capable of resolving differences between national courts, the most effective approach for all states concerned is to pay serious heed to one another's case law."
- Peace Palace (Hague, Netherlands). Library. *Interpretation des traites a la lumiere de la Convention de Vienne de 1969 sur le droit des traites: bibliographie—Interpretation of treaties in the light of the 1969 Vienna Convention on the law of treaties: bibliography*. Preparee par la Bibliotheque du Palais de la paix. [La Haye] Centre d'etude et de recherche de l'Academie de droit international de La Haye, 1970. 26 leaves.
- Contents.—The law of treaties in general.—The work of the International Law Commission with regard to the law of treaties.—The Vienna Conferences on the Law of treaties.—Interpretation of international law.—Interpretation of international treaties.—Different methods of interpretation.—Supplementary means of interpretation.—Interpretation of treaties in two or more languages.—Interpretation of treaties by international courts.—Interpretation of treaties by international arbitration.—Interpretation of the European treaties.—Interpretation of treaties by international organizations.—Interpretation of treaties by national courts of justice.—Interpretation of treaties in the Vienna Convention of 1969 on the Law of Treaties.
- Pickert, Perry L. Draft articles for the expansion of authoritative interpretation of United States treaties. *Brooklyn journal of international law*, v. 2, spring 1976: 205-227.
- "This paper discusses the problems caused by the abuse of unilateral interpretation of international law and of treaties and suggests draft articles for inclusion in bilateral and multilateral treaties and in the constitutions of international organizations. The articles provide for compulsory settlement by the International Court of disputes arising from the interpretation or application of such treaties or constitutions."
- Ris, Martin. Treaty interpretation and ICJ recourse to travaux preparatoires: towards a proposed amendment of articles 31 and 32 of the Vienna Convention on the Law of Treaties. *Boston College international and comparative law review*, v. 14, winter 1991: 111-136.
- "Comment examines recourse to travaux preparatoires documents which proceed the final text of a treaty by the ICJ International Court Justice in the interpretation of treaties. Part I introduces the standard doctrines of treaty interpretation and their definition and proposed usage of travaux preparatoires. Part II then examines recourse to travaux preparatoires in representative cases and advisory opinions of the ICJ \*\*\*. This Comment proposed an amendment to articles 31 and 32 of the Vienna Convention that could facilitate reliable ICJ recourse to travaux preparatoires."
- Rosenne, Shabtai. Interpretation of treaties in the Restatement and the ILC's draft articles: a comparison. *Columbia journal of transnational law*, v. 5, no. 2, 1966: 205-330.
- "In this article an attempt will be made briefly and in somewhat general terms to compare those parts of the [American Law Institute's] Restatement [of the Foreign Relations Law of the United States] which deal with the interpretation of treaties on the international level, i.e., sections 146, 147, 148, and 153 \*\*\* with the corresponding articles of the International Law commission's draft, i.e., articles 27, 28 and 29 (matching sections 146, 147, and 148) and 59 (matching section 153)." In the notes, Roseanne presents a legislative history of articles 27, 28, 29 and 59 of the International Law Commission's draft.
- Schwarzenberger, George. Myths and realities of treaty interpretations—Articles 27-29 of the Vienna Draft Convention on the Law of Treaties. *Current legal problems*, v. 22, 1969: 205-227.
- Schreuer, C.H. The interpretation of treaties by domestic courts. *British year book of international law*, v. 42, 1971: 255-301.
- Sharma, Surya P. The ILC draft and treaty interpretation with special reference to preparatory works. *Indian journal of international law*, v. 8, 1968: 367-398.
- "The above analysis seeks to demonstrate the inadequacy of the textualist approach. Articles 27 and 28 of the Draft Articles, now adopted by the Committee of the Whole of the Vienna Conference, do not represent an established law of interpretation. For clarity in thought and rationality in dispute-solving, all the available sources of evidence, without any arbitrary weightage and hierarchical distinction, must be open for the purposes of interpretation. Relegating the circumstances attending the conclusion of the treaty, including recourse to preparatory work, to a secondary position will make the actual dispute-solving more difficult, rather than easy, and to say the least it is not an established practice."

- Stewart, George A. Interpreting the child's right to identify in the U.N. Convention on the Rights of the Child. *Family law quarterly*, v. 26, fall 1992: 221-233.  
Discusses Article 8, the right to identity, under which a child has the right to preserve his or her nationality, name and family relations as recognized by law without unlawful interference.
- Sutter, Bryan L. The nonproliferation treaty and the "New World Order." *Vanderbilt journal of transnational law*, v. 26, Apr. 1993: 181-212.  
"The Treaty on the Non-Proliferation of Nuclear Weapons (NPT or Treaty) faces either extinction or extension in 1995, when the NPT signatories will meet to decide its fate \*\*\*. Many state have expressed reservations about extending the Treaty. This Note considers the implications of those reservations as well as arguments favoring extension and examines the Treaty's strengths and weaknesses. The author concludes that the Treaty should remain in force."
- Tammelo, Ilmar. *Treaty interpretation and practical reason; towards a general theory of legal interpretation*. Sydney, Melbourne, Law Book Co., 1967. 110 p. (Studies in legal method series, no. 1)  
Partial contents.—Leading ideas and main problems of treaty interpretation.—Views of international courts on treaty interpretation.—Work of the Institute of International Law on treaty interpretation.—Work of the International Law Commission on treaty interpretation.—Rhetoric as a foundation of treaty interpretation.—Treaty interpretation and practical reason.—Annex A: Note on the maxim interpretation cessat in claris.—Annex B: Remarks on inter, prater, and contra legem interpretation.—Annex C: Remarks on the concept of meaning.—Annex D: Remarks on the concept of reason.—Annex E: The Vatteliana Armoury and the logical status of its cannons.—List of international cases relevant to treaty interpretation.
- Treaty interpretation: the proper role of an impartial tribunal. In *American Society of International Law. Proceedings \*\*\* 63d annual meeting held at Washington, D.C., v. 63, 1969: 107-140*.  
Leo Gross surveys various perspectives on the role of an international tribunal in treaty interpretation. He reviews draft articles 27 and 28 of the International Law Commission, which were adopted by the Committee of the Whole of the U.N. Conference on the Law of Treaties. Gross suggests "the Commission's deliberate emphasis on the text as the starting point of interpretation is not directed against the contextual interpretation, which in fact is specifically included in Article 27 in some illustrative detail."  
Gidon Gottlieb considers "what the proper role of an international tribunal is when it interprets treaties on the basis of the Vienna Articles." He reviews various viewpoints on the roles of texts and shared expectations in the interpretations of agreements. Gottlieb writes: "States now look to the interpretation of the texts they adopt rather than to deference to their shared subjectivities of expectations. This does not in any way mean that context, objects and purposes, preparatory work and other relevant materials are out of place in the interpretation of texts. What states want is that their texts, their agreements be interpreted, not their shared subjectivities \*\*\*. Under international law, texts were always at least the starting point of interpretation. Judicious resort to the travaux preparatoires and sensitivity to context must never permit the interpreter to lose sight of this textual starting point."  
Following the papers are summaries of comments and related discussion by Myres McDougal, Michael Barkun, Anthony D'Amato, Zaim Imam, Oscal Schachter, Burns Weston, Louis Henkin, Thomas Franck, W. Michael Reisman, Stanley Metzger, Kenneth Carlston, John Wolff and George Wells.
- Wippman, David. Treaty-based intervention: who can say no? *University of Chicago law review*, v. 62, spring 1995: 607-687.  
"Can a state by treaty lawfully authorize forcible external intervention in its internal affairs? \*\*\*. Given the variety of treaties—extant or proposed—that would permit forcible intervention in states' internal affairs \*\*\* it is time for a fresh look at the arguments for and against their validity under international law."
- Wirth, David A. Multilingual treaty interpretation and the case of SALT II. *Yale studies in world public order*, v. 6, spring 1980: 429-470.  
"Evaluates proposed solutions to the difficulties of multilingual treaty interpretation as applied to a concrete problem, the Common Understanding to Paragraph 8 of Article IV of SALT II. First, the precise meaning of the English and Russian texts is examined \*\*\* Then, \*\*\* various doctrines prescribing resolution discrepancies \*\*\* are applied to, and evaluated in the context of this provision."

- Yambrusic, Edward Slavko. *Treaty interpretation: theory and reality*. Lanham, Md., University Press of America, © 1987. 298 p.
- Yu, Tsune-Chi. *The interpretation of treaties*. New York, AMS Press [1968] 288 p.

#### 5. MODIFICATION, SUSPENSION, AND TERMINATION OF TREATIES

##### *a. Overview*

- Beilenson, Laurence W. *The treaty trap: a history of the performance of political treaties by the United States and European nations*. By Laurence W. Beilenson, assisted by Bernard M. Dain. Washington, Public Affairs Press [1969] 344 p.

Beilenson examines political treaties negotiated by European nations and the United States from 1661–1965, analyzing why certain treaties were broken or honored, and whether the objectives of specific treaties were met. He considers whether there are any consistent patterns in the types of treaties which were abrogated. Beilenson also evaluates the wisdom of relying on treaties and suggests when to rely on existing treaties and when to make new treaties. He provides an extensive bibliography and a chronological index of the treaties cited.

- Bilder, Richard B. *Managing the risks of international agreement*. Madison, University of Wisconsin Press [1981] 302 p.

"This book discusses a variety of techniques by which nations can manage the risks of their international agreements and other cooperative arrangements \*\*\*. Chapter 1 is a general discussion of the nature and importance of international agreements, the problems of risk, the options open to nations in attempting to deal with these problems, and some caveats to this study. Chapter 2 is a survey of very general risk-management techniques, designed to give a nation broad protection against the risk that it may later decide, for any reason, that it no longer wishes to participate in the agreement, and to give it flexibility to limit or escape from its obligations if it subsequently changes its mind. Chapter 3 is a survey of techniques designed specifically to protect a nation against the risk that the intrinsic value of the agreement to it may decline. Chapter 4 is a survey of techniques designed specifically to protect a nation against the risk that its potential treaty partner or partners may not perform the obligations promised, or may do so inadequately. Chapter 5 discusses some general limitations on the use of the specific risk-management techniques dealt with in the study; the relevance of alternative risk-management approaches, particularly attitudes of trust; and some things that might be done to make risk management more effective."

- Briggs, Herbert W. *Procedures for establishing the invalidity of termination of treaties under the International Law Commission's 1966 Draft Articles on the Law of Treaties*. *American journal of international law*, v. 61, Oct. 1967: 976–989.

The author "served as a member of the International Law Commission from 1962 to 1966 and was chairman of the Commission's Drafting Committee during the session in which the Draft Articles were finally adopted."

In introductory comments, Briggs writes: "Without underestimating the many positive contributions which the International Law Commission's Draft Articles make to the codification and progressive development of the law of treaties, one should nevertheless note the heavy concentration of articles on nullity, invalidity, denunciation, withdrawal, suspension, or termination of treaty obligations. It is in these articles, which do less to reinforce the obligation to observe treaties than to provide lawful grounds for invoking their invalidity or denunciation, that some of the boldest innovations are proposed with regard to matters where there is little state practice or where the rules proposed have not hitherto been clearly established. The necessity for establishing procedural safeguards was thus foreseen."

- . *Unilateral denunciation of treaties: the Vienna Convention and the International Court of Justice*. *American journal of international law*, v. 68, 1974: 51–68.

"It is noteworthy that the articles of the Vienna Convention on which the Court has made explicit observations have all concerned claims to terminate treaties unilaterally on grounds such as breach, coercion, or changed conditions, and it is to these aspects of the cases to be examined that our attention will be largely confined \*\*\*."

"One may conclude that, with the exception of its Namibia aberration, the Court's consideration of the Vienna Convention on the Law of Treaties has been helpful in furthering the consolidation of the law against unilateral denunciation of international agreements without accountability therefor."



Chinkin, Christine M. Crisis and the performance of international agreements: the outbreak of war in perspective. *Yale journal of world public order*, v. 7, spring 1981: 177-208.

The author views the impact of international crisis on international agreements, focusing "on the criteria parties should use to make and evaluate claims relating to international agreements in times of crisis and the criteria the world community should use to evaluate those claims."

———. Nonperformance of international agreements. *Texas international law journal*, v. 17, summer 1982: 387-432.

The article concentrates "on the problem of breach, or nonperformance, of an international agreement and \*\*\* consider[s] when the behavior relating to the performance of an agreement deviates so far from the expectations of both the parties and the world community that the agreement is in a state of breach or nonperformance."

David, Arie E. *The strategy of treaty termination: lawful breaches and retaliations*. New Haven, Yale University Press, 1975. 324 p.

"The problem of treaty termination in a decentralized arena necessarily involves examination of a large number of interrelated subjects. It concerns the empirical and conceptual analysis of both legitimacy and bargaining power, and the simultaneous feedback of international rules, claims, proposals, warnings, threats, and promises, including their gradual fulfillment. The following discussions, therefore, revolve around fundamental notions such as the conclusion of new agreements in a context of mutual mistrust, treaty breaches, deterrence, reprisal and retaliations, and reciprocal efforts to avoid—or at least to restrain—the damage from such activities to the economies of the parties and interested third parties. Appraisal and recommendation for conflict behavior under such conditions, of course, must also include inquiry of the longer range goals and policies of the emerging global community \*\*\*. In terms of the cases chosen, and the range of problems and factors discussed, the study is intended to be merely selective \*\*\*. The first part deals with the history of coping with problems of treaty termination \*\*\*. The purpose of part 2 is an increased understanding of the peculiar nature of the termination conflict and how it may be resolved by negotiation and new agreement \*\*\*. [In part 3] the discussion centers on the idea that in international relations governments communicate by deeds, not only by words, and that therefore the timing of procedural submission and of substantive argumentation, as well as their content and style, are of the utmost policy and tactical importance."

Koeck, Heribert Franz. The "changed circumstances" clause after the United Nations Conference on the Law of Treaties. *Georgia journal of international & comparative law*, v. 4, 1974: 93-115.

Koeck was a member of the Austrian Delegation to the second session of the U.N. Conference on the Law of Treaties in 1969.

In introductory remarks he writes: "The obligation of a state to perform under a treaty, after a substantial change of circumstance has occurred, is a question which has provided material for generations of legal scholars \*\*\*.

"The present brief study aims at examining the question of how far the 'Changed Circumstances' clause of the Vienna Convention of the Law of Treaties is in line with traditional approaches to the problem."

In concluding, Koeck writes: "If the article [62] as it stands leave[s] still some doubts about the workability of the principle of 'changed circumstances' in contemporary international law, this is due, not so much to any theoretical defect for which the drafters could be held responsible, but only to the inability or unwillingness of the conference to provide the procedural safeguards that alone would have made the article a useful instrument in the field of treaty law \*\*\*. The principle of 'changed circumstances' must today, therefore, be regarded as a device for political pressure rather than as a legal means of peaceful change."

Lissitzyn, Oliver James. Treaties and changed circumstances (*rebus sis stantibus*). *American journal of international law*, v. 61, 1967: 895-992.

"In some degree, the I.L.C. [International Law Commission] Draft [Articles on the Law of Treaties] reflects both approaches to the problem of the role of changes of circumstances in treaty relationships—the expectations-of-parties approach and the intolerable-burden approach. The relevant articles of the Draft, however, fail to clarify or fully mesh the policies underlying the two approaches. The resulting formulations are open to differing interpretations and applications."

Another version of this article, *Stability and Change: Unilateral Denunciation or Suspension of Treaties by Reason of Changed Circumstances*, appears in "Some Contemporary Problems of Treaty Law Suggested by the Draft Articles

- on the Law of Treaties of the International Law Commission," in *Proceedings of the American Society of International Law*, v. 61, 1967, on pp. 186-193, with panel discussion of the paper on pp. 204-209.
- Nahlik, S.E. The grounds of invalidity and termination of treaties. *American journal of international law*, v.65, Oct. 1971: 736-756.
- "Among the important topics which before, at and after the Vienna Convention gave rise to much discussion and numerous controversies in the 'Invalidity, Termination and Suspension of the Operation of Treaties' under Part V of the convention \*\*\*. Although only one among seven parts of the draft convention submitted to the General Assembly by the International Law Commission, the number of articles it contained was exactly 40 percent of the total amount of all articles, thirty out of seventy-five. This fact alone caused some anxiety: so many articles to restrict the binding force of treaties by making it possible either to impeach their validity, or to terminate them, or, at the very least, to suspend their operation? Besides, are there not in those articles provision proclaimed as pertaining to the 'progressive development of international law,' which bring into international law some essential new elements? \*\*\* In order to provide a general answer to these questions, it seems necessary to concentrate upon two issues; 1) Are there truly so many, even too many, grounds of invalidity, termination, or suspension of the operations of treaties? 2) Is there much, among those grounds, that should be regarded as essentially new?"
- Reisman, W. M. Procedures for controlling unilateral treaty termination. *American journal of international law*, v. 63, 1969: 544-547.
- "The absence of institutionalized procedures for resolving disputes about continuing treaty regimes has produced a number of practical problems for international lawyers \*\*\*.
- "The International Law Commission's draft Convention on the Law of Treaties, which was reviewed by the Vienna Conference, has encountered the problem of dispute-resolution in exacerbated form. Due to the strong diplomatic pressure from certain quarters, the prescriptions for invalidating, terminating and suspending the operation of treaties, have been spelled out in greater detail than usual. As a consequence, the need for establishing procedures for dispute-resolution has become ever more urgent. Articles 62 and 63 of the draft introduce only the most minimal procedures; notification and, in case of disagreement, reference to the modalities spelled out in Article 22 of the Charter. An alternative approach, Article 62 bis, establishes a series of compulsory sequential procedures, most of them institutionalized, which alone will authorize invalidation, termination or suspension of operation.
- "Past state practice suggests that compulsory procedures will either be rejected by the Conference or, if accepted, be subjected to unilateral reservations at the later stage of ratification. As a result, treaty-making states will be required to devise their own procedure for dealing with the increased problem of invalidity, termination and suspension in a rapidly changing international context."
- Rosenne, Shabtai. *Breach of treaty*. Cambridge [Cambridgeshire] Grotius, 1985, © 1984. 142 p.
- Schwelb, Egon. Termination or suspension of the operation of a treaty as a consequence of its break. *Indian journal of international law*, v. 7, 1967: 309-334.
- "The present paper is devoted to the analysis of that provision of the [International Law Commission's] draft articles (draft article 57) which deals with the consequences of a breach of a treaty."
- Egon Schwelb provides a legislative history of Article 57 and compares it with the American Law Institute's provisions in its Restatement of the Foreign Relations Law of the United States, 1962, as revised in 1964 and 1965. Schwelb discusses the concept of a "material breach," problems arising from interdependent and multilateral treaties, the separability of treaties and the rights of parties affected by the breach to invoke the breach as a ground for terminating the treaty or suspending its operation.
- Some contemporary problems in treaty law suggested by the Draft Articles of the Law of Treaties of the International Law Commission. *American Society of International Law. Proceedings* \*\*\* 61st annual meeting held at Washington, D.C., v. 61, 1967: 186-209.
- Oliver Lissitzyn examines whether a state has "the right to terminate or suspend its obligations under a treaty on the ground that there has been a change in conditions or circumstances since the treaty was concluded if the treaty itself does not expressly provide for such a right." He surveys and analyzes the relevant International Law Commission's draft articles. [Another version of Lissitzyn's paper, *Treaties and Changed Circumstances (Rebus sis Stantibus)*

appears in the American journal of international law, v. 61, 1967, on pp. 895–992. It is cited above.]

Richard Bilder explores how foreign office (such as State Department) officials view treaties and issues concerning breach of treaties. He then considers the implications of their approaches for international law.

Following the papers are summaries of comments and discussion by Myres McDougal, Egon Schwelb, Anthony D'Amato, Denys Myers, Wasswa Balimuni, Leon Lipson, Vishwanath More, Hans Aufricht, Quincy Wright, and John Fried. Tobin, Harold James. The termination of multipartite treaties. New York, AMS Press, 1967. 321 p. (Studies in history, economics, and public law, no. 388) Reprint of the 1933 ed., which was issued also as a thesis, Columbia University.

The author examines the effect of war on multipartite treaties. He also considers termination of treaties by unilateral denunciation and termination by agreement of the parties, through the conclusion of a new and superseding treaty. Tobin discusses related questions as well, including the separability of treaty provisions. "This study is based primarily on treaty texts, protocols of conferences, diplomatic correspondence and court decisions concerning treaties. This material has been supplemented by legal and historical interpretations of the events bearing directly on these treaties." A bibliography of works contributing to the study is included.

Wright, Quincy. The termination and suspension of treaties. American journal of international law, v. 61, 1967: 1000–1005.

Quincy Wright examines provisions of the Draft Convention of Treaty Law by the United Nations International Law Commission which addresses treaty termination resulting from violation of the agreement by one party. He also considers how the Draft Convention would apply to the Vietnam Ceasefire Agreement.

"The issue whether another party to a treaty has violated a provision, whether the violation constitutes a 'material breach,' and whether the breached provision is separable, are generally controversial, and the freedom of one party to decide unilaterally on these questions is likely to lead to abuses. On the other hand, it would seem unjust if one party were obliged to continue observance of a treaty, when convinced that the other party is grossly violating it, for at least three months, and perhaps longer, while negotiations proceed by the means suggested in Article 33 of this Charter \*\*\*. Unilateral suspension of the operation of a treaty, in whole or in part, might be made permissible on notice charging violation, but with the requirement that the treaty obligation cannot be terminated or withdrawn from until agreement has been reached or the International Court of Justice has supported the claim to terminate or to suspend for a longer period." Wright recommends that this solution be considered by the Vienna Convention.

#### *b. Questions of treaty validity*

Malawer, Stuart S. Imposed treaties and international law. California Western international law journal, v. 7, winter 1977: 1–178.

"This article discusses and analyzes the rule of international law which declares invalid any treaty which is imposed by the threat or use of aggressive military force against a contracting state. The twentieth century development of the rule is examined by surveying the doctrine, state practice, international legislation and jurisprudence of the inter-war and post-World War II periods."

Meron, Theodor. Applicability of multilateral conventions to occupied territories. American journal of international law, v. 72, July 1978: 542–557.

"The object of this article is to consider whether an occupying power has the right or the duty under international law to apply multilateral treaties to which it is a party in the territories which it occupies. Focusing on the case of the territory west of the Jordan River, which is commonly known as the West Bank \*\*\* this study will deal the relevant ILO conventions, the Chicago Convention, the law of belligerent occupation, and the interaction between these bodies of law."

Paul, Vladimir. The legal consequences of conflict between a treaty and an imperative norm of general international law (*jus cogens*). Österreichische Zeitschrift für öffentliches Recht, v. 21, Apr. 1971: 19–49.

The author, who is from Prague, examines the history of the concept of *jus cogens*, in light of court opinions and State and international practices. He reviews writings on *jus cogens* and analyzes the International Law Commission's (ILC) conception of *jus cogens* in Article 61 of the Draft Articles on the Law of Treaties, Paul considers the relations of *jus cogens* to international morality and public policy, and he discusses the separability of treaty provisions. He also reviews ILC draft procedures for dealing with international disputes regarding

the invalidity of international treaties which conflict with a peremptory norm of international law.

Rozakis, Christos L. *The concept of jus cogens in the law of treaties*. Amsterdam; New York, North-Holland Pub. Co., 1976. 206 p.

"The present study is aimed at exposing in a systematic way the hiatus existing between the substantive provisions of the Convention which lay down the function of the jus cogens concept and the provisions implementing that function. In effect, the substantive provisions, as such, introduce in the international legal system the concept of jus cogens duly empowered with the sanction of invalidity to be applied to all treaties which conflict with the content of norms having that imperative character; but the articles which are assigned to deal with the materialization of that sanction and which constitute the only legal tool through which the parties to the Convention may contest the legality of a treaty, are quite often unable to fulfill the intended function of the substantive articles."

Contents.—The function of the jus cogens norms.—The identification of the jus cogens norms.—The modification of the jus cogens norms.—The sanctioning power of the jus cogens norms.—The settlement of disputes.

Schwelb, Egon. Some aspects of international jus cogens as formulated by the International Law Commission. *American journal of international law*, v. 61, Oct. 1967: 946–975.

"The [International Law] Commission's proposals relating to international jus cogens [in the Commission's draft articles on the law of treaties] have engendered a considerable amount of debate among governments and among publicists. In the present article, an attempt will be made to deal from a practical point of view with some of the many problems which the \*\*\* draft articles raise. The article will not reproduce and analyze the views of writers, but lay emphasis on such state practices as there exist and upon currently advancing views of governments. References to the views of publicists will be made only where this is necessary to illustrate the scope and the potentialities, but also the vagueness, the elasticity, and the dangers of the concept of international jus cogens as formulated in the draft."

Scott, Gary L. Carr, Craig L. *The International Court of Justice and the treaty/custom dichotomy*. *Texas international law journal*, v. 16, summer 1981: 347–359.

"This Article addresses the treaty/custom problem in three distinct ways. First, it briefly reviews some of the recent literature on the subject, with revelatory rather than exegetic intent. Second, it traces the impact of the treaty/custom debate on the opinions of the International Court of Justice; it is there that the crosscurrents of international law experience their ebb and flow. Third, it exposes some preconceptions about law which have led students of international law to place such importance on the treaty/custom issue, and it offers a prolegomenon to an alternate theoretical framework for analyzing the functions of the International Court of Justice which avoids appeal to the treaty/custom dichotomy."

Sztucki, Jerzy. *Jus cogens and the Vienna Convention on the Law of Treaties: a critical appraisal*. Wien, New York, Springer-Verlag, 1974. 204 p. (*Osterreichische Zeitschrift fur offentliches Recht. Supplementum 3*)

"The primary purpose of this study is to analyze critically the conventional concept of jus cogens as it developed and as it stands—without avoiding theoretical considerations but also without attempting to present any new theory of the legality of treaties in the present day international law \*\*\*. In the last part an attempt is made at presenting in summarized form the question of legality of treaties as it appears to stand now."

The author includes a bibliography listing recent works on the law of treaties, writings devoted to the Vienna Convention on the Law of Treaties, and works addressing the question of jus cogens in international law.

Zotiades, George B. *Intervention by treaty right: its legality in present day international law*. [Nicosia, Cyprus, Geka Press] 1965. 41 p. (*Jus gentium*, series of publications on international law; v. 6)

"What this paper deals with is the legality of unilateral—not collective—intervention expressis verbis stipulated in bilateral treaties. The validity of this group of treaties is questioned."

Partial contents.—Statements of the problem.—The definition of intervention.—Treaties of guarantee stipulating a right of intervention.—The principle of non-intervention in international law.—Critical analysis of the arguments advanced in support of the legality of intervention by treaty right.—Intervention by treaty right as a violation of present day international law.

## 6. DISPUTE SETTLEMENT

Adede, A.O. A survey of treaty provisions on the rule of exhaustion of local remedies. *Harvard international law journal*, v. 18, winter 1977: 1-19.

"The treaty-law analysis undertaken here will address two basic questions. The first question asks which 'local remedies' are to be exhausted as a pre-condition to the initiation of international proceedings. The primary issue here is whether 'local remedies' to be exhausted include nonjudicial forms of redress. The second question involves the scope of the rule. The main problem is whether the local remedies rule must be applied in every case or whether certain conditions exist under which it need not be applied. The answer to the second question will enable us to decide whether the rule of exhaustion of local remedies is a rule of substances or rule of procedure. The answers to both questions will provide the basis for conclusions relating to the proper function and rationale of the rule."

Coll, Richard J. United States enforcement of arbitral awards against sovereign states: implications of the ICSID convention. *Harvard international law journal*, v. 17, spring 1976: 401-415.

"This Comment examines the relevant provisions of the ICSID [International Centre for Settlement of Disputes] Convention to determine its impact upon the traditional bars to enforcement of arbitral awards against states by private parties. To facilitate analysis, the specific question addressed is whether an American investor who has prevailed in ICSID arbitration can secure enforcement of the award in the United States should the foreign state against which the award was rendered refuse to comply with it."

Cosca, Cecilia E. Zimmerer, Joseph J. Judicial interpretations of foreign arbitral awards under the U.N. convention. *Law and policy in international business*, v. 8, no. 3, 1976: 737-762.

Comment reviews U.S. case law, indicating "a receptiveness to enforcement of international arbitration agreements and awards based on both the Convention and an independent base of public policy."

Foreign judgments based on foreign arbitral awards: the applicability of res judicata. *University of Pennsylvania law review*, v. 124, Nov. 1975: 223-249.

In the context of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, comment considers whether the doctrine of merger, an element of res judicata, is applicable to arbitral awards and foreign judgments based thereon.

Kennedy, Lionel. Enforcing international commercial arbitration agreements and awards not subject to the New York Convention. *Virginia journal of international law*, v. 23, fall 1982: 75-101.

Comment discusses ways of enforcing an international arbitration agreement or award that is not covered by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New Convention).

McClendon, J. Stewart. Enforcement of foreign arbitral awards in the United States. *Northwestern journal of international law and business*, v. 4, spring 1982: 58-74.

Examines both the New York Convention and the United States Arbitration Act. Describes the requirements and procedures for enforcing foreign arbitral awards in the United States. Considers the substantive and procedural defenses to enforcement of foreign arbitral awards, and reviews the relevant U.S. case law.

Mirabito, A. Jason. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: the first four years. *Georgia journal of international & comparative law*, v. 5, summer 1975: 471-501.

"The purpose of this paper is to examine the various legal regimes in force that facilitate this enforcement [of foreign arbitral awards] and especially to consider the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, recently adopted by the United States, and its effects upon the enforcement of foreign arbitral awards." Mirabito concludes: "Although the Convention is not a panacea for all the problems which enforcement of foreign award entails, and although it does not go as far as some desire in creating an international arbitration tribunal, it is at least a practical, realistic system that can operate in today's world."

Mosler, Hermann. Supra-national judicial decisions and national courts. *Hastings international and comparative law review*, v. 4, spring 1981: 425-472.

"Justice Mosler of the International Court of Justice discusses at length the various supra-national courts of universal, regional, and specialized jurisdiction.

The Article continues with an analysis of the relationship between national and supra-national courts, forms of supra-national judgments, and the effect of these judgments on the national judiciary of the states party to the action and on non-party states. Finally, the relevance of multilateral treaty systems to the enforcement of international judgments is examined."

Sohn, Louis B. The role of arbitration in recent international multilateral treaties. *Virginia journal of international law*, v. 23, winter 1983: 171-189.

This article "considers the various dispute resolution procedures traditionally found in multilateral treaties. It then \*\*\* turns to a more specific discussion of the use of arbitration as a settlement technique, including an overview of the current status of efforts aimed at the codification of international arbitral rules. Finally, this Article \*\*\* focus[es] on the dispute resolution provisions of the 1982 Law of the Sea Convention in an attempt to evaluate the role played by arbitration in recent multilateral agreements.

Symposium-enforcement of foreign judgments and arbitral awards. *Virginia journal of international law*, v. 17, spring 1977: 359-493.

Contents.—Enforceability of settlements of foreign investment disputes, by P. Gilbert.—The challenge to the enforcement of socialist arbitral awards, by F. Orban, III.—Enforcement of foreign judgements and arbitral awards in West Germany, by H. Bertram-Nothnagel.—Enforcement of foreign judgments in the United States, by R. von Mehren.—The Common Market Convention on Jurisdiction and the Enforcement of Judgments: an interim update, by P. Herzog.—The proposed United States-United Kingdom convention on recognition and enforcement of judgments: a prototype for the future? By H. Smit.—Foreign arbitral awards and the 1958 New York convention: experience to date in the U.S. courts, by P. Trooboff and C. Goldstein.

#### 7. SUCCESSION OF STATES

Lavalle, Roberto. Dispute settlement under the Vienna Convention of Succession of States in Respect of Treaties. *American journal of international law*, v. 73, July 1979: 407-425.

Provides a critical review of the provisions of part VI of the Convention which, according to the author "suffers from certain technical shortcomings and raises problems of interpretation."

Maloney, Matthew G. Succession of States in respect of treaties: the Vienna Convention of 1978. *Virginia journal of international law*, v. 19, summer 1979: 885-914.

Explores "historical and practical background of the law of State succession, describe[s] and analyze[s] the new Vienna Convention and consider[s] the applicability of the Convention to future problems of State succession."

Rhineland, John B. Bunn, George. Who's bound by the former Soviet Union's arms control treaties? *Arms control today*, v. 21, Dec. 1991: 3-7.

"As the Soviet government transforms or collapses, which of the resulting entities will be bound by the treaties the Soviet Union entered into?"

Rogge, O. John. State succession. *New York law forum*, v. 16, no. 2, 1970: 378-391.

Examines the problem of the effect on U.S. extradition relations when a state or territory covered by a such a treaty changes its form of government or becomes part of a nation other than that with which we have the formerly applicable treaty.

Stewart, James B. The International Law Commission, 26th session. Draft Articles on the Succession of States in respect of Treaties: the pragmatic development of international law. *Harvard international law journal*, v. 16, summer 1975: 638-647.

"The Articles on the Succession of States in respect of Treaties are designed to resolve disputes over treaty obligations concluded by a predecessor State when a new State makes its appearance. They do not cover situations arising from a change of governments within a State."

Succession of states in respect of bilateral treaties. [New York] United Nations, 1971. 103 p. (United Nations. [Document] A/CN.4/243/Add.1)

At head of title: United Nations General Assembly.

Succession of states in respect of bilateral treaties; studies prepared by the Secretariat. [New York] United Nations, 1970. 63 p. (United Nations. [Document] A/CN.4/229)

At head of title: United Nations General Assembly.

Describes extradition treaties.

Succession of states in respect of treaties; report. [New York] United Nations, 1975. 26 p. (United Nations. [Document] A/10198)

At head of title: United Nations General Assembly.

Includes comments and observations of member states on the draft articles on succession of states in respect of treaties.

Third report on succession in respect of treaties. Prepared by Sir Humphrey Waldock. [New York] United Nations, 1970. 70 p.

At head of title: United Nations General Assembly.

Udokang, Okon. Succession of new states to international treaties. Dobbs Ferry, N.Y., Oceana Publications, 1972. 525 p.

"The international law of State succession must not be studied in isolation, but rather in the wider context of international politics."

Partial contents.—The concept and theory of State succession.—Succession to treaties in new States.—Succession to multilateral treaties.—Succession to membership in international institutions.—Succession to "localized" or "dispositive" treaties.—Succession to bilateral treaties and economic concession.

The author includes an extensive bibliography of books, U.N. publications, articles, and other sources.

Vienna Convention on Succession of States in Respect of Treaties; official documents. American journal of international law, v. 72, Oct. 1978: 971-988.

### C. INTERNATIONAL AGREEMENTS AND U.S. LAW

#### 1. GENERAL

American Law Institute. Restatement of the law, the foreign relations law of the United States. Rev. and enl. St. Paul, Minn., American Law Institute Publishers, 1987. 2 v. Restatement of the law, third, the foreign relations law of the United States. "As adopted and promulgated by the American Law Institute at Washington, D.C., May 14, 1986."

"This volume is the American Law Institute's Official Draft of Restatement Third, Restatement of the Foreign Relations Law of the United States."

Bradley, Curtis A. The treaty power and American federalism. Michigan law review, v. 97, Nov. 1998: 390-461.

Article "describes why the relationship between the treaty power and American federalism is particularly significant today, in light of recent changes in the nature of treaty-making, as well as the recent federalism jurisprudence of the Supreme Court."

The Constitution of the United States of America: analysis and interpretation; annotations of cases decided by the Supreme Court of the United States to June 29, 1992. Prepared by the Congressional Research Service. Washington, U.S. Government Printing Office, 1992. (Document, Senate, 103d Congress, 1st Sess., no. 103-6)

This edition includes annotations of U.S. Supreme Court decisions interpreting the provisions of the Constitution through June 29, 1992. An index with subheadings under terms such as treaties, war, executive agreements, powers, and Congress provides access to specific topics. With 1996, 1998, and 2000 supplements. Available on the Web: <http://www.access.gpo.gov/congress/senate/constitution/>

Cowles, Willard Bunce. Treaties and constitutional law: property interferences and due process of law. Westport, Conn., Greenwood Press, 1975. 315 p. Reprint of the 1941 ed. published by American Council on Public Affairs, Washington.

"Our first inquiry will be to ascertain whether or not it was the original intention that the due process and just compensation clauses were to be paramount law in respect of the domestic, legal operation of treaties. Part One of the study will deal with this. Thereafter (in Part Two) we shall develop the legal and congressional thought and decisions where the courts or Congress have had before them the question of the supremacy of those clauses in relation to treaty stipulations. If, in some cases, the courts have held a treaty provision to be binding upon them, we shall inquire whether they have regarded the United States as, or have held it to be, duty bound under the Fifth Amendment to assure the property owner of just compensation. Subsequent action of Congress in such cases will be set forth."

Crandall, Samuel Benjamin. Treaties: their making and enforcement. 2d ed. Washington, J. Byrne and Co., 1916. 663 p.

Partial contents.—Prior to the Articles of Confederation.—Under the Articles of Confederation.—The Federal Convention.—Discussion preceding the adoption of the Constitution.—The advice and consent of the Senate.—Powers of the President.—Agreements reached by the executive without the advice and con-

sent of the Senate.—Agreements by the executive in virtue of acts of Congress.—Treaties involving an appropriation.

A table of cases precedes chapter 1, and a digest of decisions of American courts construing treaties, arranged by countries and treaties, forms the first appendix.

The 1904 edition of this work was reprinted in 1968 by AMS Press, N.Y., as part of the Columbia University Studies in Social Sciences series; no. 54.

Dalton, Robert E. International agreements in the revised restatement. *Virginia journal of international law*, v. 25, fall 1984: 152–168.

“On April 1, 1980, the American Law Institute published Tentative Draft No. 1 of the Restatement of Foreign Relations Law of the United States (Revised) (‘Revised Restatement’). This Article addresses the provisions of the draft that deal with international agreements. The reporters have made a significant contribution, although several areas, especially concerning the interplay of executive, congressional, and customary authority, still raise important questions.”

Dearborn, Charles H., III. The domestic legal effect of declarations that treaty provisions are not self-executing. *Texas law review*, v. 57, Jan. 1979: 233–251.

“On February 23, 1978, President Carter transmitted four human rights treaties to the Senate for its advice and consent. The President also recommended a number of ‘reservations,’ ‘understandings,’ and ‘declarations,’ ostensibly designed to conform the treaties to United States law and thereby avoid ‘constitutional or other legal obstacles to \*\*\* ratification.’ The State Department and the President also recommended that a declaration that certain provisions are not self-executing accompany each treaty \*\*\*. This Note argues that the declarations are of dubious validity, probably have no binding effect on United States courts, and should not be used as aids in construing the treaties.”

The Federalist. Edited with introduction and notes by Jacob E. Cooke. Middletown, Conn., Wesleyan University Press [1961] 672 p.

Professor Arthur Bestor contends that “by general agreement the most significant of the contemporaneous explanations of how the Constitution was intended to work was the series of papers entitled *The Federalist*.” These essays were written by James Madison, Alexander Hamilton, and John Jay in 1788, in response to objections made by New Yorkers to the Constitution which had been proposed on September 17, 1787, at the Philadelphia Convention. The essays defend the Constitution and explain its provisions. An index, with entries including Congress of the United States, executive, foreign affairs, President, Senate, treaty power, and war, provides subject access to the essays.

Foundation for Study of Treaty Law. Treaty law manual. Washington, Foundation for Study of Treaty Law [1954?] 61 p.

“A determination of whether the American people should amend their constitution to limit the treaty power of the Federal Government is a question of balancing risks. Opponents of the proposal say that it might, in some now unforeseen future circumstances, prevent a President of the United States from entering into a treaty or executive agreement vital to the public interest. They urge that the President must necessarily have broad powers to fully serve the people.

“The proponents of the amendment, on the other hand, say that granting broad powers to the executive over the internal domestic affairs of the people may ultimately result in the loss of our liberty. They recall that our forefathers refused to adopt the present constitution until the Bill of Rights had been added to protect individual liberties. The guarantees of individual liberty included in that Bill of Rights may now, the proponents of the amendment urge, be taken from the people by international treaty.”

Haskell, Donald M. The Warsaw system and the U.S. Constitution revisited. *Journal of air law and commerce*, v. 39, autumn 1973: 483–517.

“The Warsaw Convention and the Montreal Interim Agreement provide effective limits on recovery for wrongful death in international flights. In this article Mr. Donald M. Haskell argues for the validity of these international agreements under the United States Constitution. His analysis included an examination of the supremacy clause and the treaty-making power of the federal government, the separation of powers and political question doctrines of judicial abstention, and the application of due process and equal protection principles to claims arising from international air tragedies.”

Hendry, James McLeod. *Treaties and Federal constitutions*. Westport, Conn., Greenwood Press, 1975, © 1955. 186 p. Reprint of the ed. published by Public Affairs Press, Washington.

“This study has two objectives. The first is to make an exhaustive analysis of constitutional limitations of four Federal states [Canada, Australia, the



United States, and Switzerland], compare their effect, and determine their real and supposed validity restricting the participation of these states in international affairs. The second is to ascertain what scope there is for international law to assist the states in better international collaboration by the development, change or institution of international legal rules for international agreements."

Contents.—The problem.—Historical and constitutional considerations on the treaty processes of Federal states.—The treaty-making powers of Federal executives.—Governmental participation in the treaty-making powers of Federal executive.—Treaty performance and fundamental laws.—Treaty performance and the legislative powers of the component states.—Constitutional limitations and international law.—Constitutional limitations and fundamental laws.

Henkin, Louis. *Foreign affairs and the United States Constitution*. Oxford, Clarendon Press; New York, Oxford University Press, 1996. 582 p.

The author "attempts to illuminate the constitutional provisions that deal with foreign relations and the special significance for foreign relations of other constitutional clauses \*\*\*. This volume is an essay in law, not in legal history, and it concentrates on where we are going, rather than on where we were or even how we got here." Henkin examines "insufficiencies in the constitutional blueprint," the distribution of Federal political power in foreign affairs, and the constitutional law governing international agreements and cooperation. He reviews use of the treaty power to promote international human rights."

———. The treaty makers and the law makers: the Niagara Reservation. *Columbia law review*, v. 56, Dec. 1956: 1151–1182.

Henkin reviews the background and provisions of the 1950 Treaty with Canada Concerning Uses of the Waters of the Niagara River. He examines the Senate reservation in its resolution of August 9, 1950, that "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it is specifically authorized by Act of Congress." Henkin explores the reasons motivating that reservation, as revealed in the Senate Foreign Relations Committee Report (S. Exec. Rept. 11, 86th Cong., 2d Sess., 1950). He also considers developments subsequent to the treaty, from 1950 to 1956.

Henkin critiques assumptions underlying the New York Power Authority's claim that the reservation does not fall within the treaty power of the Constitution. He considers the contractual natures of the reservation and examines legislative aspects of the treaty in relation to the legislative power of Congress.

Henkin contends that Article VI of the Constitution "establishes that the power includes an important power to legislate domestically within a limited area" including "The power to enact provisions in or relating to a treaty like the provision in the Niagara reservation." He reviews reservations to earlier treaties which might serve as precedents and examines other grounds for questioning the claim that the reservation is invalid. He argues: "Even if the provision contains no element of international obligation, it is a provision like one in other United States treaties which relates to the subject and purposes of the treaty and to its implementation. The provision is another instance of the exercise of an accepted power of the President and Senate to invite Congressional cooperation in the treaty function \*\*\*. This was a recognition, yet another time in our history, that the legislative power of Congress intersects and supplements the treaty powers and that a specific instance may call for cooperation between these powers rather than isolated operation of each."

Institute on the Law of Treaties and the State-Federal Relationship, University of Missouri, 1969. *Proceedings*. Edited by Frederick W. Hess. [Kansas City] University of Missouri-Kansas City [1970] 74 p. Sponsored by the Law Center of the University of Missouri, Kansas City, and the American Society of International Law. Held June 6, 1969.

"That the subject matter of international agreements has grown over the last 150 years into areas previously not amenable to treaty regulation is obvious to anyone studying cultural, commercial, administrative and scientific topics which have been thus regulated in recent decades. The question may arise: What factors bring about this development, what are its limitations, and to what extent has international regulation made inroads into areas once reserved to domestic jurisdiction?"

The second aspect of the treaty problem affects the United States. Here, faced with our constitutional framework, we may ask ourselves to what extent our notions of the Federal treaty power have remained in harmony with those of other

countries, and whether international agreements may today settle matters once thought to be exclusively in the constitutional province of the states \*\*\*.

"In examining the issue, prominent consideration was given to the United Nations Convention on the Law of Treaties."

Jefferson, Thomas. "Sec. LII—Treaties," of Jefferson's manual of parliamentary practice. In U.S. Congress. House. Constitution, Jefferson's manual and rules of the House of Representatives of the United States, One Hundred Sixth Congress. Compiled by Charles W. Johnson, Parliamentarian. Washington, U.S. Government Printing Office, 1999. pp. 300–303. (105th Cong., 2d Sess. House. Document no. 105–358)

Kearney, Richard D. Internal limitations on external commitments.—Article 46 of the Treaties Convention. *International lawyer*, v. 4, Oct. 1969: 1–21.

Richard Kearney discusses Article 46 of the Vienna Convention on the Law of Treaties. The article deals with "the conflict between constitutional limitations upon the authority to commit the state internationally and the necessity of international reliance upon apparent authority to commit the State internationally."

Kuchenbecker, David J. Agency-level executive agreements: a new era in U.S. treaty practice. *Columbia journal of transnational law*, v. 18, no. 1, 1979: 1–77.

"This Article examines in detail the employment of agency-level executive agreements as an instrument of U.S. treaty practice. It focuses not only on the legal instrument itself but upon what its use reflects about the changes within the government as virtually every nondiplomatic agency enters into international agreements on behalf of the United States \*\*\*. Examines the legal authority for, and consequences of, the agency-level device, noting the similarities and contrasts with executive agreements generally and the recent developments in U.S. treaty practice that have affected its negotiation \*\*\*. Provides a brief description of the State Department's current relationship with other executive branch agencies regarding the negotiation process \*\*\*. Assesses the current state of the agencies' agreement practice, identifying the strengths and weaknesses thereof, examples of intra-agency disputes involving the State Department, and congressional action, in the form of newly enacted legislation, to remedy some of the weaknesses."

Law of Treaties. In *Research in international law; under the auspices of the faculty of Harvard Law School. Supplement (to the) American journal of international law*, v. 29, 1935. pp. 655–1240.

"Drafts of conventions prepared for the codification of international law." "Part III [law of treaties] with Index bound in this volume." Pagination for volume begins with p. 655.

Meron, Theodor. Article 46 of the Vienna Convention on the Law of Treaties (ultra vires treaties): some recent cases. *British year book of international law*, v. 49, 1978: 175–199.

"Article 46 of the Vienna Convention was invoked in the Senate of the United States with regard to the Sinai II Agreements of 1975 and with regard to the Panama Canal Treaties of 1972. In both cases, it was in the legislative branch rather than in the executive branch, that it was argued that constitutional provisions regarding competence to conclude treaties were violated and that certain agreements were ultra vires under such constitutional provisions."

Paust, Jordan J. Self-executing treaties. *American journal of international law*, v. 82, Oct. 1988: 760–783.

"The distinction found in certain cases between 'self-executing' and 'non-self-executing' treaties is a judicially invented notion \*\*\*. When did the judicially created distinction first occur? How has it actually been used in the Supreme Court's history? Should the distinction be retained?"

Tolley, Howard B. The domestic applicability of international treaties in the United States. *Lawyer of the Americas*, v. 15, spring 1983: 71–88.

"Following over a century of precedent, United States courts refused to enforce the provisions of treaties which conflict with later Congressional acts. Case law and commentary uniformly support the 'last-in-line' doctrine virtually without exception. This paper examines the origin, evolution and application of the last-in-line rule. After identifying points of agreement with prevailing authority, the text affirms a principle of treaty priority which challenges five key elements of the last-in-line rule."

U.S. Constitutional Convention, 1787. The debates in the Federal Convention of 1787, which framed the Constitution of the United States of America. Reported by James Madison. International ed., Gaillard Hunt and James Brown Scott, editors. Westport, Conn., Greenwood Press [1970] 731 p.

- The treaty ratification process is discussed on pp. 532–534. An extremely detailed index, with House and Senate listed under Legislative and the President listed under Executive, provides access to coverage of other issues.
- U.S. ratification of the human rights treaties with or without reservations? Edited for the International Human Rights Law Group by Richard B. Lillich. Charlottesville, University Press of Virginia, 1981. 203 p.
- U.S. ratification of the international covenants on human rights. Edited by Hurst Hannum and Dana D. Fischer. Irvington-on-Hudson, N.Y., Transnational Publications, 1993. 343 p.
- At head of title: The American Society of International Law.
- Weinfeld, Abraham C. What did the framers of the Federal Constitution mean by "agreements or compacts?" *University of Chicago law review*, v. 3, Apr., 1936: 453–469.
- In this comment, Weinfeld examines the Articles of Confederation, the drafts that preceded them, and the Federal Convention of 1787 to determine the difference between a "treaty" and an "agreement or compact," since "a state, may not enter into a treaty but it may enter into an agreement or compact with consent of Congress."
- Weinfeld contends that the words "agreements" or "compacts," in contrast to "treaties," were used as technical terms and carried a definite meaning. He examines the literature on international law known in this country in 1787 to determine that meaning. Weinfeld concludes: "To summarize 'agreements or compacts' as intended by the framers of the Constitution included 1) settlements of boundary lines with attending cession or exchange of strips of land, 2) regulation of matters connected with boundaries as for instance regulation of jurisdiction of offenses committed on boundary waters of fisheries or of navigation."
- Whiteman, Marjorie M. Treaties and other international agreements. In *The Digest of international law*. Vol. 14. Washington, Department of State, U.S. Government Printing Office, 1970. pp. 1–510.
- The Assistant Legal Adviser of the Department of State reviews the making and enforcement of treaties and international agreements. She quotes from and cites published and unpublished documents issued by the International Law Commission, U.S. Presidents, and the U.S. Department of State. She also cites the Vienna Convention of the Law of Treaties, the U.S. Constitution, and congressional documents and debates.
- Contents.—Meaning of terms.—Capacity to make.—Negotiation and conclusion.—Ratification.—Adherence or accession.—Acceptance or approval.—Procedure after ratification.—Reservations.—Executive agreements.—Validity.—Enforcement.—Interpretation.—Termination or suspension.
- Wildhaber, Luzius. Treaty-making power and constitution: an international and comparative study. Basel, Stuttgart, Helbing & Lichtenhahn, 1971. 412 p.
- "This book presents a comparative study of the treaty-making power in a series of countries. The first part describes and evaluates the distribution of powers between legislative, executive, courts and populace with respect to the agreement-making process. The second part deals with the distribution of powers between the federal government and the member units in federal states. The third part inquires into the limitations upon the treaty-making power which results from constitutional prohibitions, particularly into judicial review of treaties and the feasibility of transferring state competencies to international organizations \* \* \*."
- "I shall discuss the interplay between legislature and executive with respect to international agreements in Great Britain, Canada, Australia, the United States, France, Belgium, the Netherlands, the Federal Republic of Germany, Australia, and Switzerland."
- Wright, Quincy. The control of American foreign relations. New York, Macmillan, 1922. 412 p.
- "This essay seeks to draw particular attention to a difficulty in the control of foreign relations found in every government, but especially in a government with powers defined in a judicially enforced written constitution. This is the difficulty which arises from the fact that the organs conducting foreign relations. have their responsibilities defined by international law, which their powers are defined by constitutional law. Since the sources of these two bodies of law are different, a lack of coordination between the powers and the responsibilities of these organs is to be expected. To avoid confusion the writer has considered the subject from the international point of view and from the [U.S.] constitutional point of view in separate parts of the book."
- . Treaties and the constitutional separation of powers in the United States. *American journal of international law*, v. 12, Jan. 1915: 64–95.

Wright examines the treaty power in relation to legislative and juridical powers. He concludes: "It appears that the principle of separation of powers imposes no limitation upon the treaty-making power. If the subject is appropriate for treaty negotiation, consonant with the purposes of the Constitution, and in violation of none of its specific prohibitions, the treaty, if ratified, is valid, and all other departments of government—the legislative, executive and judiciary—are bound by their allegiance to the Constitution to perform the acts necessary to give it effect. Considering the practical working of the government, this capacity of the treaty power to impose obligations upon the other independent departments is not remarkable. Practically every valid act of one department does the same \*\*\*.

"Where the cooperation of another department is required it would always be appropriate for the treaty power itself to consider the opinion of the departments concerned, especially if the prerogatives of Congress are involved, before ratifying the treaty, but such action would seem to be dictated by courtesy or expediency rather than legal necessity."

## 2. CONGRESSIONAL AND PRESIDENTIAL ROLES IN THE MAKING OF TREATIES AND INTERNATIONAL AGREEMENTS

Berger, Raoul. The presidential monopoly of foreign relations. *Michigan law review*, v. 71, Nov. 1972: 1–58.

Berger discusses "presidential executive agreements, and whether the Senate may be excluded from knowledge of, and participation in, negotiations with foreign nations as a part of the treaty-making process."

Bestor, Arthur. Respective roles of Senate and President in the making and abrogation of treaties—the original intent of the framers of the Constitution historically examined. *Washington law review*, v. 55, no. 1, 1979–1980: 4–135.

This study "seeks to determine the original intent of the framers of the American Constitution as evidenced by the documents dating from the period during which the Constitution and its predecessor, the Articles of Confederation, were drawn up and adopted—roughly the period from 1776 through 1789."

Biden, Joseph R., Jr. Ritch, John B., III. The Treaty power: upholding a constitutional partnership. *University of Pennsylvania law review*, v. 137, May 1989: 1529–1557.

A member of the Senate Foreign Relations Committee and the Deputy Staff Director of the same committee "recount significant events leading to the Senate's repudiation of the Sofaer Doctrine and offers a rationale for the necessity of the Senate's action."

Borchard, Edwin. Shall the executive agreement replace the treaty? *Yale law journal*, v. 53, Sept. 1944: 664–683.

Examines the basis of proposals to substitute executive agreements for treaties, reviews historical distinctions between treaties and agreements, and describes types of executive agreements. Contends that "in the few instances where the President has used his power to make executive agreements in a field important enough to warrant a treaty \*\*\* explanation can be found in the apparent Senate acquiescence in the particular assumption of executive power."

Reviews objections to the use of executive agreements as a substitute for treaties, contending that it is an evasion of the Constitution, and that executive agreements are of limited utility because their durability is precarious. Considers the impact of Supreme Court opinions on executive agreements. Concludes "Proponents of a constitutional amendment do not take into account the new troubles they would encounter if the President did not belong to the same party as the majority of one or both of the two Houses. They also fail to realize that it might be easier to get a two-thirds vote of approval in the Senate, if a given treaty warrants support, than a majority in a hostile House or Senate, for the nature of the proposed change is such that it might make the congressional 'veto' more political than it has been in the past."

Briggs, Herbert, W. The Leaders' agreement at Yalta. *American journal of international law*. v. 40, Apr. 1946: 376–383.

In this commentary, Briggs contends: "There are sufficient precedents to justify the conclusion that the President has the Constitutional competence to conclude internationally binding military agreements without the advice and consent of the Senate \*\*\*. At the same time, the price exacted by Marshal Stalin made the agreement much more than a military agreement. Its provisions that the claims of the Soviet Union should be unquestionably fulfilled after Japan has been defeated refer to the transfer of Japanese territory and the shackling of Chinese territory and contain commitments of such uncertain meaning and

doubtful duration as to raise serious doubts as to the President's constitutional competence to commit the United States by executive agreement.

"There is no reason \*\*\* why all executive agreements should be regarded as of equal validity; more especially there is no reason in law—national or international—why a succeeding administration should not treat an executive agreement made outside his competence by a preceding Executive as merely his personal pledge never binding under international law in the United States."

Buechler, Gary Michael. Constitutional limits on the President's power to interpret treaties, the Sofaer Doctrine, the Biden Condition, and the Doctrine of Binding Authoritative Representations. *Georgetown law journal*, v. 78, Aug. 1990: 1983–2024.

"This note argues that neither the Biden Condition on or the Sofaer Doctrine [which attempt to define the scope of the President's authority to interpret treaties within the constitutional allocation of the treaty-making power] strikes the proper constitutional balance of treaty-making power between the Executive and the Senate. It proposes a new formulation, the Doctrine of Binding Authoritative Representations (DBAR), to govern the use of implicit conditions binding the Executive to its representations and thus restricting its power to interpret treaties."

Byrd, Elbert M., Jr. *Treaties and executive agreements in the United States: their separate roles and limitations*. The Hague, Martinus Nijhoff, 1960. 276 p.

Byrd examines the roles and limitations of treaties and executive agreements, drawing upon the Constitution, the intentions of the framers of the Constitution, Supreme Court opinions, and the use of international agreements by the U.S. throughout its history. He considers executive agreements necessary for the national security of the United States "in a dangerous world, in which conditions are subject to swift change," and contends that treaties should only be used for agreements which affect the powers reserved for the States.

Byrd, Robert C. *Treaties*. In his *The Senate, 1789–1989: addresses on the history of the United States Senate*. Vol. 2. Bicentennial ed. Edited by Wendy Wolff. Washington, U.S. Government Printing Office, 1991. (Document, Senate, 100th Cong., 1st Sess., no. 100–20) (Senate Bicentennial publication) pp. 1–23. Originally delivered in the Senate on Apr. 10 and Apr. 29, 1987, and updated June 1989.

Cohen, Richard. Self-executing executive agreements: a separation of powers problem. *Buffalo law review*, v. 24, fall 1974: 137–158.

In this comment, the author argues that "as a matter of domestic law, the President may make international agreements other than treaties." He evaluates "the various approaches which have been used to ascertain the origin and nature of the qualifications limiting presidential power to make self-executing executive agreements."

Colegrove, Kenneth Wallace. *The American Senate and world peace*. New York, Vanguard Press [1944] 209 p.

The author contends that the U.S. treaty-making process is inadequate and undemocratic. He draws on examples of Senate involvement in the treaty-making process, especially the defeat of the Covenant of the League of Nations in the Senate. Colegrove also describes instances in which the President has relied upon executive agreements, rather than treaties. He suggests that abolition of the two-thirds rule and of the Senate monopoly in ratification of treaties would lead to greater cooperation between the Congress and the President regarding foreign policy, and he discusses the problem of constitutional reform of the treaty-making process. *Congressional Quarterly, Inc. Making foreign policy*. Washington, Congressional Quarterly, 1988. 119 p.

Contents.—Making foreign policy.—National Security Council.—Treaty ratification.—Defending Europe.—Euromissile negotiations.—The military buildup in the 1990s.—Persian Gulf oil.—Dollar diplomacy. Reports originally appeared in Editorial research reports.

Damrosch, Lori Fisler. The role of the United States Senate concerning 'self-executing' and 'non-self-executing' treaties. *Chicago-Kent law review*, no. 3, v. 67, 1991: 515–532.

Examines "the usage of non-self-executing declarations in recent U.S. practice, with examples drawn from human rights treaties and economic agreements \*\*\*. Considers and criticizes the several rationales that might be proffered in justification of the use of non-self-executing declarations, and contends the device should be confined to the limited class of cases when the House of Representatives is expected to become actively engaged in implementing the treaty."

Dangerfield, Royden J. In defense of the Senate: a study in treaty-making. Norman, University of Oklahoma, 1933. 365 p.

The author "attempts a systematic analysis of the effect of the Senate's participation in the ratification of treaties. An effort is made to measure quantitatively the effect of the Senate's actions in dealing with 832 treaties, including all treaties signed on behalf of the United States during the period from February 6, 1778 to February 6, 1928." "The factors influencing Senate action are isolated for more detailed study by the application of the statistical method. The effects of the present organizations and institutions are weighed. The interplay of personalities is placed in the setting of legislative-executive conflict."

Executive-congressional relations and the treaty ratification process; conference report, Jan. 17-19, 1991. Washington, Woodrow Wilson International Center for Scholars, the Henry L. Stimson Center, 1991. 20 p.

Partial contents.—Case studies of successful treaty ratification efforts.—Case studies of failed treaty ratification efforts.—Legal and constitutional issues.—The joint chiefs and ratification.—Executive-congressional relations.

Fitzgerald, Peter L. Executive agreements and the intent behind the treaty power. *Hastings constitutional law quarterly*, v. 2, summer 1975: 757-771.

This note examines "the use of executive agreements in United States foreign policy, as a means of concluding international compacts \* \* \*. The author examines the effect this trend has on the formal treaty process and the balance of power between the executive and legislative branches."

Fleming, Denna Frank. The treaty veto of the American Senate. New York, G.P. Putnam's Sons, 1930. 325 p.

Fleming contends that "the failure of treaties for the advancement of peace in the administration of every President since Benjamin Harrison left office, in 1893, creates a situation which calls for study and appraisal."

Contents.—The origins of the Senate's power over treaties.—The relation of the Senate to the negotiation of treaties.—The Senate's assertion of a right to amend treaties.—Treaties rejected by the Senate.—The action of the Senate on arbitration treaties.—The earlier treaties of peace in the Senate [from the Jay Treaty of 1794 through the Treaty of Paris of 1898].—The struggle over the League of Nations.—The Senate reservations to the Treaty of Versailles.—The attempt to enter the Permanent Court of International Justice.—The results of the World Court reservations.—Interpretations of the Paris Peace Pact.—Some conclusions on the legislative control of treaties.

Forkosch, Morris D. The United States Constitution and international relations: some powers and limitations explored. *California Western international law journal*, v. 5, winter 1975: 219-270.

This article analyzes the way in which the foreign relations of the United States may be subject to the restrictions imposed by some constitutional clauses. Concludes that constitutional powers and limitations in foreign relations abound "but there is no definitive understanding of their meaning. The executive and judicial interpretations have conflicted, the legislative conflict with the executive over power and jurisdiction has flourished, and there comes through a hopeless feeling that no concrete resolution will ever occur."

Friedlander, Robert A. Should the U.S. Constitution's treaty-making power be used as the basis for enactment of domestic legislation? Implications of the Senate approved genocide convention. *Case Western Reserve journal of international law*, v. 18, spring 1986: 267-282.

Fryer, Keith E. Levengood, J. Michael. Arms control: SALT II—executive agreement or treaty? *Georgia journal of international & comparative law*, v. 9, winter 1979: 123-136.

The article examines the question of "whether there exist constitutional as well as political restraints upon executive discretion to classify agreements."

Furlong, William L. Scranton, Margaret E. The dynamics of foreign policymaking: the President, the Congress, and the Panama Canal treaties. Boulder, CO, Westview Press, © 1984. 263 p.

Contents.—Introduction and analysis.—From conception and construction to the new treaties.—Why change Panama Canal policy?—Assessing executive impact: Presidents, their administrations, and the treaties.—Congress and the treaties.—Implementation legislation and impacts.—Explanations, costs, and conclusions.

Garrett, Stephen A. Foreign policy and the American Constitution; the Bricker Amendment in contemporary perspective. *International studies quarterly*, v. 16, June 1972: 187-220.

Garrett relates the controversy in 1954 over the Bricker amendment, which sought to establish congressional control over treaties and executive agree-

- ments, to the senatorial campaign for greater influence over U.S. policy in Vietnam during the late 1960s and early 1970s. He examines the general problem of executive-congressional conflict regarding foreign policy and the roles Congress can and should have in foreign policy decisionmaking.
- Gilbert, Amy M. *Executive agreements and treaties, 1946-1973: framework of the foreign policy of the period*. Endicott, N.Y., Thomas-Newell, 1973. 213 p.
- The author reviews the types of executive agreements and traces "the channeling of foreign affairs through international agreements." since World War II. Chapter 6 covers the assessment of international agreements by the Bricker movement in the 1950s, and principal versions of the Bricker amendment are reprinted in Appendix A.
- Glennon, Michael J. *Constitutional diplomacy*. Princeton, N.J., Princeton University Press, © 1990. 353 p.
- . The Senate role in treaty ratification. *American journal of international law*, v. 77, Apr. 1983: 257-280.
- "A nation with more than one governmental hand at the foreign policy helm can incur costs in credibility. The hand that signs is not the hand that delivers; what looks like a good bargain to diplomats at the negotiating table may look altogether different to legislatures in the cold light of constituents' mail. The domestic value of pluralistic governmental decisionmaking thus competes with the international value of reciprocal expectations. The tension between these values is particularly evident in the making of the foreign policy of the United States \*\*\*. Generated principally by Watergate and Vietnam, the reassertion by Congress of its foreign policy prerogatives has raised new questions concerning the respective scope of legislative and executive powers in the making of international agreements. This article analyzes several newly arisen issues that reflect the heightened 'value tension' described above, and it suggests resolutions consistent with the vindication of both values."
- Hardwick, Deborah Godich. The Iranian Hostage Agreement cases: the evolving Presidential claims settlement power. *Southwestern law journal*, v. 35, Feb. 1982: 1055-1077.
- "This Comment traces the President's role in international affairs and the Presidential power to enter into executive agreements from the earliest days of the nation to the present. Particular emphasis is placed on the evolution of the President's power to settle claims of United States citizens by executive agreement. In addition, this Comment examines several recent cases arising out of the Iranian Hostage Agreement, and the impact of *Dames & Moore v. Regan*, the Supreme Court's initial response to the Iranian Hostage Agreement."
- Hayden, Joseph Ralston. *The Senate and treaties, 1789-1817; the development of the treaty-making functions of the United States Senate during their formative period*. New York, Da Capo Press, 1970 [© 1920] 237 p.
- The author surveys the treaty-making functions of the Senate from 1789 through 1817 in an attempt "to discover the conception of the place of the Senate in treaty-making then held by the various departments of the government, to trace the development of the procedure of the Senate in the transaction of treaty business, to ascertain the relations between the Senate and the executive in this field, and to investigate the effect of the position of the Senate in our constitutional system upon the relations between the United States and other nations."
- Henkin, Louis. Foreign affairs and the Constitution. *Foreign affairs*, v. 66, winter 1987-88: 284-310.
- "After 200 years the difficult constitutional issues of foreign affairs arise from the so-called separation of powers and the various checks and balances between Congress and the president \*\*\*. The constitutional blueprint has proved to be unclear and incomplete as regards foreign affairs, and there is no agreed guiding principle to help make its provisions clear, or to fill the lacunae. National experience has provided some answers, but Congress and president continue to tug for more of the foreign policy blanket."
- Holt, William Stull. *Treaties defeated by the Senate; a study of the struggle between President and Senate over the conduct of foreign relations*, Gloucester, Mass., P. Smith, 1964 [© 1933] 328 p.
- Holt examines "the circumstances attending the defeat of every treaty [from 1789 to 1920] that failed of completion through the action of the Senate, in the hope of ascertaining which were lost either because of domestic politics or because of the const between President and Senate."
- Hyman, Sharon G. Executive agreements: beyond constitutional limits? *Hofstra law review*, v. 11, winter 1983: 805-844.

"This note analyzes the international agreement-making powers of the President by examining the various categories of international agreements, the claimed authority for each, and the problems associated with each type of agreement. Relevant court decisions dealing with the parameters of presidential powers in foreign affairs are discussed and controversial agreements and the resulting tension between Congress and the Executive are examined. The difficult issue of executive discretion in choosing the particular mode of agreement is explored, as are congressional attempts to exert control over the Executive in this area. Finally, the need for a system of greater consultation between the legislative and executive branches is discussed and a concluding proposal is suggested."

Jackson, John H. Status of treaties in domestic legal systems: a policy analysis. *American journal of international law*, v. 86, Apr. 1992: 310-340.

"This article explores some of the policy considerations relating to the effect of an international treaty in domestic law."

Johnson, Loch K. *The making of international agreements: Congress confronts the executive*. New York, New York University Press, 1984. 206 p.

This work explores the "disagreements among policymakers and scholars concerning the proper executive-legislative balance in the making of international agreements." Chapter one of this book discusses the procedures of agreement-making. Chapter two examines the targets of American overseas commitments. Agreement-making within the area of military policy is examined in chapter three. Chapters four and five examine the operations of the Congress. Chapter six summarized the theme of the volume, that foreign policy should be conducted on the basis of a partnership between the executive and legislative branches, and outlines some \*\*\* prescriptions toward this end with respect of agreement-making.

Johnson, Loch. McCormick, James M. The democratic control of international commitments. *Presidential studies quarterly*, v. 8, summer 1978: 275-283.

"This paper assesses the extent to which democratic controls have operated in the making of American commitments abroad in the postwar period. First, we survey the volume and content of agreements made by the United States from 1946 to 1972. Secondly, we analyze the form that these agreements have taken—treaty, statutory agreement and executive agreement. While the preponderance of agreements have taken forms involving both the Congress and the Executive, \*\*\* a small, but significant, group of commitments have not."

Kaufman, Natalie Hevener. Whiteman, David. Opposition to human rights treaties in the United States Senate: the legacy of the Bricker Amendment. *Human rights quarterly*, v. 10, Aug. 1988: 309-227.

"Thirty years after the defeat of the Bricker Amendment, the covenants and most other major human rights treaties have yet to receive Senate approval. During the same period, these covenants have been ratified by eighty-five other nations, including fifteen Western democracies. The question which deserves our attention is why the United States has not ratified these treaties as well."

Koh, Harold Hongju. The President versus the Senate in treaty interpretation: what's all the fuss about? *Yale journal of international law*, v. 15, summer 1990: 331-344.

"Article II of the Constitution mandates that the Senate and President act as partners in the treaty process, with each institution fulfilling a constitutional role \*\*\*. Even when particular issues prove contentious, as recently occurred during the Anti-Ballistic Missile (ABM) \*\*\*. the two branches simply need one another too much to allow political stalemate and acrimony to persist indefinitely."

Koplow, David A. When is an amendment not an amendment?: modification of arms control agreements without the Senate. *University of Chicago law review*, v. 59, summer 1992: 981-1072.

"Several recent international agreements limiting nuclear or other advanced weaponry purport to authorize the parties to modify some of their negotiated terms through informal mechanisms other than the traditional treaty amendment, thereby cutting the United States Congress out of the revision process \*\*\*. This Article dissects the legal and policy issues raised by this proposed avenue for creating new treaty terms. It offers a critique of the practice and some recommendations for constraining the danger before a constitutional crisis fully erupts."

Kuchenbecker, David J. Agency-level executive agreements: a new era in U.S. treaty practice. *Columbia journal of transnational law*, v. 18, no. 1, 1979: 1-77.

"This article examines in detail the employment of agency-level executive agreements as an instrument of U.S. treaty practice \*\*\*. Section 3 assesses the



current state of the agencies' agreement practice, identifying the strengths and weaknesses thereof, examples of intra-agency disputes involving the State Department, and congressional action, in the form of newly enacted legislation, to remedy some of the weaknesses." The "weaknesses" include lack of cooperation by agencies with the State Department in meeting the requirements of the Case Act, that executive agreements be transmitted to Congress within 60 days of their execution.

Leary, Margaret A. International executive agreements: a guide to the legal issues and research sources. *Law library journal*, v. 72, winter 1979: 1-11.

"This article outlines the legal issues, both current and historical, raised by the use of executive agreements in international matters and cites the most useful sources for further research."

Lippa, Alison V. The legality, efficacy, and future use of international executive agreements: an analysis of agreements in criminal matters. *American criminal law review*, v. 29, summer 1992: 1301-1348.

"The first half of the [comment] discusses the general constitutional background of executive agreements and focuses on their impact on the separation of powers doctrine. The second half of the [comment] deals more specifically with sole executive agreements which facilitate the exchange of information between nations in investigations of criminal matters. The [comment] concentrates on case-specific and issue-specific agreements and analyzes the utility of such agreements in light of alternative ways of obtaining mutual assistance for the sharing and transferring of information and evidence in criminal investigations and prosecutions."

Loeb, Benjamin S. Amend the Constitution's treaty clause. *Bulletin of the atomic scientists*, v. 43, Oct. 1987: 38-41.

"The Constitution's two-hundredth anniversary presents an ideal occasion, says the author, to reexamine the outmoded requirement that treaties be ratified by a two-thirds vote of the Senate."

Majak, R. Roger. International agreements, an analysis of executive regulations and practices. Prepared for the use of Committee on Foreign Relations, United States Senate by the Congressional Research Service, Library of Congress, 1974-1975. Washington, U.S. Government Printing Office, 1977. 73 p.

This "study attempts to describe the procedures and practices by which international agreements are formulated and entered into by the United States, and to assess those procedures and practices in terms of possible improvements in congressional oversight and involvement." The study is based on primary documents and interviews with officials involved in making international agreements on behalf of the United States. A chart, consisting of 22 folded leaves, is included in the pocket. It compares successive State Department procedures regarding treaties and international agreements of the U.S. under the Original Circular 25 of May 15, 1953; Circular 175 of December 13, 1955; Circular 175 of June 6, 1969; proposed revision of Circular 175 of August 15, 1973; and the final revised Circular 175 of October 25, 1974. "96th Congress, 1st session. Committee print."

Mathews, Craig. The constitutional power of the President to conclude international agreements. *Yale law journal*, v. 64, Jan. 1955: 345-389.

Examines the scope of the President's power to conclude international agreements when he acts without the authorization of Congress or the Senate. Also considers to what extent Congress can constitutionally limit the President in the exercise of this power.

McClure, Wallace M. International executive agreements; democratic procedure under the Constitution of the United States. New York, Columbia University Press, 1941. 449 p.

McClure surveys the use of executive agreements and treaties, contends that treaties and executive agreements have been used interchangeably in the past, and examines the constitutional powers of the President and Congress regarding international agreements. He argues that to require assent of two-thirds of the Senate for treaty ratification is to promote a form of minority rule. McClure contends: "There is nothing that can be done by treaty that cannot be done by Congress—confirmed executive agreement, which, viewed as an instrument of national policy, is simply a democratic treaty—a treaty enacted through democratic processes."

McDougal, Myres S. Lans, Asher. Treaties and congressional-executive or Presidential agreements: interchangeable instruments of national policy. *Yale law journal*, v. 54, Mar. 1945: 181-351; June 1945: 534-615.

The authors refute the suggestions that executive agreements must be confined to unimportant matters, in light of the broad constitutional powers of the

Congress and the President. They describe how congressional-executive and Presidential agreements have become interchangeable with treaties in U.S. diplomatic practice. McDougal and Lans compare the legal consequences which courts and other governmental officials attach to congressional-executive and presidential agreements and treaties, contending that there are no important differences. They examine the reasons "that are alleged to have motivated the original adoption of the treaty-making procedure," appraise their contemporary relevance and consider how congressional-executive and Presidential agreements may be used to meet urgent problems in the post-war world "if the minority controlled treaty making procedure should for any reason become inadequate to meet the responsibilities of that world." Edwin Borchart, in *Treaties and Executive Agreements—A Reply*, which immediately follows the second part of the McDougal-Lans article (pp. 616–664), contends that there are significant differences between treaties and executive agreements. He critiques the proposals by McDougal and Lans for using congressional-executive agreements in place of treaties.

Merin, Kenneth D. The treaty power and congressional power in conflict: cession of United States property in the Canal Zone to Panama. *Seton Hall law review*, v. 8, no. 3, 1977: 434–459.

"After discussing the status of American sovereignty in the Canal Zone, as well as the general scope of the treaty power, this Article \*\*\* examine[s] the grounds on which the Executive branch has based its claim to concurrent power over the disposal of United States territory and property."

Michelson, Melissa R. Explorations in public opinion—presidential power linkages: congressional action on unpopular foreign agreements. *Political communication*, v. 15, Jan./Mar. 1998: 63–82.

"This article explores the effect of public opinion on congressional action on foreign agreements, focusing on the Panama Canal treaties of 1977 and the North American Free Trade Agreement of 1993. The two agreements are highly suited to comparison, and provide an excellent test of how shifts in public opinion influence shifts in congressional support. Two types of opinion are included: (1) the general rating of the President's job performance, and (2) opinion on the foreign agreement being debated in Congress."

Murphy, John F. Treaties and international agreements other than treaties: constitutional allocation of power and responsibility among the President, the House of Representatives, and the Senate. *Kansas law review*, v. 23, winter 1975: 221–248.

This "Article examines such issues as the scope of the President's independent authority to conclude international agreements, the authority of the President and Congress to combine their powers and conclude so-called congressional-executive agreements in place of treaties and the extent to which such agreements are interchangeable with treaties in domestic and international legal effect, and past and present efforts to resolve these problems in the form of legislation and other, more informal procedures. Finally, the Article attempts an appraisal, in light of constitutional law and policy, of the present international agreement-making roles of the President and the two Houses of Congress, and sets forth proposals for possible reforms in this areas."

Ohly, D. Christopher. Advice and consent: international executive claims settlement agreements. *California Western international law journal*, v. 5, winter 1975: 271–296.

In this article, Ohly considers the constitutional power of Congress to check the Presidential use of executive agreements in settling international claims by nationals of the United States against foreign governments.

Paige, Joseph. *The law nobody knows: enlargement of the Constitution—treaties and executive agreements*. New York, Vantage Press, © 1977. 209 p.

Partial contents.—The constitutional authority for treaty making.—The status of treaty-implementing acts.—Ratification by joint resolution.—Executive agreements.—Judicial development of treaty law.—Suggestions, plans and opinions.

Pan, Stephen C. Legal aspects of the Yalta Agreement. *American journal of international law*, v. 46, Jan. 1952: 40–59.

In a survey of various legal questions regarding the Yalta Agreement, Pan reviews actions and statements by President Roosevelt "which implied that the Yalta Agreement might not be exempt from congressional or Senatorial approval." He discusses whether executive agreements are binding on subsequent Administrations since "an executive agreement is signed by the Chief Executive and not solemnly entered into in the name of the 'United States of America' in the form of international 'treaties'."

- Rague, Margaret A. The reservation power and the Connally Amendment. *New York University journal of international law and politics*, v. 11, fall 1978: 323-358.  
 "This note examines the Connally Amendment in the context of the history and present use of the United States Senate reservation power. The Note further measures the Connally Amendment against the yet unfolding international rules with regard to use of the reservation power. The Note also reviews domestic criticism and support of the Amendment and efforts to repeal the Amendment, and examines the future of the Amendment as an instrument of U.S. foreign policy."
- Randall, Kenneth C. The Treaty power. *Ohio State law journal*, v. 51, no. 5, 1990: 1089-1126.  
 "This Article's thesis is straightforward: Where article II of the Constitution empowers the executive to govern exclusively over a particular topic, the President may unilaterally make, reinterpret, and terminate executive agreements without any senatorial consent \*\*\*. This article will examine executive agreements, the interpretation of international agreements, and the termination of international agreements."
- Reisman, W. Michael. Necessary and proper: executive competence to interpret treaties. *Yale journal of international law*, v. 15, summer 1990: 316-330.  
 "The complex of separate branches with some overlapping and sequential functions and checks and balances has achieved effectiveness and control in the area of treaty-making and performance."
- Reter, Ronald F. President Theodore Roosevelt and the Senate's "advice and consent" to treaties. *Historian (New Mexico)*, v. 44, Aug. 1982: 483-504.  
 "The present era of senatorial aggressiveness questions the development of the modern presidency. T.R.'s alleged success in circumventing the Senate is a key element in this development. The constitutional effect and significance of Rooseveltian executive agreements are suspect \*\*\*. A crucial aspect of further investigations must be the separation of reputation from the actual successful exercise of power."
- Rovine, Arthur W. Separation of powers and international executive agreements. *Indiana law journal*, v. 52, winter 1977: 397-431.  
 The author establishes criteria for identifying international agreements and examines criticisms of executive branch practices regarding international agreements, including lack of consultation with Congress. Rovine considers the intention of the framers of the Constitution and the authority of the President to enter into executive agreements based on his constitutional powers. Rovine reviews State Department guidelines listing the variables examined in determining whether a particular agreement should be a treaty or an executive agreement. He suggests that "if detailed regulation over specific areas proves insufficient for the Congress, then the current conflict between the two branches over international agreements will be resolved not so much by arriving at definitive legal solutions to complex separation of powers issues, but rather through an improved political process that entails an ongoing and cooperative system of consultation on issues of significance."
- Skoblow, David V. The Panama Canal treaties and the property disposal clause: do the treaties propose an unconstitutional giveaway? *Georgetown law review*, v. 66, Feb. 1978: 871-897.  
 "This Comment examines the constitutional and legal issues raised by the proposed transfer by treaty of sovereignty and property in the Canal Zone, and attempts to determine what rights the United States would relinquish, if the treaties become effective."
- Slonim, Solomon. Congressional executive agreements. *Columbia journal of transnational law*, v. 14, no. 3, 1975: 434-450.  
 "If indeed the protection of small States and sectional interests was a crucial factor, if not the crucial factor, in the formulation of the treaty-making provision, it appears highly unlikely that a majority vote in both Houses of Congress would represent a superior title to a two-thirds vote in the Senate alone, for the safeguards originally built into the latter provision would be obliterated. Yet, while the attempt to equate congressional-executive agreements with treaties on the basis of the Framers' intentions is shaky at best, the same cannot be said of validation of congressional-executive agreements by reference to subsequent constitutional practice \*\*\*. There still remain various categories of international agreements which do not fall within the scope of congressional powers, whether enumerated or implied. If the intentions of the Founding Fathers were adhered to, these matters would require the advice and consent of two-thirds of the Senate. But, as noted, practice, by and large, has modified the assumption of the Founding Fathers."

Stevens, Charles J. The use and control of executive agreements: recent congressional initiatives. *Orbis*, v. 20, winter 1977: 905–931.

The author examines the use of executive agreements and reviews congressional initiatives to insure legislative involvement in the development of U.S. commitments abroad. Stevens recounts the debate in the 1950s over the Bricker amendment and other proposals to assure legislative control over the effects of treaties and executive agreements. He reviews the findings and recommendations of the Senate Foreign Relations Committee, Ad Hoc Subcommittee on United States Security Agreements and Commitments Abroad (the Symington Subcommittee), in 1970. Stevens also describes U.S. military base negotiations with Spain and the use of a treaty of friendship and cooperation in 1976, to replace previous executive agreements with Spain. He discusses the Case Act which requires the Secretary of State to “transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party” within 60 days of its entry into force. Stevens considers congressional requests that military base agreements with Portugal and Bahrain, concluded in 1971, be submitted for approval as treaties, and subsequent efforts to nullify the effect of the agreements by refusing to appropriate funds for their implementation. He also surveys efforts to revive legislation that would permit a congressional veto of executive agreements.

Strong, Robert A. Jimmy Carter and the Panama Canal treaties. *Presidential studies quarterly*, v. 21, spring 1991: 269–286. Symposium on Parliamentary Participation in the making and operation of treaties. Edited by Stefan A. Riesenfeld and Frederick M. Abbott. *Chicago-Kent law review*, v. 67, no. 2, 1991: 293–704.

Partial contents.—The participation of parliament in the elaboration and application of treaties, by Francois Lichaire.—The Role of the United States Senate concerning “self-executing” and “non-self-executing” treaties, by Lori Fisler Damrosch.—The Constitutional power of the United States Senate to condition its consent to treaties, by Michael J. Glennon.—The scope of U.S. Senate control over the conclusion and operation of treaties, by Stefan A. Riesenfeld and Frederick M. Abbott.—The Role of the President, the Senate and Congress with respect to arms control treaties concluded by the United States, by Phillip R. Trimble, and Jack S. Weise.

Tananbaum, Duane A. The Bricker amendment controversy: its origins and Eisenhower’s role. *Diplomatic history*, v. 9, winter 1985: 73–93.

Examines the controversy during the 83d Congress over the constitutional amendment proposed by Senator Bricker of Ohio that would have limited the effect of treaties and executive agreements within the United States.

Tomain, Joseph P. Executive agreements and the bypassing of Congress. *Journal of international law and economics*, v. 8, June 1973: 129–139.

In this comment Tomain discusses how the executive branch has significantly increased its power in foreign policy by using executive agreements. He also considers the implications of the Transmittal Act of 1972.

Treaty ratification. Washington, *Congressional Quarterly*, 1988. 38–51 p. (Editorial research reports, 1988, v. 1, no. 4)

Partial contents.—INF treaty moves on to the next phase in the ratification process.—Prospects for INF ratification; memories of 1979 SALT II treaty.—After the Senate vote: waiting for president and Soviets to respond.

The Transfer of destroyers to Great Britain. *American journal of international law*, v. 34, Oct. 1940: 569–587, 680–697, 728–736.

In comments, Quincy Wright (pp. 680–689) and Edwin Borchard (pp. 690–697) examine the constitutional authority of President Roosevelt to agree, without congressional consultation, to provide Great Britain with 50 over-age destroyers in exchange for 99-year leases on naval bases in the Caribbean. Both critique Attorney General Robert H. Jackson’s Opinion on the exchange, which is reprinted on pp. 728–736. Regarding executive-congressional relations and use of an executive agreement instead of a treaty, Wright contends: “If the aid of Congress is necessary for fulfillment, the President should, before finally approving the instrument, either get the advice and consent of the Senate, thus making it a treaty in the constitutional sense, or he should get an authorizing act from Congress making appropriations or enacting legislation to fulfill such obligations. Since the present agreement imposed no such obligation requiring Congressional action, neither of these procedures was necessary.”

Borchard urges “that the transaction be regularized so far as and as soon as possible by act or resolution of Congress.” He argues: “It has been the usual practice, aside from executive agreements in minor matters or under congressional authority, to submit important matters to Congress or the Senate for ap-

proval." Apart from subordination of Presidential power to the "applicable provisions of the Constitution," "there are constitutional understandings which require that agreements of great importance, particularly involving the question of war and peace, shall not be concluded by Executive authority alone."

He critiques the relevance of precedents cited by the Attorney General, refutes arguments justifying use of an executive agreement instead of a treaty, and also raises questions of international law.

Herbert Briggs (pp. 569–587) provides historical and legal observations on the transfer of naval vessels from a neutral navy to a belligerent navy.

U.S. Congress. House. Committee on International Relations. Subcommittee on International Security and Scientific Affairs. Congressional review of international agreements. Hearings, 94th Cong., 2d Sess., June 22–July 22, 1976. Washington, U.S. Government Printing Office, 1976. 416 p.

The subcommittee considers legislation providing for congressional review of international executive agreements. Discussion is included on: the Senate's treaty powers, the President's authority to conclude agreements based on his constitutional powers, the power of Congress to demand transmission of agreements and to suspend the entering into force of executive agreements, and the intention of the framers of the Constitution. Individual cases discussed include the Rush-Bagot Agreement of 1817 with Great Britain limiting naval forces on the Great Lakes. Professor Arthur Bestor suggests that one clear precedent which emerges from the handing of the Rush-Bagot Agreement is "that it is not a prerogative of the President to decide whether an international agreement should be submitted for approval as a treaty. The power to decide belongs to the Senate." The subcommittee also considers whether treaties and executive agreements are inter-changeable, as well as the constitutional problems posed by concurrent resolutions and legislative vetoes, the evolution of executive branch use of executive agreements instead of treaties, and the importance of prior consultation and cooperation between the executive and legislative branches in the making of international agreements. Executive branch perspectives on constitutional and practical problems posed by the proposed legislation are also included. Appended to the hearings are texts of bills regarding congressional review of executive agreements, relevant journal articles, executive and congressional documents, and summaries of the hearings, with selected bibliographies on topics addressed.

U.S. Congress. Senate. Committee on Foreign Relations. International agreements consultation resolution; report to accompany S. Res. 536. Washington, U.S. Government Printing Office, 1978. 4 p. (95th Cong., 2d Sess., S. Rept. 95–1171)

The Committee on Foreign Relations reports favorably on S. Res. 536 and recommends that the resolution pass. "The resolution expresses the sense of the Senate that, in determining whether a particular international agreement should be submitted as a treaty, the President should have the timely advice of the Committee on Foreign Relations through agreed procedures established through the Secretary of State. This provision is similar to consultation provisions contained in Senate Resolutions 424 and 486 in the 95th Congress as well as Senate Resolution 24 in the 95th congress, all sponsored by Senator Clark. The latter resolution was incorporated in the Foreign Relations Authorization Act, Fiscal Year 1979 (S. 3076) as section 502, as reported by the committee. This section was stricken on the Senate floor, with the exception of the consultation provision on which the Senate receded in conference." This resolution is similar to that provision."

———. The role of the Senate in treaty ratification. Washington, U.S. Government Printing Office, 1977. 78 p.

At head of title: 95th Congress, 1st session. Committee Print.

Partial contents of staff memorandum prepared by M. Hansen.—Receipt and committee action.—Amendments, reservations, understanding, interpretations, etc.—Floor action.

Partial contents of the appendices.—Senate procedure, S. Doc. 93–21, excerpt.—the meaning of "advice and consent of the Senate: in the treaty-making process, by E. Collier, CRS.—Treaties returned to the President on the initiative of the Senate, by L. Wu, CRS.—Precedents for U.S. abrogation of treaties, by V. Bite, CRS.

———. Treaty powers resolution. Hearings, 94th Cong., 2d Sess., on S. Res. 468, July 21 and 28, 1976. Washington, U.S. Government Printing Office, 1977. 127 p.

The committee considers Senate Resolution 486, which "expresses the sense of the Senate that foreign international agreements involving significant political, military, or economic commitments to foreign countries properly constitute

treaties which should be submitted to the Senate for its advice and consent." Professor Arthur Bestor reviews the intent of the framers of the Constitution and use of international agreements in the early years of the Republic, considering especially the Rush-Bagot Agreement of 1817-1818, which provided for the naval demilitarization of the Great Lakes. Professor Richard Falk discusses problems in deciding which commitments should be treaties. Monroe Leigh, Legal Advisor for the Department of State, suggests that the resolution would "seriously diminish the role of the House of Representatives in authorizing or approving many international agreements \*\*\* would interfere with the President's role as the nation's negotiator of international agreements \*\*\* and would raise questions with respect to the requirements concerning adoption of legislation."

U.S. Congress. Senate. Committee on Foreign Relations. Subcommittee on United States Security Agreements and Commitments Abroad. Security agreements and commitments abroad; report. Washington, U.S. Government Printing Office, 1970. 28 p.

At head of title: 91st Congress, 2d Session. Committee Print.

This report highlights specific findings of the subcommittee during its 22-month study of U.S. commitments abroad. Many of the commitments had been unknown to the Congress prior to the study. The report concludes with recommendations that "both Congress and the Executive Branch should place more emphasis on new arrangements for continuing, objective review of all aspects of military and military-related programs and activities overseas."

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. Congressional oversight of executive agreements. Hearing, 92d Cong., 2d Sess., on S. 3475. Apr. 24 \*\*\* May 19, 1972. Washington, U.S. Government Printing Office, 1972. 668 p.

In its consideration of S. 3475, a bill providing for congressional review of executive agreements, the committee examines the constitutional issues and separation of powers problems presented by the increasing use of executive agreements. Statements by Senators, scholars, and executive branch officials are supplemented by relevant government documents, academic publications, and articles from the press.

———. Congressional oversight of executive agreements—1975. Hearings, 94th Cong., 1st Sess., on S. 632 and S. 1251. May 13 \*\*\* July 25, 1975. Washington, U.S. Government Printing Office, 1975. 505 p.

"The purpose of this inquiry is to examine closely the use of executive agreements, and to explore those remedial measures which might be employed to redress the usurpation of power by the executive branch which has occurred in this area of foreign policy." The appendix contains articles, executive documents, and congressional publications concerning the use of executive agreements and treaties in general and in specific instances, including unreported agreements with the Republic of Korea, unreported intelligence agreements, Defense Department agreements, agreements regarding the early warning system in the Sinai, and correspondence regarding U.S. assistance to South Vietnam in the post-settlement period.

———. Treaty ratification process and separation of powers. Hearing, 97th Cong., 2d Sess., on S.J. Res. 212. July 30, 1982. Washington, U.S. Government Printing Office, 1982. 201 p. "Serial no. J-97-128" Item 1042-A, 1042-B (microfiche)

U.S. Department of State. The law of treaties and other international agreements. In its Digest of United States practice in international law, 1974, by Arthur W. Rovine. Washington, U.S. Government Printing Office, 1975. pp. 195-239.

Contents.—Section 1.—Conclusion and entry into force.—Definition of international agreement.—Procedures.—Ratification.—Depositary functions.—Section 2.—Observance, application and interpretation.—Section 3.—Amendment and modification.

United States foreign relations law: documents and sources. Edited by Michael J. Glennon [and] Thomas M. Franck. London; New York, Oceana Publications, 1980+ v. 1, 2.

"The materials contained in these volumes deal with the foreign relations power of the federal government. For the most part they consist of documents presenting the views of the executive and legislative branches—or components thereof—concerning the scope of their authority."

Contents.—Vol. 1.—What constitutes an international agreement?—The power to enter into executive agreements and the role of Congress.—Treaty or executive agreement: choice of instruments.—Congressional controls over executive agreements: recent proposals.—Vol. 2.—The role of the Senate in treaty ratification.—Legal consequences of conditions attached to ratification of trea-

- ties.—Role of the House of Representatives in the making of international treaties.—Termination of treaties.
- Vartian, Armen R. Approval of SALT agreements by joint resolution of Congress. *Harvard international law journal*, v. 21, summer 1980: 421–466.
- “This Comment will examine the constitutional concerns implicated by the decision to approve SALT agreements by joint resolution of Congress. It will be argued not only that such agreements are constitutionally valid, but that there should exist a presumption toward use of the joint resolution for SALT agreements. The argument will demonstrate that the three commonly offered ‘tests’ for determining which international agreements require the treaty form are useless in the context of SALT agreements.”
- Webb, Richard E. Treaty-making and the President’s obligation to seek the advice and consent of the Senate with special reference to the Vietnam peace negotiation. *Ohio State law journal*, v. 31, summer 1970: 490–515.
- After reviewing E.S. Corwin’s judgments on the treaty-making clause, Webb contends that the President does not have the constitutional power to negotiate a peace treaty with North and South Vietnam without the formal advice and consent of the Senate.
- Wendel, Gary C. Constitutional authority for executive agreements pertaining to the Armed Forces. *Air Force law review*, v. 20, 1978: 71–86.
- “Of serious concern to the Senate, however, are those international agreements made by the president without congressional action or senatorial concurrence. This discussion concerns only those agreements made solely on the basis of the President’s ‘constitutional authority.’”
- Wright, Quincy. The United States and international agreements. *American journal of international law*, v. 38, July 1944: 341–355.
- Wright examines four perspectives on the constitutional law governing the making of international agreements: 1) that exclusive power to make international commitments is vested in the President acting with advice and consent of two-thirds of the Senate; 2) that the constitutional authority to make international agreements depends on the subject matter of the agreements; 3) that Congress is the sovereign authority in the central government and therefore has authority to determine how international agreements should be made “apart from explicit constitutional grants to other bodies,” and 4) “that the making of international agreements is by nature an executive function,” and the President can make international agreements on any subject. Wright discusses the assumptions and arguments underlying these perspectives, reviews constitutional history, and surveys the Senate record in treaty-making. He writes: “The conclusion may be drawn that in the making of international agreements, particularly those concerned with the conclusion of peace and establishment of institutions for perpetuating it, the matter rests in a very real sense in the hands of the President and the people. The President has ample legal power to negotiate, on these subjects, and ample political power if he can command a majority in both Houses of Congress \*\*\*. There has never been any Constitutional bar to concluding international agreements within the scope of Congressional power if desired by the President and a majority of both Houses.”

### 3. COMMUNICATION OF INTERNATIONAL AGREEMENTS TO CONGRESS

- U.S. Congress. House. Committee on Foreign Affairs. Transmittal of executive agreements to Congress; reports to accompany S. 596. [Washington, U.S. Government Printing Office] 1972. 4 p. (92d Cong., 2d Sess., House. Report no. 92–1301)

These reports include consideration of the meaning and background of bill S. 596, requiring that international agreements other than treaties be transmitted to the Congress within 60 days after they go into effect. The reports also contain discussion of comments by the Committee of Foreign Affairs regarding the bill.

- U.S. Congress. House. Committee on Foreign Affairs. Subcommittee on National Security Policy and Scientific Developments. International executive agreements. Hearing, 92d Cong., 2d Sess., on S. 596, H.R. 14365, and H.R. 14647. June 19, 1972. Washington, U.S. Government Printing Office, 1972. 29 p.

Testimony of Senator Clifford Case and Carl F. Salans, Deputy Advisor, Department of State.

These hearings were held to consider “legislation which would require that the texts of all future executive agreements concluded by the President with foreign states must be transmitted to Congress within 60 days after their execution.” Discussion is included on the meaning of the legislation, why it is needed, and its security implications.

U.S. Congress. Senate. Committee on Foreign Relations. Foreign Relations Authorization Act, fiscal year 1979; report together with additional views on S. 3076. Washington, U.S. Government Printing Office, 1978. pp. 45-56. (95th Cong., 2d Sess., Senate. Report. No. 95-842)

The cited section of this report addresses problems in the reporting of international agreements by executive branch agencies to Congress and discusses Title V. of S. 3076, which would amend the Case-Zablocki Act to 1) require transmittal of oral agreements, reduced to writing, 2) require the President to report to Congress annually, explaining why any agreement of the previous year was transmitted late, 3) require that no agreement be concluded or submitted without prior approval of the Secretary of State or the President, 4) place the Secretary of State in the position of determining whether an arrangement constitutes an international agreement within the meaning of the Case Act and 5) authorize the President to promulgate rules and regulations necessary to carry out the Act.

In the final version of the act approved by the President, the word "international" was inserted between oral and agreements, and point 3 was changed to specify that no agreement be concluded or submitted without prior consultation with the President or Secretary of State.

———. Transmittal of executive agreements to Congress. Hearings, 92d Cong., 1st Sess., on S. 596. Oct. 20 and 21, 1971. Washington U.S. Government Printing Office, 1971. 97 p.

These hearings on the Case Bill, which would require the transmittal of all executive agreements to Congress within 60 days of their execution, include statements by Senator Case on the bill, its legislative history, and Senate relations with the executive branch. They also include statements by Professor Ruhl J. Bartlett on the increasing use of executive agreements and on constitutional issues regarding their use. Professor Alexander Bickel considers the need for congressional review of U.S. military deployments abroad, the constitutionality of the Case Bill, and the possibility that Presidents might invoke executive privilege regarding specific agreements. John R. Stevenson, Legal Adviser, Department of State, and Charles I. Bevans, Assistant Legal Adviser for Treaty Affairs, provide State Department perspectives on the Case Bill, describe procedures followed in entering into agreements, review Presidential powers, propose alternatives and amendments to the bill, and discuss problems concerning security, classified information, and intelligence operations.

———. Transmittal of executive agreements to Congress; report to accompany S. 596. Washington, U.S. Government Printing Office, 1972. 5 p. (92d Cong., 2d Sess., Senate. Report no. 92-591)

Provides background on bill S. 596, requiring that international agreements other than treaties be transmitted to the Congress within 60 days after they go into effect, and includes comments by the Committee on Foreign Relations regarding the bill.

U.S. Department of State. Memo of March 12, 1976, from Monroe Leigh, Legal Adviser, Department of State, to all key Department personnel. In its Digest of United States practice in international law, 1976. [Washington, 1976] pp. 263-267.

Specified the criteria the State Department's Legal Adviser applies in deciding what constitutes an international agreement, for "purposes of implementing legal requirements with respect to publication of international agreements and transmittal of international agreements to Congress."

U.S. Department of State. Office of the Secretary. Coordination and reporting of international agreements. Federal register, v. 46, July 13, 1981: 35917-35921.

The text of Department of State departmental regulations 108.809, 22 CFR Part 181, is provided, with summary and supplemental information. "The regulations outline the criteria applied by the Department of State in deciding what constitutes an international agreement, and provides that determinations of such questions are made by the Legal Adviser of the Department of State, usually acting through the Assistant Legal Adviser for Treaty Affairs. The regulations spell out procedures to be followed in consulting with the Secretary of State or his designee before signing or otherwise concluding an international agreement, and detail the procedures to be followed by the Department of State in transmitting concluded agreements to the Congress."

U.S. General Accounting Office. Reporting of U.S. international agreements by executive agencies has improved; report to the Congress by the Comptroller General of the United States. Washington, G.A.O., 1978. 53 p.

"ID-78-57, Oct. 31, 1978" "The Case-Zablocki Act requires the Secretary of State to report international agreements concluded by all executive agencies to



Congress within 60 days after they become effective \*\*\*. Federal agencies have become more aware of their Act responsibilities, reporting requirements have been clarified and controls have been improved since GAO's 1976 report on this subject."

———. U.S. agreements with the Republic of Korea, Department of State and Defense; report of the Comptroller General of the United States. Washington, G.A.O., 1976. 25 p.

"ID-76-20, Feb. 20, 1976" \*\*\*\* certain agencies have not been submitting to the State Department or the Congress all agency-level agreements they have concluded. Some agencies have apparently interpreted agreements which are concluded by agency personnel or which are of a subordinate or implementing character to be outside the reporting requirements of the Case Act. Congressional and State Department clarification of the reporting requirements and improved controls over the reporting of agreements are needed."

#### 4. U.S. TERMINATION OF TREATIES

Adler, David Gray. The Framers and treaty termination: a matter of symmetry. *Arizona State law journal*, v. 1981, no. 4, 1981: 891-923.

Article reviews the debates over the treaty-making power in the 1787 Constitutional Convention and the state ratifying conventions, concluding that "the Supreme Court's failure in *Goldwater v. Carter* to uphold the right of the Senate to a voice in the termination of the [Taiwan-U.S.] Mutual Defense Treaty, is a repudiation of the Framers' concerns, and the crucial compromises that had to be reached in order for the states to agree to confederate."

Emerson, J. Terry. The legislative role in treaty abrogation. *Journal of legislation*, v. 5, 1978: 46-80.

"It is the premise of this article that Congress as a corporate entity, or at least the Senate, should reaffirm its long-standing role in the treaty termination process at least by declaring its understanding of the method which the Constitution requires for the abrogation of treaties and calling upon the Executive for prompt information of each Presidential action purporting to remove our nation from a treaty obligation."

———. Treaty termination revisited. *Woodrow Wilson journal of law*, v. 4, summer 1982: 1-25.

"The United States Supreme Court has indicated it will step aside should the Executive Branch attempt the unilateral dismantlement of the post World War II arrangement of security treaties that has been a protective umbrella over the free world for nearly four decades. Neither the Court, nor the Constitution, is a bar to presidential abrogation of formal treaties without any implied or active participation of the legislative department. Congress must find and use its own resources to thwart such action, if it is disposed to challenge presidential conduct. These are the lessons of Court's decision in *Goldwater v. Carter* announced on December 13, 1979."

Goldwater, Barry M. Treaty termination is a shared power. *Policy review*, no. 8, spring 1979: 115-124.

Senator Goldwater challenges "the validity of the President's attempted termination of the treaty without any supporting legislative authority."

*Goldwater v. Carter*: symposium. *Yale studies in world public order*, v. 6, fall 1979: 1-235.

Contents.—*Goldwater v. Carter*: crisis in American constitutional arrangements for the conduct of international relations, by C. Oliver.—The abuse of history: a refutation of the State Department analysis of alleged instances of independent Presidential treaty termination, by J. Thomas.—*Goldwater v. Carter*: the constitutional allocation of power in treaty termination, by E. Gaffney, Jr.—The constitutional power to terminate treaties: who, when, and why, by A. Swan.

Guttenborg, David A. Treaty termination and the separation of powers: the constitutional controversy continues in *Goldwater v. Carter*, 100 S. Ct. 533 (1979) (Mem.) *Denver journal of international law and policy*, v. 9, summer 1980: 239-260.

"The United States Supreme Court recently rejected the contention of a number of Members of Congress that President Carter improperly terminated the Mutual Defense Treaty of 1954 with the Republic of China (Taiwan). This Case Note analyzes the history, constitutional interpretations, and legal theories on which the Supreme Court's decision was based and discusses its effect on current and future treaties. The author concludes that because the termination ac-

- companied the derecognition of the Republic of China, its precedential effect is diminished.”
- Henkin, Louis. Litigating the President's power to terminate treaties. *American journal of international law*, v. 73, Oct. 1979: 647–654.
- Louis Henkin discusses the obstacles facing Members of Congress who seek to litigate Presidential power in foreign affairs. He examines arguments supporting and opposing the contention that the President has the power to terminate treaties.
- Henkin suggests, “As a general proposition, there may be serious, if hypothetical, reason for concern that a President might unilaterally pull us out of, say, NATO or SALT \*\*\*. There, as perhaps elsewhere, it is plausible to urge that the President should not act to terminate an important treaty without at least meaningful consultation with Congress, congressional committees, congressional leaders \*\*\*.
- “A different constitutional issue is whether the Senate can require, as a condition of its consent to a particular treaty, a presidential undertaking to terminate that treaty only in accordance with prescribed procedure.”
- Lawson, Karin Lee. The constitutional twilight zone of treaty termination: *Goldwater v. Carter*. *Virginia journal of international law*, v. 20, fall 1979: 147–169.
- “*Goldwater v. Carter* raised an issue never before litigated in U.S. courts: does the U.S. Constitution, because of its silence with regard to the termination process, implicitly give that power to the President? \*\*\* The Supreme Court's order to vacate the court of appeals' opinion and dismiss the complaint solved the question of termination of the Mutual Defense Treaty, but left unanswered the presidential power issue.”
- Martin, Serge G. The President's power to terminate treaties: the unanswered question of *Goldwater v. Carter*. *Journal of international law and economics*, v. 14, no. 2, 1980: 301–319.
- “This note examines the constitutionality of presidential actions effecting the termination of treaties in the absence of any prior congressional consent \*\*\*. Prior to the recent case of *Goldwater v. Carter*, this issue had never been directly presented to any court.”
- Murray, Nancy J. Treaty termination by the President without Senate or congressional approval: the case of the Taiwan treaty. *Southwestern law journal*, v. 33, June 1979: 729–761.
- “This comment discusses the nature of treaties, the treaty-making process, and the history of treaty-termination practices. Special emphasis is given to issues that arise in *Goldwater v. Carter*, including who has standing to challenge the President's independent termination of a treaty and, more importantly, whether such a challenge presents a justifiable controversy.”
- The Question of Presidential power to terminate treaties. *Congressional digest*, v. 58, June–July 1979: 161–192.
- Contents.—The question of Presidential power to terminate treaties.—The foreword.—Evolution of the mutual security treaties.—Recent action in the Congress.—The Taiwan Treaty lawsuit: Senator Goldwater.—The Taiwan Treaty lawsuit: President Carter.—Should the Byrd proposal concerning the termination of mutual defense treaties be adopted?
- Resolving treaty termination disputes. *University of Pennsylvania law review*, v. 129, May 1981: 1189–1229.
- “This comment has addressed the question whether the termination of a treaty requires legislative participation, or, rather, only executive action. Observing that the United States is party to a wide variety of treaties, it suggests that different treaty terminations will implicate different congressional and presidential interests in controlling the termination decision. Depending on the interest implicated, unilateral presidential treaty termination will be permissible in some cases, while in others, legislative participation will be required. A balancing test, looking to the various governmental interests at stake in treaty terminations, was proposed for determining the appropriate manner of making a particular treaty termination decision. The Comment concluded by arguing that, whatever test may be adopted, an established procedure for deciding who is to participate in treaty terminations would be desirable.”
- Rubin, Alfred P. Constitutional confusion: treaty denunciation. *Fletcher forum*, v. 4, winter 1980: 88–93.
- Examines some of Judge Gasch's reasoning “in the case of *Senator Barry Goldwater, et al. v. James Earl Carter, et al.*, that President Carter's notice of termination of the 1954 Mutual Defense Treaty Between the United States and the Republic of China must receive the approval of two-thirds of the United

- States Senate or a majority of both houses of Congress for that notice to be effective.”
- Scheffer, David J. The law of treaty termination as applied to the United States derecognition of the Republic of China. *Harvard international law*, v. 19, fall 1978: 931–1009.
- “The first part of this Comment reviews, in their legal context, the recent events which have culminated in normalization of relations between the United States and the PRC \*\*\*. The second part of this Comment examines the weaknesses of the ‘lapse’ theory in light of the recent events discrediting its relevance \*\*\*. The third part analyzes, in the context of normalization, the more general issue of how treaties should be abrogated by the United States government.”
- U.S. Congress. Senate. Committee on Foreign Relations. Termination of treaties: the constitutional allocation of power. Washington, U.S. U.S. Government Printing Office, 1979. 423 p.
- At head of title: 95th Congress, 2d Session. Committee Print.
- This compilation of materials on the termination of treaties includes State Department lists of withdrawals from bilateral and multilateral treaties as well as academic publication, articles from the press, and executive and congressional publications.
- . Treaty termination. Hearings, 96th Cong., 1st Sess., Apr. 9–11, 1979, on S. Res. 15, Resolution concerning mutual defense treaties. Washington, U.S. Government Printing Office, 1979. 589 p.
- The committee considers Senate Resolution 15: “Resolved, that it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation.” The committee also reviews “the role of the Senate, in approving treaties—specifically, which agreements require Senate approval, how the Senate’s advice function is most properly performed, and whether the Senate’s internal procedures for consenting to the ratification of treaties should be modernized.”
- . Treaty termination resolution; report together with additional views on S. Res. 15. Washington, U.S. Government Printing Office, 1979. 47 p. (96th Cong., 1st Sess., Senate. Report no. 96–119)
- This report includes a summary of Senate action since 1969 regarding the treaty power. The committee proposes a substitute resolution as an amendment to the original version of Senate Resolution 15. “The substitute resolution presents general guidelines for the termination of any treaty to which the United States is a party.
- “It also sets forth two methods by which the Senate or the Congress as a whole can specify procedures for the termination of treaties on a case-by-case basis: either 1) by including a condition in the resolution of consent to ratification of a particular treaty, or 2) by enacting a joint resolution concerning a particular treaty.”
- In its discussion of the resolution, the committee considers the Administration’s position, relevant Supreme Court decisions, and precedents for specifying termination procedures. Additional views of Senator Claiborne Pell and Senator Jesse Helms, opposing the action taken by the committee, are included.
- Watson, Geoffrey R. The death of treaty. *Ohio State law journal*, v. 55, 1994: 781–853.
- “Article explores the decline and fall of Treaty. Part I of the Article traces the origins and development of treaties. It argues that Treaty reached its political and doctrinal zenith in the nineteenth century \*\*\*. Part II explores the subsequent doctrinal disintegration of Treaty.”

## D. GUIDES

### 1. GUIDES TO RESOURCES ON TREATIES

This section is designed to assist the reader in locating information about treaties and international agreements.

List of treaty collections—Liste de recueils de traites—Lista de colecciones de tratados. United Nations, Office of Legal Affairs, Codification Division. Moorestown, N.J., Symposia Press; Holmes Beach, Fla., Exclusive distribution by W. W. Gaunt, 1981. 174 p. Reprint. Originally published: New York, United Nations, 1956 (United Nations. [Document] ST/LEG/5)

The list of treaty collections is “limited in principle, to collections published in and after the last two decades of the 18th century.” The first part identifies general collections, including indices, chronologies, bibliographies, and hand-

- books. The second lists collections by subject; the third, by country. Titles are given in their original language. Accompanying comments are in English, except for collections which are predominantly in French; then the commentary is in French.
- Kavass, Igor I. Hood, Howard A. Computerized legal databases: an international survey. *International journal of legal information*, v. 11, no. 3 & 4, 1983: 115-129.
- Kramer, Mary. How to find U.S. treaties in the Library of Congress. Washington, Library of Congress, General Reading Rooms Division, 1981. 11 p.  
 "This brief guide to U.S. treaty research consists of a selected and annotated bibliography of important treaty collections and indexes." It also includes a glossary.
- Parry, Clive. Where to look for your treaties. *International journal of law libraries*, v. 8, 1980: 8-18.
- Pilschke, Elmer. Treaties and agreements. In his *U.S. foreign relations: a guide to information sources*. Detroit, Gale Research, ©1980. pp. 571-587. (American government and history information guide series, v. 6)  
 "This section contains the principal documents and compilations relevant to the treaties and agreements published by Congress and the Department of State, general multinational treaty series (including those of the League of Nations, and the United Nations) together with related indexes of research significance, and selected unofficial compilations of and commentaries on treaties and agreements, including several functional treaty lists."
- Renoux, Yvette. Glossary of international treaties. In French, English, Spanish, Italian, Dutch, German and Russian. Compiled and arranged with the collaboration of Janine Yates. Amsterdam, New York, Elsevier Publishing Co., 1970. 212 p. (Glossaria interpretum, no. 14)
- Research sources on international law: bibliographic notes. *Journal of international law and economics*, v. 13, no. 3, 1979: 717-746. Part I—dictionaries and encyclopedias.  
 "This column presents nearly one hundred current and historical dictionaries and encyclopedias to which the practitioner or student can turn for quick reference to the definitions, origins, and usage of international legal terms and concepts." Part II—Treaties. "The portion of this column devoted to researching treaties is organized as follows.—Sources of information on treaty research.—Indexes to treaties and collections.—Non-collection treaty sources.—Collections of treaties.—Status of treaties.—United States treaty system."
- Sprudz, Adolf. Treaty sources in legal and political research; tools, techniques, and problems, the conventional and the new. Tucson, University of Arizona Press [1971] 63 p. (The Institute of Government Research. *International studies*, no. 3)  
 Sprudz surveys the practice of selected states and the United Nations in making treaty information a matter of public record. He reviews guides and indexes to treaty collections, charts indicating the status of specific treaties, and other sources. Sprudz also discusses computerized data bases, including the United Nations Treaty Series Project, and the U.S. Department of Defense International Agreements Project, part of the U.S. Air Force Project FLITE.
- Zwirn, Jerrold. United States treaties. In his *Congressional publications: a research guide to legislation, budgets, and treaties*. Littleton, CO, Libraries Unlimited, 1983. pp. 150-165.  
 "This chapter presents a detailed description of the treaty-making process as reflected in the roles of the President and the Senate. Though treaties are a form of domestic law, their international aspect affords greater latitude for official discretion than does the legislative process \* \* \*. The absence of prescribed time limits and unsettled standing of governmental precedents significantly affect treaty publications. The impact of these factors is noted at various points throughout the discussion and is more thoroughly treated in reference to sources that can be consulted to determine the status of treaties."

## 2. COMPILATIONS OF TREATIES, AND INDEXES INTERNATIONAL IN SCOPE

Since the emphasis of this bibliography is on U.S. treaties and treaty-making, only a few selected treaty compilations and indices which are international in scope are listed in this section. For discussions on researching foreign treaties, please see the guides listed in Section A, above, especially "Research Sources on International Law: Bibliographic Notes" in the *Journal of International Law and Economics*, v. 13, no. 3, 1979, pp. 717-746.

International Legal Materials, published bimonthly by the American Society of International Law, provides current information on treaties and includes the texts of treaties and other international documents before they may be available in compilations.

Complex current issues may require the expertise of international legal specialists, such as those in the Office of the Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, or the international legal specialists on the staff of the Library of Congress Law Library.

In this section of the bibliography, independent works are listed alphabetically by title or by the corporate body issuing them, if the name of the corporate body reflects the scope of the treaty activity covered. The citations for indices or other supplemental works immediately follow, preceded by a series of dashes to indicate their relationship with the independent works under which they are listed. For example, the Index Guide to Treaties, prepared by Irwin, immediately follows the Consolidated Treaty Series, on which it is based. The development of online information retrieval systems is dynamic, so a librarian or information broker should be consulted for current information on database access to specific treaty issues.

The Consolidated treaty series. Edited and annotated by Clive Parry. Dobbs Ferry, N.Y., Oceana Publications, 1981, v. 1–231.

“The present series \*\*\* is proposed \*\*\* to make a beginning with the year 1648 \*\*\* and, for the period between that year and the date of commencement of the League series (approximately 1918–20), to reproduce such prints of treaties in their original languages as can be found in whatsoever collection along with such translations into English or French as again \*\*\* can be found.” The treaties are arranged chronologically; the title of each volume specifies the year it covers. Each entry indicates parties to the treaty, when the treaty came into force, whether it is still in effect, and if applicable, how it has been superseded or terminated.

———. Index-guide to treaties: based on the Consolidated treaty series, edited and annotated by Clive Parry, LL.D., and all other series therein utilised. Dobbs Ferry, N.Y., Oceana Publications, 1979+

Contents: [pt. 1] v. 1. Irwin, P. General chronological list 1648–1809 i.e., 1648–1808]—v. 2. Hill, Brian H.W. General chronological list 1648–1809 supplement, 1809–1851.—v. 3. Hill, Brian H.W. General chronological list, 1852–1885.—v. 4. Hill, Brian H.W. General chronological list, 1886–1903.—v. 5. Hill, Brian H.W. General chronological list, 1904–1919.—[pt. 2] Meyer, Michael A. Special chronological list, 1648–1920 (2 v.).—[pt. 3] Hill, Brian H.W. Party index. v. 1, Afghanistan-Finland—v. 2, France-German states.—v. 3, Great Britain-Italy.—v. 4, Japan-South Rhodesia.—v. 5, Spain-Zanzibar.

Index to multilateral treaties; a chronological list of multi-party international agreements from the sixteenth century through 1963, with citations to their text. Edited by Vaclav Mostecky and Francis R. Doyle. Cambridge, Mass., distributed by Oceana Publications, for the Harvard University Law School Library, 1965, and supplements, 1966–1968.

This work lists multilateral international agreements from 1596 to 1963, indicating date and, where important, place of signature; language of treaty; and signatories, if there were five or fewer. Citations are provided to official and unofficial sources for the complete texts of treaties. Treaties are arranged chronologically with indices by subject and region.

International organization and integration: annotated basic documents and descriptive directory of international organizations and arrangements. 2d, completely rev. ed. The Hague, Boston, Martinus Nijhoff Publishers; Hingham, Mass., Kluwer Boston, distributors for the U.S. and Canada, 1981+ v. 1A, 2A.

Contents (Incomplete).—v. 1A. The United Nations organization—v. 2 A. European Communities.

Key treaties for the great powers, 1814–1914. Selected and edited by Michael Hurst. New York, St. Martin's Press [1972] 2 v. (948 p.)

Contents.—v. 1. 1814–1870.—v. 2. 1871–1914.

The Major international treaties, 1914–1973; a history and guide with texts. [By] J.A.S. Grenville. New York, Stein and Day [1974] 575 p.

Provides a history and analysis of major treaties and agreements, and includes the texts of the most important.

Treaties and alliances of the world. Compiled and written by Henry W. Degenhardt; general editor, Alan J. Day. 3d ed. Harlow, Essex, Longman; Detroit, Distributed by Gale Research, 1981. 409 p.

Provides brief descriptions of treaties and international agreements, indicating significant dates, signatories, and major provisions. Also describes organiza-

tions established by treaties or international agreements. Length and depth of coverage varies with the topic.

Contents.—Early international agreements and their later expansion.—World War II: treaties and agreements on territorial changes, frontiers and other matters arising out of the War.—the United Nations.—Nuclear and conventional disarmament.—Agreements on scientific, space, and environmental cooperation.—International economic co-operation.—Commodity and raw material producers' organizations and agreements.—West European groupings, treaties and agreements.—Organization for Economic Co-operation and Development (OECD).—North Atlantic Treaty Organization (NATO).—The Communist World.—East-West treaties of 1970–1980.—The Commonwealth.—The French Community ("Communaute") and other Francophone co-operation.—The Americas.—The Middle East and Islamic states.—Africa.—South-East Asia and the Pacific Area.—The "Third World": attempts at achieving cohesion.

United Nations. Office of Legal Affairs. United Nations treaty series: treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations. New York, United Nations, 1946+

Treaties appear chronologically by date of registration with the Secretariat. Each volume includes a list of notifications of ratifications, accessions, successions, and extensions of published treaties.

Cumulative indices were originally published for each 100 volumes; they are now published for each fifty. Chronological indices list treaties in order of their date of signature. Other indices list them by country and by subject, using broad subject headings.

———. Cumulative list and index of treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, December 1969–December 1974. By Joseph T. Vambery and Rose V. Vambery. Dobbs Ferry, N.Y., Oceana Publications, 1977. 2 v.

Provides and index to treaties and international agreements published in the United Nations Treaty Series from December 1969 to 1975.

———. Multilateral treaties in respect of which the Secretary-General performs depositary functions; list of signatures, ratifications, accessions, etc. as of 31 December 1970. New York, United Nations, 1971. 439 p. (United Nations. Document ST/LEG/SER.D/4)

This annual publication list conventions as well as treaties chronologically by date of signature. Information on each treaty includes date of entry into force, list of signatories with date of receipt by the United Nations of their instruments of accession, citation to the text in the United Nations Treaty Series, and the text of accompanying declarations or reservations.

———. Statement of treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations. New York, United Nations, 1974+ (United Nations. [Document] ST/LEG/ser.A.)

This monthly publication supplements the annual volumes of the Multilateral Treaties List and contains information on treaty matters. Both this publication and the list are dependent on signatory states for information and thus may be incomplete. Publication is running at least 1 year behind.

———. Status of multilateral conventions of which the Secretary-General acts as depositary. Revised edition. New York, United Nations, 1959+ 1 v. (looseleaf) (United Nations. [Document] ST/LEG/3, rev. 1)

World treaty index. By Peter H. Rohn. 2d ed. Santa Barbara, Calif., ABC-Clio Information Services, © 1983–© 1984. 5 v.

This index, generated from a data base on machine-readable tape, provides access to the League of Nations Treaty Series, the United Nations Treaty Series, and other treaties from more than 40 national treaty collections. For each treaty, it includes date of signature, list of parties, and citations to sources for the full text.

Contents.—v. 1. Reference volume.—v. 2. Main entry section, pt 1, 1900–1959.—v. 3. Main entry section, pt. 2, 1960–1980.—v. 4. Party index.—v. 5. Keyword index.

———. Treaty profiles. Santa Barbara, Calif., Clio Books, © 1976. 256 p.

This quantitative analysis of the bilateral treaty-making behavior of countries and international organizations, indicating leading treaty partners, registration frequency, and other information, is derived from a subset of the database used to generate the World Treaty Indexes, listed above.

## 3. U.S. TREATIES AND THE TREATYMAKING PROCESS

This section is divided into four subsections: a) Sources for information on treaties throughout the treaty-making process; b) Official treaty series; c) Indices and retrospective compilations; and d) Sources primarily concerned with the status of treaties (although they may supply additional information and although other sources may include information on treaty status, as indicated in annotations.) Table A1-1 is provided to facilitate identification of sources providing information and various stages of the treaty-making process. Sources listed in the table are described in greater detail in the relevant subsections. Online database systems which can be used to access sources are indicated in the "notes" column in the table and in annotations in the text. Development of online systems is dynamic, so a librarian or information broker should be consulted for complete, current information on database access for specific treaty issues.

Although the purpose of this section is to identify prominent resources on U.S. treaties through the current U.S. treaty-making process, it is by no means definitive. Please consult the guides to resources on treaties in section A, above, for discussions of the complexities of locating information on U.S. treaties and treaty-making. A number of the sources complement each other. For example, in *Congressional Publications: a Research Guide to Legislation, Budgets and Treaties*, Jerrold Zwirn discusses U.S. treaty publications by reviewing how they are generated during the current treaty-making process. In *U.S. Foreign Relations: A Guide to Information Sources*, Elmer Plishke organized the documents and compilations by issuing agency. He includes information on sources useful for historical research on U.S. treaty-making. Mary Kramer provides guidance on doing research in the Library of Congress on current and historical U.S. treaties in *How to find U.S. Treaties in the Library of Congress*.

For ongoing, current information on treaty developments, see the Department of State Dispatch and the *American Journal of International Law*, published by the American Society of International Law. Specific, complex questions may require the expertise of legal specialists, such as those in the U.S. State Department Office of the Assistant Legal Adviser for Treaty Affairs, or legal specialists in the Library of Congress Law Library or Congressional Research Service.

a. Sources for treaty information throughout the treaty-making process

*CIS/index*

CIS/index to publications of the United States Congress. Washington, Congressional Information Service, 1970+

CIS indexes and abstracts congressional publications other than the Congressional Record. Issues appear monthly, with quarterly, annual and multiyear cumulations. Abstracts are arranged by committee and then by form of publication. The section on the Senate Foreign Relations Committee includes subsections for Senate Executive Reports and Senate Treaty Documents. Subject indexes provide entries under the term "Treaties and conventions," as well as under topical headings. The Legislative Calendar for the Senate Foreign Relations Committee can be located under the index term "Congressional Committee Calendar." Abstracts provide bibliographic information, which can be used to locate the publication in a library or to obtain it from the issuing source. Alternatively, the index may be used in conjunction with the CIS microfiche collection, which includes the texts of most items indexed. CIS/index is available online through DIALOG.

*Congressional Index*

Congressional index. Chicago, Commerce Clearing House, 1937+

This weekly loose-leaf service provides information on the contents and status of bills and resolutions pending in Congress. The "Treaty Section" is especially useful for determining recent developments regarding the status of treaties pending approval. Treaties not yet approved are arranged chronologically by the session of Congress in which they were introduced.

Table A1-1.—Publications Providing Information on U.S. Treaties Throughout the Treaty-making Process<sup>1</sup>

Stage/Form/Information	Sources	Notes
<b>Initiation</b>		
Statements by President or Secretary of State.	Weekly Compilation of Presidential Documents State Department Dispatch .....	Available on NEXIS
	Foreign Policy Bulletin .....	Privately published
<b>Negotiation</b>		
Course of proceedings	Weekly Compilation of Presidential Documents State Department Dispatch .....	Available on NEXIS
First printing of treaty with outline of history.	Foreign Policy Bulletin .....	
	Department of State Dispatch .....	
	Department of State Press Releases.	
<b>Transmittal to Senate</b>		
Notification of receipt by Senate, President's message.	Congressional Record .....	Available online in many places, including DIALOG, Legislate, NEXIS, WESTLAW, and CQ
Treaty text and transmittal documentation.	Executive Journal of the Senate .....	CIS/index; GPO Monthly Catalog
Citation for Senate Executive or Treaty Document.	Senate Treaty Document, 98th Congress on; formerly, Senate Executive Document.	
	Executive Journal of the Senate .....	Available on NEXIS
	Weekly Compilation of Presidential Documents	
	CIS/Index .....	Available on DIALOG
<b>Foreign Relations Committee Action</b>		
Legislative history .....	Senate Foreign Relations Committee calendar	Indexed by CIS/index
	Senate Executive Reports .....	Indexed by CIS/index
	Legislative Activity Reports .....	Issued at end of each Congress
Citation for executive reports.	Daily Digest, in Congressional Record .....	DIALOG
Citation to printed hearings and committee reports.	Executive Journal of the Senate .....	
	CIS/Index.	
	Monthly Catalog .....	DIALOG
	CIS/index .....	
<b>Senate action</b>		
Amendments, reservations, understandings, resolutions of ratification.	Congressional Record .....	DIALOG, NEXIS
	Executive Journal of the Senate .....	
List of treaties pending	Congressional Index .....	
Legislative history .....	Executive Journal of the Senate.	
	Senate Foreign Relations Committee calendar	CIS/index
<b>Withdrawal</b>		
Notice regarding .....	Congressional Record and its Daily Digest .....	Index: DIALOG
	Executive Journal of the Senate .....	
	Weekly Compilation of Presidential Documents	Available on NEXIS
<b>Renegotiation</b>		
Notice regarding .....	Weekly Compilation of Presidential Documents U.S. Department of State Press Releases .....	Available on NEXIS
<b>Ratification</b>		
	Department of State Dispatch .....	
	Foreign Policy Bulletin.	
	Weekly Compilation of Presidential Documents	Available on NEXIS



Table A1-1.—Publications Providing Information on U.S. Treaties Throughout the Treaty-making Process <sup>1</sup>—Continued

Stage/Form/Information	Sources	Notes
Exchange or deposit of ratification	Department of State Dispatch ..... Foreign Policy Bulletin.	
Proclamation by President		
Notice regarding .....	Department of State Bulletin .....	May include Senate conditions and qualifications
Proclamation text: treaty text, related documents, and citation to UST.	Weekly Compilation of Presidential Documents  Statutes at Large .....	May include Senate conditions and qualifications  May include Senate conditions and qualifications
Modification, termination, renewal	Shepherd's United States Citations—Statutes Edition.	Online on LEXIS and WESTLAW
Implementation		
Executive branch action	Department of State Bulletin. Weekly Compilation of Presidential Documents  Federal Register .....	Available on NEXIS FEDREG; text on NEXIS Available on DIALOG, WESTLAW, NEXIS, Legislate
Legislative activity .....	Senate Foreign Relations Committee Legislative Activities Report.	In Serial Set indexed by Monthly Catalog. CIS/index
Entry into force		
Publication of treaty, once in force.	Treaties and Other International Acts Series (TIAS).	Unbound pamphlet; listed in Monthly Catalog; Current Treaty Index
Before 1946 .....	Treaty Series .....	Included international agreements until 1929
	Executive Agreement Series (1929–1946).	
Annual cumulations		
1950–1951 .....	United States Treaties and Other International Agreements (UST). Statutes at Large .....	Indexed by UST cumulative index
Retrospective cumulations and indexes		
1776–1949 .....	United States Treaties and Other International Agreements Cumulative Index.  Treaties and Other International Agreements between the United States of America, 1776–1949 (Bevans).	Based on Bevans, Malloy, Miller, Statutes at Large, and other sources 13 v. Multilateral listed chronologically; bilateral, by country
1776–1937 .....	Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1920–1938 (Malloy).	v. 1–2 1776–1909 v. 3 1920–1923 v. 4 1923–1937
1776–1863 .....	Treaties and Other International Acts of the United States of America (Miller).	Chronological
Status		
Treaties in force .....	Treaties in force 1956 ..... Guide to U.S. Treaties in Force, 1982–.	
Unperfected .....	Unperfected Treaties of the United States of America.	v. 1 covers 1776–1855; 5 volumes anticipated

*Congressional Record*

U.S. Congress. Congressional record: proceedings and debates of the Congress. Washington, U.S. Government Printing Office. 1873+ Issued in daily, biweekly (green bound), and permanent (red bound) editions.

The text of the daily edition is revised and rearranged in the permanent edition. A "Daily Digest" section has been included since 1947.

Indexes to the Congressional Record are issued biweekly and for each session. Discussions and actions regarding treaties are listed under the subject heading "treaties," and may be listed under the subjects of specific treaties, as well.

The Congressional Record was preceded by the Debates and Proceedings in the Congress of the United States, 1st–18th Cong., 1st Sess.; the Register of Debates in Congress, 18th Cong., 2d Sess.–25th Cong., 1st Sess.; and the Congressional Globe, 23d–42d Congress.

*Executive Journal of the Senate*

U.S. Congress. Senate. Executive journal of the Senate. Journal of the Executive proceedings of the Senate of the United States. Washington, U.S. Government Printing Office, 1828+

This publication provides accounts of executive sessions of the Senate, including actions on treaties, and contains the resolutions of ratification. When executive sessions are open, proceedings and debates appear in the Congressional Record.

*Senate executive reports*

A report by the Senate Committee on Foreign Relations on each treaty is issued as a Senate executive report. Each report is assigned a numeric designation. The reports are indexed in CIS/index and the Monthly Catalog. Both CIS and the Monthly Catalog are available online through DIALOG.

*Senate Foreign Relations Committee calendar*

U.S. Congress. Senate. Committee on Foreign Relations. Legislative calendar. [Washington, D.C.] U.S. Government Printing Office.

Provides information on Senate action regarding treaties; can be used to trace the legislative history of treaties. Indexed by CRS/index, which is available online through DIALOG.

*Senate treaty documents*

A Senate treaty document provides the text of the treaty as transmitted to the Senate from the executive branch, with letters of transmittal from the President and Secretary of State and accompanying background documentation. Beginning with the 97th Congress, treaties have been issued in the Treaty Document Series. Each treaty is identified by the number of the Congress and an acquisition number, based on the number of treaties previously transmitted during the Congress. For example, Treaty Document 98–4 would be the fourth treaty transmitted to the 98th Congress. Prior to the 97th Congress, treaties were issued in the Senate Executive Documents Series. Each document was given an alphabetical designation and was cited by that letter and by the number of the Congress and the session in which it was transmitted to the Senate. Most Senate treaty and executive documents are identified in the Monthly Catalog and CIS/index (both of which are available via the U.S. Government Printing Office Web site: <http://orders.access.gpo.gov/su—docs/sale/index.html>).

*Department of State Dispatch*

U.S. Department of State. Department of State dispatch. [Washington] Office of Communication, Bureau of Public Affairs; for sale by the Superintendent of Documents, U.S. Government Printing Office, 1990+

This weekly journal provides a compilation of major speeches, congressional testimony, policy statements, fact sheets and other foreign policy information. A periodic list of treaty actions is included. Dispatch began publication in January 1990.

Dispatch is indexed in the Index to U.S. Government Periodicals and is part of the NEXIS service.

*Department of State Bulletin*

U.S. Department of State. Department of State bulletin. [Washington] Office of Public Communication, Bureau of Public Affairs; for sale by the Superintendent of Documents, U.S. Government Printing Office, 1939–1989.

This, "the official monthly record of United states foreign policy," contained a section on treaties which provided information on the status of treaties, including notification of U.S. and foreign ratification of treaties to which the

United States is a party. Recent press releases, which may contain the texts of treaties or information on executive branch action at various stages of the treaty-making process, were also listed in the Department of State Bulletin.

This publication was issued weekly through December 27, 1977, and monthly from January 1978, until it ceased publication in December 1989.

An index was issued periodically, and the Department of State Bulletin was also indexed by the Index to U.S. Government Periodicals, and more selectively by Public Affairs Information Service, and the Readers' Guide to Periodical Literature.

*Foreign Policy Bulletin*

The Foreign Policy Bulletin began publication in July 1990. It is a privately published journal, edited and published by Paul E. Auerswald, former editor of the State Department Bulletin. The Foreign Policy Bulletin maintains a format similar to that of the now defunct State Department Bulletin. Each issue includes a section on treaties. Publication information may be obtained from the Foreign Policy Bulletin, 4802 Butterworth Place, N.W., Washington, D.C. 20016.

*Department of State press releases*

Department of State press releases may contain information on executive branch action regarding treaties during the treaty-making process. The text of a treaty may appear for the first time in a Department of State press release, usually on the date of signing. Press releases were listed in the Department of State bulletin.

*Federal Register*

Federal register. [Washington, Office of the Federal Register, National Archives and Records Service, General Services Administration; Superintendent of Documents, U.S. Government Printing Office, distributor] 1936+

The Federal Register may include information on executive branch action regarding the implementation of treaties. It is issued daily, except Saturday, Sunday, and official Federal holidays.

*Monthly Catalog*

Monthly catalog of United States Government publications. Washington, U.S. Government Printing Office, 1895+

Senate executive documents and reports are listed under Senate; new treaties are listed by their number in the Treaties and Other International Acts Series under the State Department. The Monthly Catalog is available via the U.S. Government Printing Office Web site: <http://orders.access.gpo.gov/su—docs/sale/index.html>.

*Shepard's United States Citations—Statutes Edition*

Shepard's United States citations: statutes. 6th edition. Colorado Springs, Shepard's Citations, 1968+

"A compilation of citations to United States Constitution, United States statutes at large, United States treaties and other international agreements, \*\*\* [and other sources]. The citations appear in: United States Supreme Court reports; Supreme court reporter; Federal reporter; Federal supplement; \*\*\* United States statutes at large; United States treaties and other international agreements" and other sources.

Includes information on modifications of treaties by legislation or changes in the treaties. Treaties through 1949 are listed by date of signing. Since 1950, a special section has been included which lists treaties by their citations in the Treaties and Other International Acts Series.

This service is kept up to date by periodically issued unbound cumulative supplements which are superseded from time to time by bound cumulative supplements. Since 1979, the supplements have been published by Shepard's, Inc. of Colorado Springs.

*Statutes at Large*

United States. Laws, statutes, etc. United States statutes at large, containing the laws and concurrent resolutions Washington, D.C., U.S. Government Printing Office, 1937+

Contains the texts of public and private laws, constitutional amendments, concurrent resolutions, and proclamations, including Presidential proclamations regarding treaties.

Through 1951, a portion of part 2 or part 3 of the Statutes at Large included separate lists of treaties and international agreements with their texts. Volume 64, part 3, contains a cumulative list of all treaties and international agree-

ments contained in volumes 1–64, arranged alphabetically by country and then by topic. Since 1951, the texts of treaties and international agreements have been published separately by the State Department in the United States Treaties and Other International Acts Series, listed below in the section on Official Treaty Sources.

*Weekly Compilation of Presidential Documents*

Weekly compilation of Presidential documents. Washington, Office of the Federal Register, National Archives and Records Service, General Services Administration; Superintendent of Documents, U.S. Government Printing Office, 1965+

Issued weekly, with quarterly, semiannual, and annual indexes. Contains Presidential materials released by the White House, including statements, proclamations, and executive orders. Available online through NEXIS.

*b. Official treaty series*

*TIAS*

U.S. Department of State. Treaties and other international acts series (TIAS). Washington, for sale by the Superintendent of Documents, U.S. Government Printing Office, 1946+

This series provides dissemination of the official versions of new treaties, although there may be a considerable time lag between the date a treaty enters into force and the date it is published in the TIAS. Each treaty or agreement is published in pamphlet form in the official languages of the original instrument. Dates of signature, ratification, proclamation, and implementation are also included.

TIAS continues the Treaty Series and the Executive Agreement Series. Numbering begins with 1501, since the numbering for the Treaty Series (994) and the Executive Agreement Series (506) totaled 1500.

———. Treaty series (TS). Washington, D.C., U.S. Government Printing Office, [18—]–1946.

Included separately published pamphlets containing the official texts of U.S. treaties and other international agreements until 1929; thereafter, included only treaties. Numbering began in 1908, with number 489. For earlier periods, up to number 376, the arrangement is alphabetical by country, then chronological. Multilateral agreements follow number 376. From number 390 on, the sequence is chronological.

———. Executive agreement series (EAS). Washington, U.S. Government Printing Office, 1929–1946.

Pamphlet series for the official texts of U.S. international agreements from 1929 to 1946. In 1946, treaties and executive agreements were again combined in the Treaties and Other International Acts series.

*UST*

U.S. Treaties, etc. United States treaties and other international agreements. Washington, U.S. Dept of State, 1950+

Since 1950, this annual compilation of the Treaties and Other International Acts Series (TIAS), cited above, has been the official publication for treaties and other international agreements to which the United States is a party. Previously, the texts of treaties were included in the United States Statutes at Large. Treaties and international agreements are arranged in the order in which they were published in TIAS. Entries include the full text of the treaty or agreement in each official language and a chronology. Each volume contains indexes by subject and country, and a four volume cumulative index has been issued, covering the years 1950–1970 (volumes 1–21).

*c. Indexes and retrospective compilations*

Entries in this section are chronological by the times period covered, with an index to current treaties listed first. For coverage of treaties from 1776 to 1949, the cumulative index is listed first, followed by the works on which it is based.

*Current*

Current treaty index. Compiled by Igor I. Kavass and Adolf Sprudz. Buffalo, N.Y., W.S. Hein, 1982+

Provides a cumulative index to the United States slip treaties and agreements, published in the Treaties and Other International Acts Series.

“The information on current treaties and agreements is arranged numerically, chronologically, by country, and by subject \*\*\*. The information in the Current Treaty Index will of course eventually be incorporated in the UST Cumulative Indexing Service as the treaties and agreements are included in the bound UST

volumes." A new edition of the Current Treaty Index will then be issued, listing new treaties and agreements in slip form. "The editorial intention is to have Current Treaty Index appear annually" or more frequently, if circumstances permit.

"The Current Treaty Index has many uses. Not only a quick reference for treaties and agreements entered into by the United States \*\*\* during recent years, it presents also an excellent birdseye view of recent commitments made by the United States in different areas of international economics and foreign relations (using the subject index) \*\*\*. Similarly, the chronological index [indicates] the cyclical pattern of international agreements in different subject areas. The close relationship between the United States and other countries may best be seen through the country index."

*1950+*

UST cumulative index, 1950–1970: cumulative index to United States treaties and other international agreements, 1950–1970: 1 UST–21UST, TIAS nos. 2010–7034. Compiled by Igor I. Kavass and Adolf Sprudz. Buffalo, N.Y., W.S. Hein, 1973. 4 v.

Contents.—v. 1. UST list of documents in numerical order of TIAS numbers.—v. 2. UST chronological index, 1950–1970.—v. 3. UST country index, 1950–1970.—v. 4. UST subject index, 1950–1970.

This index is kept up to date by annual looseleaf volumes, cumulated and re-published every 5 years.

*1776–1949*

United States treaties and other international agreements cumulative index, 1776–1949, as published in Statutes at Large, Malloy, Miller, Bevans, and other relevant sources. By Igor I. Kavass and Mark A. Michael. Buffalo, N.Y., W.S. Hein, 1975. 4 v.

Volume 1 lists in numerical order the treaties and agreements published in the Treaty Series, the Executive Agreement Series, and the Treaties and Other International Acts Series. Volumes 2, 3, and 4 provide chronological, country, and subject indexes, respectively.

*1776–1949 (Bevans)*

U.S. Treaties, etc. Treaties and other international agreements of the United States of America, 1776–1949. Compiled under the direction of Charles I. Bevans. [Washington, Department of State, for sale by the Superintendent of Documents, U.S. Government Printing Office, 1968–1976] 13 v. (Department of State publications 8407, 8441, 8484, 8521, 8543, 8549, 8566, 8590, 8615, 8642, 8728, 8761, 8830)

The texts of treaties are provided in English only, with some commentary. Volumes 1–4 contain multilateral treaties arranged chronologically; volumes 5–12 contain bilateral treaties, arranged by country. volume 13 is the index.

Contents.—v. 1. Multilateral, 1776–1917.—v. 2. Multilateral, 1918–1930.—v. 3. Multilateral, 1931–1945.—v. 4. Multilateral, 1946–1949.—v. 5. Afghanistan—Burma.—v. 6. Canada—Czechoslovakia.—v. 7. Denmark—France.—v. 8. Germany—Iran.—v. 9. Iraq—Muscat.—v. 10. Nepal—Peru.—v. 11. Philippines—United Arab Republic.—v. 12. United Kingdom—Zanzibar.—v. 13. General index. This work, cited as Bevans, superseded the works by Malloy and Miller, which are listed below.

*1776–1931 (Malloy)*

U.S. Treaties, etc. Treaties, conventions, international acts, protocols, and agreements between the United States of America and other powers. Washington, U.S. Government Printing Office, 1910–1938. 4 v.

Texts of the treaties and agreements are provided in English, with annotations and index. Volumes 1 and 2 provide a single compilation, covering 1776–1909. Volumes 3 and 4 are supplements, covering 1910–1923 and 1923–1937, respectively. Bilateral treaties and agreements are arranged alphabetically by country, followed by multilateral treaties and agreements, which are arranged chronologically. Volume 4 includes a list of treaties by date of proclamation, with relevant citations to Statutes at Large. This work is sometimes cited as Malloy, after the compiler of the first two volumes.

*1776–1863 (Miller)*

U.S. Treaties, etc. Treaties and other international acts of the United States of America. Edited by Hunter Miller. Washington, U.S. Government Printing Office, 1931–1948. 8 v. in 7.

Volume 1 provides the plan of the compilation; volumes 2–8 provide the texts of treaties and agreements in the official languages for the period 1776–1863, with commentary. Arrangement is chronological. Includes legislative history and commentary.

*d. Status of treaties*

*Treaties in Force*

U.S. Department of State. Office of the Legal Adviser. *Treaties in force: a list of treaties and other international agreements of the United States in force*. Washington, for sale by the Superintendent of Documents [as of the 1st of the year], U.S. Government Printing Office, 1956 +

This annual publication lists all U.S. treaties and international agreements in force as of the beginning of the year. Bilateral agreements are arranged by country and then subject. Multilateral agreements are listed alphabetically by subject. Parties to each agreement or treaty are indicated. References are provided to the texts of treaties in Statutes at Large, UST, TIAS, Bevans, and other U.S. official treaty collections.

———. *A Guide to the United States treaties in force*. By Igor K. Kavass and Adolf Sprudz. Buffalo, N.Y., W.S. Hein, 1982+

*Unperfected Treaties*

Unperfected treaties of the United States of America, 1776–1976. Edited and annotated by Christian L. Wiktor. Dobbs Ferry, N.Y., Oceana Publications, 1976–1994. 9 v.

Provides texts and annotations on treaties concluded by the United States which did not go into force. Volume 1 covers the years 1776–1855.

*Additional information*

The Consolidated treaty series. Edited and annotated by Clive Parry. Dobbs Ferry, N.Y., [Oceana Publications, 1969] (1981) v. 1–231

“The present series \*\*\* is proposed \*\*\* to make a beginning with the year 1648 \*\*\* and, for the period between that year and the date of commencement of the League series (approximately 1918–20), to reproduce such prints of treaties in their original languages as can be found in whatsoever collection along with such translations into English or French as again \*\*\* can be found.”

“Appendix of Dutch colonial agreements”: v. 227–231

Index-guide to treaties: based on the Consolidated treaty series, edited and annotated by Clive Parry, LL.D., and all other series therein utilised. Dobbs Ferry, N.Y., Oceana Publications, 1979–1986. 3 v. in 12 (Consolidated treaty series)

Contents.—[pt. 1] v. 1. Irwin, P. General chronological list, 1648–1809 [i.e., 1648–1808]—v. 2. Hill, Brian H.W. General chronological list, 1886–1903.—v. 5. Hill, Brian H.W. General chronological list, 1904–1919.—[pt. 2] Meyer, Michael A. Special chronological lists, 1648–1920 (2 v.)—[pt. 3] Hill, Brian H.W. Party index. v. 1, Afghanistan-Finland.—v. 2, France-German states.—v. 3, Great Britain-Italy.—v. 4, Japan-South Rhodesia.—v. 5, Spain-Zanzibar.

This series continues the earlier series of works on treaties, edited by Clive Parry. It includes “newly concluded international agreements, both executive agreements as well as formal treaties, which have been ratified. The Department of State Dispatch provides notation of whether or not treaties have been ratified. Because the treaties published in this work are relatively recent, TIAS (United States Treaties and Other International Agreement) numbers have not yet been assigned. Executive agreements included are assigned a number beginning with the last two digits of the year. A complete index is included.

United Nations. Secretary General. *Multilateral treaties deposited with the Secretary-General; status as of 31 December 1991*. New York, 1992. 951 p. (ST/LEG/SER.E/10) This publication continues the publication entitled, *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions*. The last issue of that publication appeared in 1980 (ST/LEG/SER.D/13) with data up to December 31, 1979. The 1992 volume of this publication is the tenth in the series ST/LEG/SER.E.

This publication covers “all multilateral treaties the original of which is deposited with the Secretary-General; the Charter of the United Nations, in respect of which certain depositary functions have been conferred upon the Secretary-General \*\*\*; multilateral treaties formerly deposited with the Secretary General of the League of Nations \*\*\*; certain pre-United Nations treaties.”

U.S. Department of State. *Catalog of Treaties: 1814–1918*. Washington, U.S. Government Printing Office, 1919; reprinted by Oceana Publications, Dobbs Ferry, N.Y., 1964. 716 p.

"This Catalog of Treaties, originally started as a card catalogue \*\*\* The treaties from 1814 to 1918 are arranged in a chronological list, with information as to the time and place of signature and of ratification, the signatory powers, the treaty collections where the text may be found with the language of the text, as well as cross-references to later treaties which abrogate, modify, or supersede the treaty in question \*\*\*. The appendix contains a few of the most important treaties before 1814, as well as early treaties referred to in the main list." The index contains a country index as well as an index to agreements of general international character. A list of inter-American agreements is also included.

Oceana also offers the treaties and International Agreements Researchers' Archive on CD-ROM. This set is searchable by such elements as signatories, date signed, date in force, expiration, TIAS and CTIA number.

#### 4. TOPICAL COLLECTIONS

##### *a. Diplomatic and national security issues*

Elliott, Jonathan. *The American diplomatic code, embracing a collection of treaties and conventions between the United States and foreign powers from 1778 to 1834; also, a concise diplomatic manual containing a summary of the law of nations from the works of Wicquefort, Martens, Kent, Vattel, Waqrd, Story.* New York, B. Franklin [1970] 2 v. (Burt Franklin research and source works series, 605) Texts of treaties in English and Dutch, French, Italian, or Spanish. Reprint of the 1834 ed.

Extradition laws and treaties, United States. Compiled by I. I. Kavass and A. Sprudz. Buffalo, N.Y., W.S. Hein, 1979. 2 v. (Loose-leaf) Texts of treaties were taken from the Treaties and other international agreements of the United States of America. 1776-1949, edited by Charles I. Bevans, and United States treaties and other international agreements (TIAS advance sheets). "For extradition laws of the 1800s, see *The Law of Extradition, International and Interstate*, by Samuel T. Spear. Littleton, Colo., F.B. Rothman, 1984 [c1884] 766 p.

Spear's work has as a subtitle: "With an appendix, containing the extradition treaties and laws of the United States, the extradition laws of the states, several sections of the English Extradition Act of 1870, and the opinion of Governor Cullom." The Rothman publication is a reprint of the third edition, originally published in Albany, by Wedd, Parsons in 1885.

Friedman, Leon. *The Law of war, a documentary history.* New York, Random House, 1972. 2 v. Inter-American relations: a collection of documents, legislation, descriptions of inter-American organizations, and other material pertaining to inter-American affairs; report prepared for the use of the Committee on Foreign Relations, United States Senate and Committee on Foreign Affairs, U.S. House of Representatives by the Congressional Research Service, Library of Congress. Washington, U.S. Government Printing Office, 1989. 999 p. (Print, Senate, 100th Cong., 2d Sess., joint committee print, S. Prt. 100-168)

Partial contents.—Major inter-American treaties and agreements.—Summary of major inter-American conferences, meetings, or events, 1826-1988.—General U.S. legislation related to Latin America and the Caribbean.—Major U.S. legislation and agreements related to specific sub-regions and countries.—Selected Presidential speeches.

The laws of armed conflicts. A collection of conventions, resolutions and other documents. Edited by Dietrich Schindler and Jiri Toman. Leiden, Sijthoff; Geneva, Henry Dunant Institute, 1973. 795 p. (Scientific collection of the Henry Dunant Institute.)

Major peace treaties of modern history, 1648-1967. Compiled by Fred L. Israel. Commentaries by Emanuel Chill, with an introductory essay by Arnold Toynbee. New York, Chelsea House Publishers, 1967-80. 5 v. v. 5 has title: Major peace treaties of modern history, 1967-1979.

United Nations. Secretariat. A comprehensive study of the scope originally proposed or aimed at in draft multilateral disarmament treaties of a universal character concluded under U.N. auspices and the scope finally fixed in those treaties, including the contemplated measures for expanding that scope; working paper. [New York] 1977. 54 p. (United Nations. [Document] A/AC.187/68).

At head of title: United Nations General Assembly.

This document covers six multilateral disarmament treaties: Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water; Treaty on Principles governing the activities of States in the Exploration and Use of Outer space, Including the Moon and Other Celestial Bodies; Treaty on the Non-Proliferation of Nuclear Weapons; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the

Sea-Bed and the Ocean Floor and in the Subsoil Thereof; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction; Convention on the Prohibition of Military of Any Other Hostile Use of Environmental Modification Techniques.

United States. International terrorism: a compilation of major laws, treaties, agreements, and executive documents: report prepared for the Committee on Foreign Affairs, U.S. House of Representatives, by the Congressional Research Service, Library of Congress. Washington, For sale by the Superintendent of Documents, Congressional Sales Office, U.S. Government Printing Office, 1991. 1397 p.

At head of title: 102d Congress, 1st Session. Committee Print.

This compilation comprises major laws, treaties and agreements, and executive documents relating to U.S. and international efforts to combat terrorism. The legislation is subdivided into sections relating to foreign assistance, the Department of State, trade and financial issues, treaty implementation, and other subjects.

It also includes a selection of significant executive orders, proclamations, messages to Congress, Presidential determinations, and economic summit conference statements. Bilateral agreements on aviation security and extradition, as well as relevant multilateral treaties, are included. In addition, the compilation includes a number of reports to the President and to Congress and important regulations and documents on such topics as hostage relief and air security.

U.S. Arms Control and Disarmament Agency. Arms control and disarmament agreements: texts and histories of negotiations. 1990 ed. Washington, U.S. Arms Control and Disarmament Agency, for sale by the Superintendent of Documents, U.S. Government Printing Office, 1990. 459 p. (U.S. Arms Control and Disarmament Agency publication 105)

U.S. Congress. Senate. Committee on Foreign Relations. Legislation on foreign relations through 1992. Washington, U.S. Government Printing Office, 1993. 4 v. (Print, Senate, 103d Congress, 1st Sess., S. Prt. 103-23)

"Printed for the use of the Committee on Foreign Relations and Foreign Affairs of the Senate and the House of Representatives respectively."

These volumes of legislation and related material are part of a five volume set of laws and related material frequently referred to by the Committees on Foreign Affairs of the House of Representatives and Foreign Relations of the Senate amended to date and annotated to show pertinent history or cross references. Volumes I, II, III, and IV contain legislation and related material and are republished with amendments and additions at the end of each annual session of Congress. Volume V which contains treaties and related material will not be revised every year, but only as necessary.

*b. Economic and commercial issues*

Air and aviation treaties of the world. Edited by S. Houston Lay. Dobbs Ferry, N.Y., Oceana Publications, 1979+

Air and aviation treaties of the world. Edited by S. Houston Lay. Dobbs Ferry, N.Y., Oceana Publications, 1984—v. 1-3 (loose-leaf)

Contents (Incomplete): pt. 1. Multilateral treaties v. 1-3. The work is numbered in terms of parts, binders, and booklets; statement of holdings reflects binders.

Commercial treaty index. [Chicago] American Bar Association Committee on Commercial Treaties, 1973+ 1 v. (loose-leaf)

This is a subject index of "certain segments of the United States' nontariff commercial treaty series."

American Bar Association. Committee on Commercial Treaties. Commercial treaty index. 2d ed. [Chicago] Section of International Law, American Bar Association, 1974-1 v. Loose-leaf for updating.

Intergovernmental Maritime Consultative Organization. Status on 30 September 1971 of multilateral acts in respect of which the Inter-Governmental Maritime Consultative Organization acts as depositary. London, 1972? 63 p.

International tax treaties of all nations: containing English language texts of all tax treaties between two or more nations in force on July 1, 1975. Edited by Walter H. Diamond, and Dorothy B. Diamond. Dobbs Ferry, N.Y., Oceana Publications, 1975+

International tax treaties of all nations, series B: containing tax treaties not yet published by the United Nations, printed in English, and in many instances, languages of the signatories. Edited by Walter H. Diamond and Dorothy B. Diamond. Dobbs Ferry, N.Y., Oceana Publications, 1978-1982. v. 1-12, Includes



- unnumbered indexes which also index the International Tax Treaties of All Nations.
- Wallenstein, Gerd D. International telecommunication agreements. Dobbs Ferry, N.Y., Oceana Publications, 1977 3 v.  
Provides the texts of international telecommunication treaties and agreements which are in force.
- c. International environmental issues and management of common areas*
- Christol, Carl Quimby. The modern international law of outer space. New York, Pergamon Press, © 1982. 932 p. (Pergamon policy studies on international politics) Appendixes (pp. 849–915) contain 12 international agreements.
- Index to marine treaties. Compiled by John King Gamble, Jr. Seattle, Division of Marine Resources, University of Washington, 1972. 438 p.  
Includes all marine treaties found in v. 1–643 of the United Nations treaty series (UNTS); in the Canadian treaty series (CTS) 1946–67; and in the United States Treaties and Other International Acts Series (TIAS) 1950–70. A Washington sea grant publication; WSG 72–2 On cover: Washington Sea Grant Program.
- U.S. Congress. Senate. Committee on Commerce, Science, and Transportation. Space law and related documents: international space law documents, U.S. space law documents. Washington, U.S. Government Printing Office, 1990. 605 p. (Print, Senate, 101st Cong., 2d Sess., committee print S. Print 101–88)  
This document consists of two parts: “Part 1 on international space law, and Part 2 on domestic space law.”
- U.S. International Trade Commission. International agreements to protect the environment and wildlife. Washington, The Commission, 1991. ca. 217 p. in various pagings. (U.S. ITC publication 2351)  
Categorizes 170 multilateral and bilateral agreements of significance to U.S. interests into 8 groups: marine pollution; pollution of air, land, and inland waters; boundary waters between the United States and Mexico and Canada; archaeological, cultural, historical or natural heritage; maritime and coastal waters matters; nuclear pollution. “Summary information on all these agreements (when available) includes objectives and obligations, dates signed, literature citations, enforcement and dispute-settlement provisions, information-exchange provisions, current issues, and a listing of parties.”
- International protection of the environment: treaties and related documents compiled and edited by Bernd Ruster & Bruno Simma. Dobbs Ferry, N.Y., Oceana Publications, 1975–1982. 30 v. Vols. 18–30 compiled and edited by Bernd Ruster, Bruno Simma, and Michael Bock.
- U.S. Library of Congress. Congressional Research Service. Treaties and other international agreements on fisheries, oceanographic resources, and wildlife to which the United States is party. Prepared at the request of Honorable Warren G. Magnuson, Chairman, for the use of the Committee on Commerce, U.S. Senate. Washington, U.S. Government Printing Office, 1974 [i.e. 1975] 968 p.  
At head of title: 93d Congress, 2d Session. Committee Print.
- . Treaties and other international agreements on fisheries, oceanographic resources, and wildlife involving the United States. Prepared at the request of Warren G. Magnuson for the use of the Committee on Commerce, Science, and Transportation, United States Senate. Washington, U.S. Government Printing Office, 1977. 1201 p.
- U.S. Marine Mammal Commission. The Marine Mammal Commission compendium of selected treaties, international agreements, and other relevant documents on marine resources, wildlife and the environment. Compiled by Richard L. Wallace. [Washington] The Commission. [1994] 3 v.  
This work presents both multilateral and bilateral agreements.

## APPENDIX 2.—CASE-ZABLOCKI ACT ON TRANSMITTAL OF INTERNATIONAL AGREEMENTS AND RELATED REPORTING REQUIREMENTS<sup>1</sup>

Sections 112a and 112b, Title 1, United States Code; as added by act of September 23, 1950, 64 Stat. 980; and added by Public Law 92-403 [Case-Zablocki Act, S. 596], 86 Stat. 619, approved August 22, 1972; as amended by Public Law 95-45 [Department of State Appropriation Authorization; H.R. 5040] 91 Stat. 221, approved June 15, 1977; Public Law 95-426 [Foreign Relations Authorization Act, Fiscal Year 1979; H.R. 12598], 92 Stat. 963, approved October 7, 1978; and by Public Law 103-437 [H.R. 4777], 108 Stat. 4581, approved November 2, 1994

### § 112a.<sup>2</sup> United States treaties and other international agreements; contents; admissibility in evidence

(a)<sup>3</sup> The Secretary of State shall cause to be compiled, edited, indexed, and published, beginning as of January 1, 1950, a compilation entitled "United States Treaties and Other International Agreements," which shall contain all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other final formality has been executed, during each calendar year. The said United States Treaties and Other International Agreements shall be legal evidence of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements, therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

(b)<sup>4</sup> The Secretary of State may determine that publication of certain categories of agreements is not required, if the following criteria are met:

- (1) such agreements are not treaties which have been brought into force for the United States after having received Senate advice and consent pursuant to section 2(2) of Article II of the Constitution of the United States;

<sup>1</sup> Source: U.S. Congress, House Committee on International Relations and Senate Committee on Foreign Relations, Joint Committee Print, *Legislation on Foreign Relations Through 1999*, vol. II.

<sup>2</sup> Title VIII of the Legislative Branch Appropriations Act, 1976 (Public Law 94-59; 89 Stat. 296; 44 U.S.C. 1317 note), however, provided the following:

"Hereafter, notwithstanding any other provisions of law, appropriations for the automatic distribution to Senators and Representatives (including Delegates to Congress and the Resident Commissioner from Puerto Rico) of copies of the Foreign Relations of the United States, the United States Treaties and other International Agreements, the District of Columbia Code and Supplements, and more than one bound set of the United States Code and Supplements shall not be available with respect to any Senator or Representative unless such Senator or Representative specifically, in writing, requests that he receive copies of such documents."

See also Department of State regulations (22 CFR Part 181) for the coordination and reporting of international agreements.

<sup>3</sup> Sec. 138(1) of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236; 108 Stat. 397), added subsec. designation "(a)".

<sup>4</sup> Sec. 138(2) of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236; 108 Stat. 397), added Subsections (b) and (c).

The Secretary of State delegated functions authorized under Subsection (b) to the Legal Advisor (Department of State Public Notice 2086; sec. 13 of Delegation of Authority No. 214; 59 F.R. 50790).

(2) the public interest in such agreements is insufficient to justify their publication, because (A) as of the date of enactment of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, the agreements are no longer in force, (B) the agreements do not create private rights or duties, or establish standards intended to govern government action in the treatment of private individuals; (C) in view of the limited or specialized nature of the public interest in such agreements, such interest can adequately be satisfied by an alternative means; or (D) the public disclosure of the text of the agreement would, in the opinion of the President, be prejudicial to the national security of the United States; and

(3) copies of such agreements (other than those in paragraph (2) (D)), including certified copies where necessary for litigation or similar purposes, will be made available by the Department of State upon request.

(c)<sup>4</sup> Any determination pursuant to subsection (b) shall be published in the Federal Register.

**§ 112b.<sup>5</sup> United States international agreements; transmission to Congress**

(a)<sup>6</sup> The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing)<sup>7</sup> other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter.<sup>8</sup> However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs<sup>9</sup> of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President. Any department or agency of the United States Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than twenty days after such agreement has been signed.<sup>10</sup>

(b)<sup>6</sup> Not later than March 1, 1979, and at yearly intervals thereafter, the President shall, under his own signature, transmit to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate a report with respect to each international agreement which, during the preceding year, was transmitted to the Congress after the expiration of the 60-day period referred to in the first sentence of subsection (a), describing fully and completely the reasons for the late transmittal.

(c)<sup>6</sup> Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State. Such consultation may encompass a class of agreements rather than a particular agreement.

(d)<sup>6</sup> The Secretary of State shall determine for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of this section.

(e)<sup>6</sup> The President shall, through the Secretary of State, promulgate such rules and regulations as may be necessary to carry out this section.

<sup>5</sup> Popularly referred to as the Case-Zablocki Act.

<sup>6</sup> Sec. 708 of Public Law 95-426 (92 Stat. 993) inserted the subsection designation "(a)" and added subsections (b) through (e).

<sup>7</sup> Sec. 708 of Public Law 95-426 (92 Stat. 993) added the parenthetical phrase.

<sup>8</sup> Sec. 139 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (Public Law 100-204; 101 Stat. 1347) required that if the 60-day period specified in this sentence was not honored, no funds authorized to be appropriated would be available after the end of the 60-day period to implement any agreement required to be transmitted until the text of such agreement was so transmitted. This restriction on use of funds was made effective 60 days after the enactment of Public Law 100-204 and made applicable during fiscal years 1988 and 1989.

<sup>9</sup> Sec. 1 of Public Law 103-437 (108 Stat. 4581) struck out "Committee on International Relations" and inserted in lieu thereof "Committee on Foreign Affairs". Sec. 1(a)(5) of Public Law 104-14 (109 Stat. 186) subsequently provided that references to the Committee on Foreign Affairs of the House of Representatives shall be treated as referring to the Committee on International Relations of the House of Representatives (but did not amend the law).

<sup>10</sup> This sentence was added by sec. 5(a) of Public Law 95-45 (91 Stat. 224).

## APPENDIX 3.—COORDINATION AND REPORTING OF INTERNATIONAL AGREEMENTS, STATE DEPARTMENT REGULATIONS

Regulations of the Secretary of State, 22 CFR Part 181, July 13, 1981, 46 F.R. 35918; amended at 61 F.R. 7071, February 26, 1996<sup>1</sup>

### SUBCHAPTER S—INTERNATIONAL AGREEMENTS

#### PART 181—COORDINATION AND REPORTING OF INTERNATIONAL AGREEMENTS

Sec.

- 181.1 Purpose and application.
- 181.2 Criteria.
- 181.3 Determinations.
- 181.4 Consultations with the Secretary of State.
- 181.5 Twenty-day rule for concluded agreements.
- 181.6 Documentation and certification.
- 181.7 Transmittal to the Congress.
- 181.8 Publication.<sup>2</sup>

AUTHORITY: 1 U.S.C. 112a, 112b; and 22 U.S.C. 2651a.

#### § 181.1 Purpose and application.

(a) The purpose of this part is to implement the provisions of 1 U.S.C. 112a and 112b, popularly known as the Case-Zablocki Act (hereafter referred to as “the Act”), on the reporting to Congress, coordination with the Secretary of State and publication of international agreements.<sup>3</sup> This part applies to all agencies of the U.S. Government whose responsibilities include the negotiation and conclusion of international agreements. This part does not, however, constitute a delegation by the Secretary of State of the authority to engage in such activities. Further, it does not affect any additional requirements of law governing the relationship between particular agencies and the Secretary of State in connection with international negotiations and agreements, or any other requirements of law concerning the relationship between particular agencies and the Congress. The term “agency” as used in this part means each authority of the United States Government, whether or not it is within or subject to review by another agency.

(b) Pursuant to the key legal requirements of the Act—full and timely disclosure to the Congress of all concluded agreements and consultation by agencies with the Secretary of State with respect to proposed agreements—every agency of the Government is required to comply with each of the provisions set out in this part in implementation of the Act. Nevertheless, this part is intended as a framework of measures and procedures which, it is recognized, cannot anticipate all circumstances or situations that may arise. Deviation or derogation from the provisions of this part will not affect the legal validity, under United States law or under international law, of agreements concluded, will not give rise to a cause of action, and will not affect any public or private rights established by such agreements.

<sup>1</sup> Sources: 22 CFR Part 181 (April 1, 2000 edition); U.S. Congress. House Committee on International Relations, Senate Committee on Foreign Relations, Joint Committee Print. Legislation on Foreign Relations Through 1999, volume II.

<sup>2</sup> Sec. 181.8 was added at 61 F.R. 7071, February 16, 1996.

<sup>3</sup> The first sentence of sec. 181.1 was amended at 61 F.R. 7071, February 16, 1996. It formerly read as follows: “The purpose of this part is to implement the provisions of 1 U.S.C. 112b, popularly known as the Case-Zablocki Act (hereafter referred to as “the Act”), on the reporting to Congress and coordination with the Secretary of State of international agreements of the United States.”.

### § 181.2 Criteria.

(a) *General.*—The following criteria are to be applied in deciding whether any undertaking, oral agreement, document, or set of documents, including an exchange of notes or of correspondence, constitutes an international agreement within the meaning of the Act, as well as within the meaning of 1 U.S.C. 112a, requiring the publication of international agreements. Each of the criteria except those in paragraph (a) (5) of this section must be met in order for any given undertaking of the United States to constitute an international agreement.

(1) *Identity and intention of the parties.*—A party to an international agreement must be a state, a state agency, or an intergovernmental organization. The parties must intend their undertaking to be legally binding, and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements. An example of the latter is the Final Act of the Helsinki Conference on Cooperation and Security in Europe. In addition, the parties must intend their undertaking to be governed by international law, although this intent need not be manifested by a third-party dispute settlement mechanism or any express reference to international law. In the absence of any provision in the arrangement with respect to governing law, it will be presumed to be governed by international law. This presumption may be overcome by clear evidence, in the negotiating history of the agreement or otherwise, that the parties intended the arrangement to be governed by another legal system. Arrangements governed solely by the law of the United States, or one of the states or jurisdictions thereof, or by the law of any foreign state, are not international agreements for these purposes. For example, a foreign military sales loan agreement governed in its entirety by U.S. law is not an international agreement.

(2) *Significance of the arrangement.*—Minor or trivial undertakings, even if couched in legal language and form, are not considered international agreements within the meaning of the Act or of 1 U.S.C. 112a. In deciding what level of significance must be reached before a particular arrangement becomes an international agreement, the entire context of the transaction and the expectations and intent of the parties must be taken into account. It is often a matter of degree. For example, a promise to sell one map to a foreign nation is not an international agreement; a promise to exchange all maps of a particular region to be produced over a period of years may be an international agreement. It remains a matter of judgment based on all of the circumstances of the transaction. Determinations are made pursuant to § 181.3. Examples of arrangements that may constitute international agreements are agreements that: (a) are of political significance; (b) involve substantial grants of funds or loans by the United States or credits payable to the United States; (c) constitute a substantial commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations; (d) involve continuing and/or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment, or the pooling of data. However, individual research grants and contracts do not ordinarily constitute international agreements.

(3) *Specificity, including objective criteria for determining enforceability.*—International agreements require precision and specificity in the language setting forth the undertakings of the parties. Undertakings couched in vague or very general terms containing no objective criteria for determining enforceability or performance are not normally international agreements. Most frequently such terms reflect an intent not to be bound. For example, a promise to “help develop a more viable world economic system” lacks the specificity essential to constitute a legally binding international agreement. However, the intent of the parties is the key factor. Undertakings as general as those of, for example, Articles 55 and 56 of the United Nations Charter have been held to create internationally binding obligations intended as such by the parties.

(4) *Necessity for two or more parties.*—While unilateral commitments on occasion may be legally binding, they do not constitute international agreements. For example, a statement by the President promising to send money to Country Y to assist earthquake victims would not be an international agreement. It might be an important undertaking, but not all undertakings in international relations are in the form of international agreements. Care should be taken to examine whether a particular undertaking is truly unilateral in nature, or is part of a larger bilateral or multilateral set of undertakings. Moreover, “consideration,” as that term is used in domestic contract law, is not required for international agreements.

(5) *Form.*—Form as such is not normally an important factor, but it does deserve consideration. Documents which do not follow the customary form for international agreements, as to matters such as style, final clauses, signatures, or

entry into force dates, may or may not be international agreements. Failure to use the customary form may constitute evidence of a lack of intent to be legally bound by the arrangement. If, however, the general content and context reveal an intention to enter into a legally binding relationship, a departure from customary form will not preclude the arrangement from being an international agreement. Moreover, the title of the agreement will not be determinative. Decisions will be made on the basis of the substance of the arrangement, rather than on its denomination as an international agreement, a memorandum of understanding, exchange of notes, exchange of letters, technical arrangement, protocol, note verbale, aide-memoire, agreed minute, or any other name.

(b) *Agency-level agreements.*—Agency-level agreements are international agreements within the meaning of the Act and of 1 U.S.C. 112a if they satisfy the criteria discussed in paragraph (a) of this section. The fact that an agreement is concluded by and on behalf of a particular agency of the United States Government, rather than the United States Government, does not mean that the agreement is not an international agreement. Determinations are made on the basis of the substance of the agency-level agreement in question.

(c) *Implementing agreements.*—An implementing agreement, if it satisfies the criteria discussed in paragraph (a) of this section, may be an international agreement, depending upon how precisely it is anticipated and identified in the underlying agreement it is designed to implement. If the terms of the implementing agreement are closely anticipated and identified in the underlying agreement, only the underlying agreement is considered an international agreement. For example, the underlying agreement might call for the sale by the United States of 1000 tractors, and a subsequent implementing agreement might require a first installment on this obligation by the sale of 100 tractors of the brand X variety. In that case, the implementing agreement is sufficiently identified in the underlying agreement, and would not itself be considered an international agreement within the meaning of the Act or of 1 U.S.C. 112a. Project annexes and other documents which provide technical content for an umbrella agreement are not normally treated as international agreements. However, if the underlying agreement is general in nature, and the implementing agreement meets the specified criteria of paragraph (a) of this section, the implementing agreement might well be an international agreement. For example, if the underlying agreement calls for the conclusion of “agreements for agricultural assistance,” but without further specificity, then a particular agricultural assistance agreement subsequently concluded in “implementation” of that obligation, provided it meets the criteria discussed in paragraph (a) of this section, would constitute an international agreement independent of the underlying agreement.

(d) *Extension and modifications of agreements.*—If an undertaking constitutes an international agreement within the meaning of the Act and of 1 U.S.C. 112a, then a subsequent extension or modification of such an agreement would itself constitute an international agreement within the meaning of the Act of 1 U.S.C. 112a.

(e) *Oral agreements.*—Any oral arrangement that meets the criteria discussed in paragraphs (a) (1)–(4) of this section is an international agreement and, pursuant to section (a) of the Act, must be reduced to writing by the agency that concluded the oral arrangement. In such written form, the arrangement is subject to all the requirements of the Act and of this part. Whenever a question arises whether an oral arrangement constitutes an international agreement, the arrangement shall be reduced to writing and the decision made in accordance with § 181.3.

### **§ 181.3 Determinations.**

(a) Whether any undertaking, document, or set of documents constitutes or would constitute an international agreement within the meaning of the Act or of 1 U.S.C. 112a shall be determined by the Legal Adviser of the Department of State, a Deputy Legal adviser, or in most cases the Assistant Legal Adviser for Treaty Affairs. Such determinations shall be made either on a case-by-case basis, or on periodic consultation, as appropriate.

(b) Agencies whose responsibilities include the negotiation and conclusion of international agreements are responsible for transmitting to the Assistant Legal Adviser for Treaty Affairs, for decision pursuant to paragraph (a) of this section, the texts of any document or set of documents that might constitute an international agreement. The transmittal shall be made prior to or simultaneously with the request for consultations with the Secretary of State required by subsection (c) of the Act and § 181.4 of this part.

(c) Agencies whose responsibilities include the negotiation and conclusion of large numbers of agency-level and implementing arrangements at overseas posts, only a small number of which might constitute international agreements within the meaning of the Act and of 1 U.S.C. 112a, are required to transmit prior to their entry

into force only the texts of the more important of such arrangements for decision pursuant to paragraph (a) of this section. The texts of all arrangements that might constitute international agreements shall, however, be transmitted to the Office of the Assistant Legal Adviser for Treaty Affairs as soon as possible, and in no event to arrive at that office later than 20 days after their signing for decision pursuant to paragraph (a) of this section.

(d) Agencies to which paragraphs (b) and (c) of this section apply shall consult periodically with the Assistant Legal Adviser for Treaty Affairs in order to determine which categories of arrangements for which they are responsible are likely to be international agreements within the meaning of the Act and of 1 U.S.C. 112a.

**§ 181.4 Consultations with the Secretary of State.**

(a) The Secretary of State is responsible, on behalf of the President, for ensuring that all proposed international agreements of the United States are fully consistent with United States foreign policy objectives. Except as provided in § 181.3(c) of this part, no agency of the U.S. Government may conclude an international agreement, whether entered into in the name of the U.S. Government or in the name of the agency, without prior consultation with the Secretary of State or his designee.

(b) The Secretary of State (or his designee) gives his approval for any proposed agreement negotiated pursuant to his authorization, and his opinion on any proposed agreement negotiated by an agency which has separate authority to negotiate such agreement. The approval or opinion of the Secretary of State or his designee with respect to any proposed international agreement will be given pursuant to Department of State procedures set out in Volume 11, *Foreign Affairs Manual*, Chapter 700 (Circular 175 procedure). Officers of the Department of State shall be responsible for the preparation of all documents required by the Circular 175 procedure.

(c) Pursuant to the Circular 175 procedure, the approval of, or an opinion on a proposed international agreement to be concluded in the name of the U.S. Government will be given either by the Secretary of State or his designee. The approval of, or opinion on a proposed international agreement to be concluded in the name of a particular agency of the U.S. Government will be given by the interested assistant secretary or secretaries of State, or their designees, unless such official(s) judge that consultation with the Secretary, Deputy Secretary, or an Under Secretary is necessary. The approval of, or opinion on a proposed international agreement will normally be given within 20 days of receipt of the request for consultation and of the information as required by § 181.4(d)-(g).

(d) Any agency wishing to conclude an international agreement shall transmit to the interested bureau or office in the Department of State, or to the Office of the Legal Adviser, for consultation pursuant to this section, a draft text or summary of the proposed agreement, a precise citation of the Constitutional, statutory, or treaty authority for such agreement, and other background information as requested by the Department of State. The transmittal of the draft text or summary and citation of legal authority shall be made before negotiations are undertaken, or if that is not feasible, as early as possible in the negotiating process. In any event such transmittals must be made no later than 50 days prior to the anticipated date for concluding the proposed agreement. If unusual circumstances prevent this 50-day requirement from being met, the concerned agency shall use its best efforts to effect such transmittal as early as possible prior to the anticipated date for concluding the proposed agreement.

(e) If a proposed agreement embodies a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in an approved budget, the agency proposing the agreement shall state what arrangements have been planned or carried out concerning consultation with the Office of Management and Budget for such commitment. The Department of State should receive confirmation that the relevant budget approved by the President provides or requests funds adequate to fulfill the proposed commitment, or that the President has made a determination to seek the required funds.

(f) Consultation may encompass a specific class of agreements rather than a particular agreement where a series of agreements of the same general type is contemplated; that is, where a number of agreements are to be negotiated according to a more or less standard formula, such as, for example, Public Law 480 Agricultural Commodities Agreements. Any agency wishing to conclude a particular agreement within a specific class of agreements about which consultations have previously been held pursuant to this section shall transmit a draft text of the proposed agreement to the Office of the Legal Adviser as early as possible but in no event later than 20 days prior to the anticipated date for concluding the agreement.

(g) The consultation requirement shall be deemed to be satisfied with respect to proposed international agreements of the United States about which the Secretary of State (or his designee) has been consulted in his capacity as a member of an interagency committee or council established for the purpose of approving such proposed agreements. Designees of the Secretary of State serving on any such interagency committee or council are to provide as soon as possible to the interested offices or bureaus of the Department of State and to the Office of the Legal Adviser copies of draft texts or summaries of such proposed agreements and other background information as requested.

(h) Before an agreement containing a foreign language text may be signed or otherwise concluded, a signed memorandum must be obtained from a responsible language officer of the Department of State or of the U.S. Government agency concerned certifying that the foreign language text and the English language text are in conformity with each other and that both texts have the same meaning in all substantive respects. The signed memorandum is to be made available to the Department of State upon request.

**§ 181.5 Twenty-day rule for concluded agreements.**

(a) Any agency, including the Department of State, that concludes an international agreement within the meaning of the Act and of 1 U.S.C. 112a, whether entered into in the name of the U.S. Government or in the name of the agency, must transmit the text of the concluded agreement to the office of the Assistant Legal Adviser for Treaty Affairs as soon as possible and in no event to arrive at that office later than 20 days after the agreement has been signed. The 20-day limit, which is required by the Act, is essential for purposes of permitting the Department of State to meet its obligation under the Act to transmit concluded agreements to the Congress no later than 60 days after their entry into force.

(b) In any case of transmittal after the 20-day limit, the agency or Department of State office concerned may be asked to provide to the Assistant Legal Adviser for Treaty Affairs a statement describing the reasons for the late transmittal. Any such statements will be used, as necessary, in the preparation of the annual report on late transmittals, to be signed by the President and transmitted to the Congress, as required by subsection (b) of the Act.

**§ 181.6 Documentation and certification.**

(a) Transmittals of concluded agreements to the Assistant Legal Adviser for Treaty Affairs pursuant to § 181.5 must include the signed or initialed original texts, together with all accompanying papers, such as agreed minutes, exchanges of notes, or side letters. The texts transmitted must be accurate, legible, and complete, and must include the texts of all languages in which the agreement was signed or initiated. Names and identities of the individuals signing or initialing the agreements, for the foreign government as well as for the United States, must, unless clearly evident in the texts transmitted, be separately provided.

(b) Agreements from overseas posts should be transmitted to the Department of State by priority airgram, marked for the attention of the Assistant Legal Adviser for Treaty Affairs, with the following notation below the enclosure line: FAIM: Please send attached original agreement to L/T on arrival.

(c) Where the original texts of concluded agreements are not available, certified copies must be transmitted in the same manner as original texts. A certified copy must be an exact copy of the signed original.

(d) When an exchange of diplomatic notes between the United States and a foreign government constitutes an agreement or has the effect of extending, modifying, or terminating an agreement to which the United States is a party, a properly certified copy of the note from the United States to the foreign government, and the signed original of the note from the foreign government, must be transmitted. If, in conjunction with the agreement signed, other notes related thereto are exchanged (either at the same time, beforehand, or subsequently), properly certified copies of the notes from the United States to the foreign government must be transmitted with the signed originals of the notes from the foreign government.

(e) Copies may be certified either by a certification on the document itself, or by a separate certification attached to the document. A certification on the document itself is placed at the end of the document. It indicates, either typed or stamped, that the document is a true copy of the original signed or initialed by (insert full name of signing officer), and it is signed by the certifying officer. If a certification is typed on a separate sheet of paper, it briefly describes the document certified and states that it is a true copy of the original signed by (full name) and it is signed by the certifying officer.



**§ 181.7 Transmittal to the Congress.**

(a) International agreements other than treaties shall be transmitted by the Assistant Legal Adviser for Treaty Affairs to the President of the Senate and the Speaker of the House of Representatives as soon as practicable after the entry into force of such agreements, but in no event later than 60 days thereafter.

(b) Classified agreements shall be transmitted by the Assistant Secretary of State for Congressional Relations to the Senate Committee on Foreign Relations and to the House Committee on Foreign Affairs.<sup>4</sup>

(c) The Assistant Legal Adviser for Treaty Affairs shall also transmit to the President of the Senate and to the Speaker of the House of Representatives background information to accompany each agreement reported under the Act. Background statements, while not expressly required by the Act, have been requested by the Congress and have become an integral part of the reporting requirement. Each background statement shall include information explaining the agreement, the negotiations, the effect of the agreement, and a precise citation of legal authority. At the request of the Assistant Legal Adviser for Treaty Affairs, each background statement is to be prepared in time for transmittal with the agreement it accompanies by the office most closely concerned with the agreement. Background statements for classified agreements are to be transmitted by the Assistant Secretary of State for Congressional Relations to the Senate Committee on Foreign Relations and to the House Committee on Foreign Affairs.<sup>3</sup>

(d) Pursuant to Section 12 of the Taiwan Relations Act (22 U.S.C. 3311), any agreement entered into between the American Institute in Taiwan and the governing authorities on Taiwan, or any agreement entered into between the Institute and an agency of the United States Government, shall be transmitted by the Assistant Secretary of State for Congressional Relations to the President of the Senate and to the Speaker of the House of Representatives as soon as practicable after the entry into force of such agreements, but in no event later than 60 days thereafter. Classified agreements entered into by the Institute shall be transmitted by the Assistant Secretary for Congressional Relations to the Senate Committee on Foreign Affairs.<sup>5</sup>

**§ 181.8 Publication.<sup>6</sup>**

(a) The following categories of international agreements will not be published in United States Treaties and Other International Agreements:

- (1) Bilateral agreements for the rescheduling of intergovernmental debt payments;
- (2) Bilateral textile agreements concerning the importation of products containing specified textile fibers done under the Agricultural Act of 1956, as amended;
- (3) Bilateral agreements between postal administrations governing technical arrangements;
- (4) Bilateral agreements that apply to specified military exercises;
- (5) Bilateral military personnel exchange agreements;
- (6) Bilateral judicial assistance agreements that apply only to specified civil or criminal investigations or prosecutions;
- (7) Bilateral mapping agreements;
- (8) Tariff and other schedules under the General Agreement on Tariffs and Trade and under the Agreement of the World Trade Organization;
- (9) Agreements that have been given a national security classification pursuant to Executive Order No. 12958 or its successors; and

(b) Agreements on the subjects listed in paragraphs (a) (1) through (9) of this section that had not been published as of February 26, 1996.

(c) Any international agreements in the possession of the Department of State, other than those in paragraph (a) (9) of this section, but not published will be made available upon request by the Department of State.

<sup>4</sup>Sec. 1(a) (5) of Public Law 104-14 (109 Stat. 186) provided that references to the Committee on Foreign Affairs of the House of Representatives shall be treated as referring to the Committee on International Relations of the House of Representatives.

<sup>5</sup>In original. Should read Senate Committee on Foreign Relations.

<sup>6</sup>Sec. 181.8 was added at 61 F.R. 7071, February 16, 1996.

## **APPENDIX 4.—DEPARTMENT OF STATE CIRCULAR 175 PROCEDURES ON TREATIES**

**Foreign Affairs Manual, 11 FAM 700, Treaties and Other International  
Agreements, TL:POL—36, Revised February 25, 1985**

### **11 FAM 710**

#### **PURPOSE AND DISCLAIMER**

#### **11 FAM 711 PURPOSE**

(STATE ONLY)

a. The purpose of this chapter is to facilitate the application of orderly and uniform measures and procedures for the negotiation, signature, publication, and registration of treaties and other international agreements of the United States. It is also designed to facilitate the maintenance of complete and accurate records on treaties and agreements and the publication of authoritative information regarding them.

b. The chapter is not a catalog of all the essential guidelines or information pertaining to the making and application of international agreements. It is limited to guidelines or information necessary for general guidance.

#### **11 FAM 712 DISCLAIMER**

(STATE ONLY)

This chapter is intended solely as a general outline of measures and procedures ordinarily followed which, it is recognized, cannot anticipate all circumstances or situations that may arise. Deviation or derogation from the provisions of this chapter will not invalidate actions taken by officers nor affect the validity of negotiations engaged in or of treaties or other agreements concluded.

#### **11 FAM 713 THROUGH 719 UNASSIGNED**

### **11 FAM 720**

#### **NEGOTIATION AND SIGNATURE**

#### **11 FAM 720.1 CIRCULAR 175 PROCEDURE**

This subchapter is a codification of the substance of Department Circular No. 175, December 13, 1955, as amended, on the negotiation and signature of treaties and other international agreements. It may be referred to for convenience and continuity as the "Circular 175 Procedure."

#### **11 FAM 720.2 GENERAL OBJECTIVES**

The objectives are:

a. That the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits;

b. That the objectives to be sought in the negotiation of particular treaties and other international agreements are approved by the Secretary or an officer specifically authorized by him or her for that purpose;

c. That timely and appropriate consultation is had with congressional leaders and committees on treaties and other international agreements;

d. That where, in the opinion of the Secretary of State or a designee, the circumstances permit, the public be given an opportunity to comment on treaties and other international agreements;

e. That firm positions departing from authorized positions are not undertaken without the approval of the Legal Adviser and interested Assistant Secretaries or their deputies;

f. That the final texts developed are approved by the Legal Adviser and the interested assistant secretaries or their deputies and, when required, brought a reasonable time before signature to the attention of the Secretary or an officer specifically designated by the Secretary for that purpose;

g. That authorization to sign the final text is obtained and appropriate arrangements for signature are made; and

h. That there is compliance with the requirements of 1 U.S.C. 112b, as amended, on the transmission of the texts of international agreements other than treaties to the Congress (see 11 FAM 724); the law on the publication of treaties and other international agreements (see 11 FAM 725); and treaty provisions on registration (see 11 FAM 750.3-3).

#### 11 FAM 721 EXERCISE OF THE INTERNATIONAL AGREEMENT POWER

##### 11 FAM 721.1 DETERMINATION OF TYPE OF AGREEMENT

The following considerations will be taken into account along with other relevant factors in determining whether an international agreement shall be dealt with by the United States as a treaty to be brought into force with the advice and consent of the Senate or as an agreement to be brought into force on some other constitutional basis.

##### 11 FAM 721.2 CONSTITUTIONAL REQUIREMENTS

There are two procedures under the Constitution through which the United States becomes a party to international agreement. Those procedures and the constitutional parameters of each are:

###### *a. Treaties*

International agreements (regardless of their title, designation, or form) whose entry into force with respect to the United States takes place only after the Senate has given its advice and consent are "treaties." The President, with the advice and consent of two-thirds of the Senators present, may enter into an international agreement on any subject genuinely of concern in foreign relations, so long as the agreement does not contravene the United States Constitution; and

###### *b. International Agreements Other Than Treaties*

International agreements brought into force with respect to the United States on a constitutional basis other than with the advice and consent of the Senate are "international agreements other than treaties." (The term "executive agreement" is appropriately reserved for agreements made solely on the basis of the constitutional authority of the President.) There are three constitutional bases for international agreements other than treaties as set forth below. An international agreement may be concluded pursuant to one or more of these constitutional bases:

**(1) Agreements Pursuant to Treaty.**—The President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate, the provisions of which constitute authorization for the agreement by the Executive without subsequent action by the Congress;

**(2) Agreements Pursuant to Legislation.**—The President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by the Congress; and

**(3) Agreements Pursuant to the Constitutional Authority of the President.**—The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority. The constitutional sources of authority for the President to conclude international agreements include:

(a) The President's authority as Chief Executive to represent the nation in foreign affairs;

(b) The President's authority to receive ambassadors and other public ministers;

(c) The President's authority as "Commander-in-Chief"; and

(d) The President's authority to "take care that the laws be faithfully executed."

11 FAM 721.3 CONSIDERATIONS FOR SELECTING AMONG CONSTITUTIONALLY  
AUTHORIZED PROCEDURES

In determining a question as to the procedure which should be followed for any particular international agreement, due consideration is given to the following factors along with those in 11 FAM 721.2:

- a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
- b. Whether the agreement is intended to affect State laws;
- c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- d. Past U.S. practice as to similar agreements;
- e. The preference of the Congress as to a particular type of agreement;
- f. The degree of formality desired for an agreement;
- g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- h. The general international practice as to similar agreements.

In determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, or the President.

11 FAM 721.4 QUESTIONS AS TO TYPE OF AGREEMENT TO BE USED; CONSULTATION  
WITH CONGRESS

a. All legal memorandums accompanying Circular 175 requests (see 11 FAM 722.3, paragraph h) will discuss thoroughly the bases for the type of agreement recommended.

b. When there is any question whether an international agreement should be concluded as a treaty or as an international agreement other than a treaty, the matter is brought to the attention of the Legal Adviser of the Department. If the Legal Adviser considers the question to be a serious one that may warrant congressional consultation, a memorandum will be transmitted to the Assistant Secretary for Legislative and Intergovernmental Affairs and other officers concerned. Upon receiving their views on the subject, the Legal Adviser shall, if the matter has not been resolved, transmit a memorandum thereon to the Secretary for a decision. Every practicable effort will be made to identify such questions at the earliest possible date so that consultations may be completed in sufficient time to avoid last-minute consideration.

c. Consultations on such questions will be held with congressional leaders and committees as may be appropriate. Arrangements for such consultations shall be made by the Assistant Secretary for Legislative and Intergovernmental Affairs and shall be held with the assistance of the Office of the Legal Adviser and such other offices as may be determined. Nothing in this section shall be taken as derogating from the requirement of appropriate consultations with the Congress in accordance with 11 FAM 723.1, paragraph e, in connection with the initiation of, and developments during negotiations for international agreements, particularly where the agreements are of special interest to the Congress.

11 FAM 722 ACTION REQUIRED IN NEGOTIATION AND/OR SIGNATURE OF TREATIES  
AND AGREEMENTS

11 FAM 722.1 AUTHORIZATION REQUIRED TO UNDERTAKE NEGOTIATIONS

Negotiations of treaties, or other international agreements on matters of substance, or for their extension or revision, are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government, until authorized in writing by the Secretary or an officer specifically authorized by the Secretary for that purpose. Notification of the termination of any treaty or other international agreement on matters of substance requires similar authorization.

11 FAM 722.2 SCOPE OF AUTHORIZATION

Approval of a request for authorization to negotiate a treaty or other international agreement does not constitute advance approval of the text nor authorization to agree upon a date for signature or to sign the treaty or agreement. Authorization to agree upon a given date for, and to proceed with, signature must be specifically requested in writing, as provided in 11 FAM 722.3. This applies to treaties and

other agreements to be signed abroad as well as those to be signed at Washington. Special instructions may be required, because of the special circumstances involved, for multilateral conventions or agreements to be signed at international conferences.

11 FAM 722.3 REQUEST FOR AUTHORIZATION TO NEGOTIATE AND/OR SIGN ACTION  
MEMORANDUM

a. A request for authorization to negotiate and/or sign a treaty or other international agreement takes the form of an action memorandum addressed to the Secretary or other principal to whom such authority has been delegated, as appropriate, and cleared with the Office of the Legal Adviser (including the Assistant Legal Adviser for Treaty Affairs), the Office of the Assistant Secretary for Legislative and Intergovernmental Affairs, other appropriate bureaus, and any other agency (such as Defense, Commerce, etc.) which has primary responsibility or a substantial interest in the subject matter. It is submitted through the Executive Secretariat.

b. The action memorandum may request one of the following: (1) authority to negotiate, (2) authority to sign, or (3) authority to negotiate and sign. The request in each instance states that any substantive changes in the draft text will be cleared with the Office of the Legal Adviser and other specified regional and/or functional bureaus before definitive agreement is reached. Drafting offices should consult closely with the Office of the Legal Adviser to insure that all legal requirements are met.

c. The action memorandum indicates what arrangements are planned as to: (1) congressional consultation and (2) opportunity for public comment on the treaty or agreement being negotiated, signed, or acceded to.

d. The action memorandum shall indicate: (1) whether a proposed treaty or agreement embodies a commitment to furnish funds, goods, or services beyond or in addition to those authorized in an approved budget; and if so, (2) arrangements planned or carried out concerning consultation with the Office of Management and Budget (OMB) for such commitment.

e. The Department will not authorize such commitments without confirmation that the relevant budget approved by the President requests or provides funds adequate to fulfill the proposed commitment or that the President has made a determination to seek the required funds.

f. Where it appears that there may be obstacles to the immediate public disclosure of the text upon its entry into force, the action memorandum shall include an explanation thereof (see 11 FAM 723.2 and 11 FAM 723.3).

g. An action memorandum dealing with an agreement that has a potential for adverse environmental impact should contain a statement indicating whether the agreement will significantly affect the quality of the human environment.

h. The action memorandum is accompanied by: (1) the U.S. draft, if available, of any agreement or other instrument intended to be negotiated; or (2) the text of any agreement and related exchange of notes, agreed minutes, or other document to be signed (with appropriate clearances, including the Assistant Legal Adviser for Treaty Affairs); and (3) a memorandum of law prepared in the Office of the Legal Adviser.

i. These provisions shall apply whether a proposed international agreement is to be concluded in the name of the U.S. Government or in the name of a particular agency of the U.S. Government. However, in the latter case, the action memorandum may be addressed to the interested Assistant Secretary or Secretaries of State, or their designees in writing, unless such official(s) judge that consultation with the Secretary, Deputy Secretary or an Under Secretary is necessary. (See 22 CFR 181.4.)

11 FAM 722.4 SEPARATE AUTHORIZATIONS

When authorization is sought for a particular treaty or other agreement, either multilateral or bilateral, the action memorandum for this purpose outlines briefly and clearly the principal features of the proposed treaty or other agreement, indicates any special problems which may be encountered and, if possible, the contemplated solutions of those problems.

11 FAM 722.5 BLANKET AUTHORIZATIONS

In general, blanket authorizations are appropriate only in those instances where, in carrying out or giving effect to provisions of law or policy decisions, a series of agreements of the same general type is contemplated; that is, a number of agreements to be negotiated according to a more or less standard formula (for example, Pub. L. 480 Agricultural Commodities Agreements; Educational Exchange Agreements; Investment Guaranty Agreements; Weather Station Agreements, etc.) or a

number of treaties to be negotiated according to a more or less standard formula (for example, consular conventions, extradition treaties, etc.). Each request for blanket authorization shall specify the office or officers to whom the authority is to be delegated. The basic precepts under 11 FAM 722.3 and 11 FAM 722.4 apply equally to requests for blanket authorizations. The specific terms of any blanket authorization, i.e., that the text of any particular agreement shall be cleared by the Office of the Legal Adviser and other interested bureaus before signature, shall be observed in all cases.

#### 11 FAM 722.6 CERTIFICATION OF FOREIGN LANGUAGE TEXT

a. Before any treaty or other agreement containing a foreign language text is laid before the Secretary (or any person authorized by the Secretary) for signature, either in the Department or at a post, a signed memorandum must be obtained from a responsible language officer of the Department certifying that the foreign language text and the English language text are in conformity with each other and that both texts have the same meaning in all substantive respects. A similar certification must be obtained for exchanges of notes that set forth the terms of an agreement in two languages.

b. In exceptional circumstances the Department can authorize the certification to be made at a post.

#### 11 FAM 722.7 TRANSMISSION OF TEXTS TO THE SECRETARY

The texts of treaties and other international agreements must be completed and approved in writing by all responsible officers concerned sufficiently in advance to give the Secretary, or the person to whom authority to approve the text has been delegated, adequate time before the date of signing to examine the text and dispose of any questions that arise. Posts must transmit the texts to the Department as expeditiously as feasible to assure adequate time for such consideration. Except as otherwise specifically authorized by the Secretary, a complete text of a treaty or other international agreement must be delivered to the Secretary or other person authorized to approve the text, before any such text is agreed upon as final or any date is agreed upon for its signature.

#### 11 FAM 723 RESPONSIBILITY OF OFFICE OR OFFICER CONDUCTING NEGOTIATIONS

##### 11 FAM 723.1 CONDUCT OF NEGOTIATIONS

The office or officer responsible for any negotiations keeps in mind:

a. That during the negotiations no position is communicated to a foreign government or to an international organization as a U.S. position that goes beyond any existing authorization or instructions;

b. That no proposal is made or position is agreed to beyond the original authorization without appropriate clearance (see 11 FAM 722.3, paragraph a);

c. That all significant policy-determining memorandums and instructions to the field on the subject of the negotiations have appropriate clearance (see 11 FAM 722.3, paragraph a);

d. That the Secretary or other principal, as appropriate, is kept informed in writing of important policy decisions and developments, including any particularly significant departures from substantially standard drafts that have been evolved;

e. That with the advice and assistance of the Assistant Secretary for Legislative and Intergovernmental Affairs, the appropriate congressional leaders and committees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement. Where the proposal for any especially important treaty or other international agreement is contemplated, the Office of the Assistant Secretary for Legislative and Intergovernmental Affairs will be informed as early as possible by the office responsible for the subjects;

f. That the interest of the public be taken into account and, where in the opinion of the Secretary of State or his or her designee the circumstances permit, the public be given an opportunity to comment;

g. That in no case, after accord has been reached on the substance and wording of the texts to be signed, do the negotiators sign an agreement or exchange notes constituting an agreement until a request under 11 FAM 722.3 for authorization to sign has been approved and, if at a post abroad, until finally Instructed by the Department to do so as stated in 11 FAM 730.3. If an agreement is to be signed in

two languages, each language text must be cleared in full with the Language Services Division or, if at a post abroad, with the Department before signature, as stated in 11 FAM 722.6;

h. That due consideration is given also to the provisions of 11 FAM 723.2 through 11 FAM 723.9, 11 FAM 730.3, and 11 FAM 731 of this chapter; and

i. That in any case where any other department or agency is to play a primary or significant role or has a major interest in negotiation of an international agreement, the appropriate official or officials in such department or agency are informed of the provisions of this subchapter.

#### 11 FAM 723.2 AVOIDING OBSTACLES TO PUBLICATIONS AND REGISTRATION

The necessity of avoiding any commitment incompatible with the law requiring publication (1 U.S.C. 112a) and with the treaty provisions requiring registration (see 11 FAM 750.3-3) should be borne in mind by U.S. negotiators. Although negotiations may be conducted on a confidential basis, every practicable effort must be made to assure that any definitive agreement or commitment entered into will be devoid of any aspect which would prevent the publication and registration of the agreement.

#### 11 FAM 723.3 QUESTIONS ON IMMEDIATE PUBLIC DISCLOSURE

in any instance where it appears to the officer or office in the Department responsible for the negotiations or to the U.S. representatives that the immediate public disclosure upon its entry into force of an agreement under negotiations would be prejudicial to the national security of the United States, the pertinent circumstances shall be reported to the Secretary of State and his or her decision awaited before any further action is taken. Where such circumstances are known before authorization to negotiate or to sign is requested, they shall be included in the request for authorization. All such reports and requests are to be cleared with the Office of the Legal Adviser.

#### 11 FAM 723.4 PUBLIC STATEMENTS

No public statement is to be made indicating that agreement on a text has been reached, or that negotiations have been successfully completed, before authorization is granted to sign the treaty or other agreement. If such authorization has been granted subject to a condition that no substantive change in the proposed text is made without appropriate clearance (see 11 FAM 722.3, paragraph a), no such public statement is to be made until definitive agreement on the text has been reached and such clearance has been received. Normally, such a public statement is made only at the time a treaty or other agreement is actually signed, inasmuch as it remains possible that last-minute changes will be made in the text. Any such statement prior to that time must have the appropriate clearance, and the approval of the Secretary or the Department principal who originally approved the action memorandum request under "Circular 175 Procedure."

#### 11 FAM 723.5 ENGLISH-LANGUAGE TEXT

Negotiators will assure that every bilateral treaty or other international agreement to be signed for the United States contains an English-language text. If the language of the other country concerned is one other than English, the text is done in English and, if desired by the other country, in the language of that country. A U.S. note that constitutes part of an international agreement effected by exchange of notes is always in the English language. If it quotes a foreign government note, the quotation is to be rendered in English translation. A U.S. note is not in any language in addition to English, unless specifically authorized (with the clearance of the Assistant Legal Adviser for Treaty Affairs). The note of the other government concerned may be in whatever language that government desires.

#### 11 FAM 723.6 TRANSMISSION OF SIGNED TEXTS TO ASSISTANT LEGAL ADVISER FOR TREATY AFFAIRS

a. The officer responsible for the negotiation of a treaty or other agreement at any post is responsible for insuring the most expeditious transmission of the signed original text, together with all accompanying papers such as agreed minutes, exchanges of notes, plans, etc. (indicating full names of persons who signed), to the Department for the attention of the Assistant Legal Adviser for Treaty Affairs; provided, that where originals are not available, accurate certified copies are obtained and transmitted as in the case of the original. (See 11 FAM 723.7, 11 FAM 723.8,

and 11 FAM 723.9.) The transmittal is by airgram, not by transmittal slip or operations memorandum.

b. Any officer in the Department having possession of or receiving from any source a signed original or certified copy of a treaty or agreement or of a note or other document constituting a part of a treaty or agreement must forward such documents immediately to the Assistant Legal Adviser for Treaty Affairs.

#### 11 FAM 723.7 TRANSMISSION OF CERTIFIED COPIES TO THE DEPARTMENT

When an exchange of diplomatic notes between the mission and a foreign government constitutes an agreement or has the effect of extending, modifying, or terminating an agreement to which the United States is a party, a properly certified copy of the note from the mission to the foreign government, and the signed original of the note from the foreign government are sent, as soon as practicable (indicating full names of persons who signed) to the Department for attention of the Assistant Legal Adviser for Treaty Affairs. The transmittal is by airgram, not by transmittal slip or operations memorandum.

Likewise, if, in addition to the treaty or other agreement signed, notes related thereto are exchanged (either at the same time, beforehand, or thereafter), a properly certified copy (copies) of the note(s) from the mission to the foreign government are transmitted with the signed original(s) of the note(s) from the foreign government.

In each instance, the mission retains for its files certified copies of the note exchanged. The U.S. note is prepared in accordance with the rules prescribed in 5 FAH-1, Correspondence Handbook. The note of the foreign government is prepared in accordance with the style of the foreign ministry and usually in the language of that country. Whenever practicable, arrangements are made for the notes to bear the same date.

#### 11 FAM 723.8 CERTIFICATION OF COPIES

If a copy of a note is a part of an international agreement, such copy is certified by a duly commissioned and qualified Foreign Service officer either (a) by a certification on the document itself, or (b) by a separate certification attached to the document. A certification on the document itself is placed at the end of the document. It indicates, either typed or rubber stamped, that the document is a true copy of the original signed (or initialed) by (INSERT FULL NAME OF OFFICER WHO SIGNED DOCUMENT), and it is signed by the certifying officer. If a certification is typed on a separate sheet of paper, it briefly describes the document certified and states that it is a true copy of the original signed (or initialed) by (FULL NAME), and it is signed and dated by the certifying officer. The certification may be stapled to the copy of the note.

#### 11 FAM 723.9 PREPARATION OF COPIES FOR CERTIFICATION

For purposes of accuracy of the Department's records and publication and registration, a certified copy must be an exact copy of the signed original. It must be made either by typewriter (ribbon or carbon copy) or by facsimile reproduction on white durable paper (not by the duplimat method) and must be CLEARLY LEGIBLE. In the case of notes, the copy shows the letterhead, the date and, if signed, an indication of the signature or, if merely initialed, the initials which appear on the original. It is suggested that, in the case of a note from the mission to the foreign government, the copy for certification and transmission to the Department be made at the same time the original is prepared. If the copy is made at the same time, the certificate prescribed in 11 FAM 723.8 may state that the document is a true and correct copy of the signed original. If it is not possible to make a copy at the same time the original is prepared, the certificate indicates that the document is a true and correct copy of the copy on file in the mission. The word "(Copy)" is not placed on the document which is being certified; the word "(Signed)" is not placed before the indication of signatures. Moreover, a reference to the transmitting airgram, such as "Enclosure 1 to Airgram No. 18 (ect.)", is not placed on the certified document. The identification of such a document as an enclosure to an airgram may be typed on a separate slip of paper and attached to the document, but in such a manner that it may be easily removed without defacing the document.



11 FAM 724 TRANSMISSION OF INTERNATIONAL AGREEMENTS OTHER THAN TREATIES  
TO CONGRESS: COMPLIANCE WITH THE CASE-ZABLOCKI ACT

All officers will be especially diligent in cooperating to assure compliance with Pub. L. 92-403 "An Act to require that international agreements other than treaties, hereafter entered into by the United States, be transmitted to the Congress within sixty days after the execution thereof." That Act, popularly known as the Case-Zablocki Act, approved August 22, 1972 (86 Stat. 619; 1 U.S.C. 112b), provides as follows:

The Secretary of State shall transmit to the Congress the text of any international agreement other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.

11 FAM 725 PUBLICATION OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF  
THE UNITED STATES

The attention of all officers is directed to the requirements of the Act of September 23, 1950 (64 Stat. 979; 1 U.S.C. 112a), which provides as follows:

The Secretary of State shall cause to be compiled, edited, indexed, and published, beginning as of January 1, 1950, a compilation entitled "United States Treaties and Other International Agreements," which shall contain all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other final formality has been executed, during each calendar year. The said United States Treaties and Other International Agreements shall be legal evidence of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements, therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

11 FAM 726 THROUGH 729 UNASSIGNED

11 FAM 730

GUIDELINES FOR CONCLUDING INTERNATIONAL AGREEMENTS

11 FAM 730.1 METHOD OF CONCLUDING BILATERAL AND MULTILATERAL AGREEMENTS

An agreement may be concluded (entered into) by the process of bilateral negotiations which result either in the signing of a single instrument in duplicate or in exchange of diplomatic notes, or by the process of multilateral negotiations, usually at an international conference to which the governments concerned send official delegations for the purpose of formulating and signing an instrument of agreement.

11 FAM 730.2 BILATERAL TREATIES AND AGREEMENTS

*11 FAM 730.2-1 Negotiation and Background Assistance*

Whenever the negotiation of a new international agreement is under consideration, the Department office or the post having primary responsibility informs the Legal Adviser and may, if considered necessary, request background material and advice regarding relevant provisions in existing treaties and agreements, the general treaty relations of this Government with the government or governments concerned, and other pertinent information.

*11 FAM 730.2-2 Role of Office of the Legal Adviser*

**a. Legal Review of Draft Agreements.**—As soon as tentative provisions for an agreement are considered or drafted, the Office of the Legal Adviser is requested to make available the services of an attorney-adviser to insure that the agreement is properly drafted and agreed policy is expressed clearly and fully. The Office of the Legal Adviser prepares a draft in the first instance upon the request of another office.

**b. Legal Clearance Required.**—Any draft of a proposed treaty or agreement, or any outgoing correspondence regarding the negotiation, signature, and ratification or approval, as well as the existence, status, and application, of any international agreement to which the United States is or may become a party, is cleared with the Office of the Legal Adviser and with other appropriate bureaus or offices and, as appropriate, with any other agency concerned with the reply.

#### 11 FAM 730.3 INSTRUCTIONS TO NEGOTIATORS

When an agreement is to be concluded at a foreign capital, the Department designates the United States negotiator or negotiators, and the negotiator or negotiators are given appropriate instructions. If the agreement to be negotiated is a treaty which will be referred to the Senate, the Secretary of State may at some time prior to or during the negotiations issue or request the President to issue or request the President to issue a "full power" (see 11 FAM 732) constituting formal authorization for the United States negotiators to sign the agreement. Such a "full power" is not customary with respect to an international agreement other than a treaty. The receipt or possession of a "full power" is never to be considered as a final authorization to sign. That authorization is given by the Department by a written or telegraphic instruction, and no signature is affixed in the absence of such instruction. If the proposal for an agreement originates with the United States, the U.S. negotiators as a rule furnish a tentative draft of the proposed agreement for submission to the other government for its consideration. The negotiators submit to the Department any modification of the draft or any counterproposal made by the other government and await instructions from the Department. If the original proposal emanates from a foreign government, the mission forwards the proposal to the Department and awaits its instructions.

#### 11 FAM 730.4 PREPARATION OF TEXTS FOR SIGNATURE

If an agreement is to be signed at a post abroad as a single instrument (in duplicate), the engrossing (preparation of the documents to be signed) is customarily done in the foreign ministry on paper supplied by it, along with a binding and ribbons to tie the pages in place. However, the mission may lend assistance if the foreign ministry so desires. There is no universal standard as to the kind or size of paper which must be used (each foreign ministry has its own "treaty paper"), and the texts may be engrossed either by typing or by printing. For every bilateral agreement there must be two originals, one for each government. Each original must embody the full text of the agreement in all the languages in which the agreement is to be signed, and must be exactly the same as the other original subject only to the principle of the "alternat."

In the case of an agreement effected by exchange of notes, the U.S. notes are prepared in English and in accordance with 5 FAM 220 through 224 and the rules prescribed in 5 FAH-1, Correspondence Handbook. The note of the foreign government is prepared in accordance with the style of the foreign ministry and usually in the language of that country. Whenever practicable, arrangements are made for the notes to bear the same date.

#### 11 FAM 730.5 ARRANGEMENT OF TEXTS AND PRINCIPLE OF THE ALTERNAT

##### *11 FAM 730.5-1 Arrangement of Texts*

When English and a language other than English are both used, the texts in the two languages are placed (a) in "tandem" fashion, that is, with one text following the other (the tandem procedure is the most widely used as it is the most expeditious), or (b) in parallel, vertical columns on the same page, the columns being approximately of equal width, or (c) on opposite facing pages of the document the entire width of the type or printed space on the page.

If the two languages are placed "tandem" fashion, the English text is placed first in the U.S. original, and conversely in the foreign government's original.

If parallel columns are used, the English text is placed in the left column of each page in the original to be retained by the United States, and the foreign text appears in the right column. In the other original, to be retained by the foreign government, the foreign text appears in the left column, and the English text in the right column.

If the two languages are placed on opposite facing pages of the document, the English text occupies the left-hand page and the foreign text the right-hand page in the U.S. original, and conversely in the foreign government's original. If either the "tandem" or the "opposite facing page" style is used, the concluding part (usually beginning "IN WITNESS WHEREOF," "DONE," etc.) should appear engrossed in

parallel columns on the page on which the signatures will appear, so that only one set of signatures is required for each separately bound document (see 11 FAM 730 Exhibit 730.5-1, page 1). If parallel signature columns are not feasible, the concluding paragraphs can be placed "tandem" fashion on the page on which the signatures appear (see 11 FAM 730 Exhibit 730.5-1, page 2).

If an oriental text is one which, from the occidental viewpoint, reads from back to front, it may be possible to join the two texts in a single binding so that the signatures appear, roughly speaking, in the center of the document. If this is not feasible, the negotiators should seek instructions from the Department.

*11 FAM 730.5-2 Arrangement of Names and Signatures; Use of Titles*

In the original to be retained by the United States, the United States is named first in both the English and foreign texts, wherever the names of the countries occur together conjunctively or disjunctively; and the signature of the plenipotentiary of the United States appears on the left and that of the foreign plenipotentiary on the right of the original to be retained by the United States. Conversely, throughout both of the language texts of the original to be retained by the foreign government, that government is named first and its plenipotentiary's signature appears to the left of the signature of the U.S. plenipotentiary. The position of full sentences, paragraphs, or subparagraphs in the text is never transposed in the alternat procedure.

The general practice and preference of the Department of State is not to use titles along with signatures, especially where the President or the Secretary of State signs. However, if preferred by the other party or parties concerned, titles may be typed BELOW where each will sign (with ample space allowed for the signature).

11 FAM 731 CONFORMITY OF TEXTS

After the documents have been engrossed on the basis of agreed texts, and before the signing of the agreement, the negotiators or other responsible officers on each side make sure that the texts in both originals of the engrossed agreement are in exact conformity with each other and with the texts in the drafts agreed to, and especially that where a foreign language is included that text and the English text are in conformity in all substantive respects. Prior to engrossing it should have been determined that the foreign-language text is essentially (that is, as a matter of substance) in accord with the English text, and that it has received the clearance of the Department as required in 11 FAM 722.6.

11 FAM 732 EXCHANGE OR EXHIBITION OF FULL POWERS

Each representative who is to sign a treaty is furnished a full power signed by the head of state, head of government, or minister for foreign affairs. More than one representative should be named in a single instrument of full power. On occasion, formal full powers may be (but customarily are NOT in U.S. practice) issued for the signing of certain agreements other than treaties. When issued, the full power is formal evidence of the authority of the representative to sign on behalf of the representative's government. It names the representative, with title, and gives a clear indication of the particular instrument of agreement which the representative is entitled to sign. Full powers for representatives of the United States are prepared by the Office of the Assistant Legal Adviser for Treaty Affairs, and generally are signed by the Secretary or Acting Secretary of State. On occasion, full powers are signed by the President.

If the agreement itself requires the exchange of full powers, they are exchanged. If not, they may be either exchanged or exhibited by the representatives on the occasion of signing the agreement, as may be preferred by the foreign representative. If a full power is required, the U.S. representative shall NOT proceed to sign the treaty until the full power is in hand, or the Department specially instructs otherwise. If exchanged, the original full power of the foreign representative is forwarded to the Department with the U.S. original of the signed agreement. If the representatives retain the original of the respective full powers, each representative should supply the other representative with an offset copy or a certified copy of the full power.

11 FAM 733 SIGNATURE AND SEALING

When the engrossing of a treaty or other international agreement which is to be signed as a single instrument has been completed, mutually convenient arrangements for its signature are made by the host government. In the case of treaties, the signatures of the representatives may be accompanied by their respective seals,

ribbons being fastened in the seals and binding the documents. The same procedure may be followed for other agreements signed as single instruments. It is not essential that seals be affixed, unless the agreement specifically so requires (the preference of the Department of State is NOT to use seals). The representative's personal seal, if available, is used when seals accompany the signatures, except that if the other government concerned prefers official seals, the seal of the mission may be used.

(NOTE. A personal seal may consist of a signet ring with initial(s) or family crest, written initials, etc.)

## 11 FAM 734 EXCHANGE OF RATIFICATIONS

### 11 FAM 734.1 TIME AND PLACE OF EXCHANGE

It is customary for a treaty to contain a simple provision to the effect that the instruments of ratification shall be exchanged as soon as possible at a designated capital, and that the treaty shall enter into force on the date of such exchange or at the expiration of a specified number of days or months following the date of exchange. (As all treaties signed on the part of the United States are subject to ratification by and with the advice and consent of the Senate, and as the time required for action on any particular treaty cannot be foreseen, it is preferable that provision is made in the treaty that the instruments of ratification are to be exchanged "as soon as possible" rather than within a specified period.)

### 11 FAM 734.2 EFFECTING THE EXCHANGE

In exchanging instruments of ratification the representative of the United States hands to the representative of the foreign government a duplicate original of the President's instrument of ratification. In return, the representative of the foreign government hands to the representative of the United States the instrument of ratification executed by the head or the chief executive of the foreign government. A protocol, sometimes called "Protocol of Exchange of Ratifications" or *procès-verbal*, attesting the exchange is signed by the two representatives when the exchange is made. No full power is required for this purpose. The protocol of exchange is signed in duplicate originals, one for each government, and the principle of the alternat is observed as in the treaty. Before making the exchange and signing the *procès-verbal* or protocol of exchange the diplomatic representative of the United States must be satisfied that the ratification of the foreign government is an unqualified ratification, or subject only to such reservations or understandings as have been agreed to by the two governments.

### 11 FAM 734.3 NOTIFICATION OF DATE OF EXCHANGE

In all cases, but particularly in those in which the treaty enters into force on the day of the exchange, it is essential that the mission notify the Department by telegram when arrangements have been completed for the exchange, and also when the exchange actually takes place. By the first pouch after the exchange takes place, if possible, the mission forwards to the Department the instrument of ratification of the foreign government and the U.S. Government's original of the signed *procès-verbal* or protocol of exchange. The Department then will take such steps as may be necessary to have the proclamation of the treaty executed by the President.

[11 FAM 730 EXHIBIT 730.5-1 OMITTED]

11 FAM 735 THROUGH 739 UNASSIGNED

## 11 FAM 740

### MULTILATERAL TREATIES AND AGREEMENTS

#### 11 FAM 740.1 GENERAL PROCEDURES

The procedures for the making of multilateral agreements are in many respects the same as those for the making of bilateral agreements; for example, the general requirements in regard to full powers, ratification, proclamation, and publication. This subchapter covers those procedures which are at variance with bilateral procedures.

## 11 FAM 740.2 NEGOTIATION

*11 FAM 740.2-1 Function of International Conference*

The international conference is the device usually employed for the negotiation of multilateral agreements. The greater the number of countries involved, the greater the necessity for such a conference. If only three or four countries are involved, it may be convenient to carry on the preliminary negotiations through correspondence and have a joint meeting of plenipotentiaries to complete the negotiations and to sign the document.

*11 FAM 740.2-2 Invitation*

Traditionally, the international conference was convened by one government's extending to other interested governments an invitation (acceptance usually assured beforehand) to participate, the host government bearing most, if not all, of the expense incident to the physical aspects of the conference. This is still often the practice, but increasing numbers of conferences have been convened under the auspices, and at the call of international organizations.

*11 FAM 740.2-3 Statement of Purpose*

When a call is made or invitations are extended for a conference for the formulation of a multilateral agreement, it is customary for a precise statement of purpose to accompany the call or the invitations. Sometimes, the invitation is also accompanied by a draft agreement to be used as a basis for negotiations. If the conference is called under the auspices of an international organization, the precise statement of purpose or the draft agreement may be prepared in preliminary sessions of the organization or by the secretariat of the organization.

*11 FAM 740.2-4 Instructions to Negotiators*

The U.S. delegation to a conference may be comprised of one or more representatives. As a rule, the U.S. delegation is furnished written instructions by the Department prior to the conference in the form of a position paper for the U.S. delegation cleared with the Secretary or an officer specifically authorized by him or her and other appropriate Department officers for that purpose, under the procedures described in 11 FAM 722.3. The Office of the Legal Adviser in all instances reviews drafts of international conventions to be considered in meetings of an international organization of which the United States is a member; when necessary, it also provides legal assistance at international conferences and meetings.

*11 FAM 740.2-5 Final Acts of Conference*

The "Final Act" of a conference must not contain international commitments. A Final Act must be limited to such matters as a statement or summary of the proceedings of the conference, the names of the states that participated, the organization of the conference and the committees established, resolutions adopted, the drafts of international agreements formulated for consideration by governments concerned, and the like. If an international agreement is to be opened for signature at the close of the conference, a text thereof may be annexed to the Final Act but must not be incorporated in the body thereof; the text to be signed must be prepared and bound separately for that purpose. Where a Final Act appears to embody international commitments, the U.S. representative reports the same to the Department and awaits specific instruments before taking any further action.

## 11 FAM 741 OFFICIAL AND WORKING LANGUAGES

*a. General Procedures*

The working languages of the conference and the official languages of the conference documents are determined by the conference. A conference does not necessarily adopt all of the same languages for both purposes. It is customary and preferable for all the officials' languages in which the final document is prepared for signature to be designated as having equal authenticity. It is possible, however, for the conference to determine, because of special circumstances, that in the event of dispute one of the languages is to prevail and to include in the text of the agreement a provision to that effect. Before a U.S. delegation concurs in any such proposal, it must request instructions from the Department.

*b. English Language Text*

Negotiators will use every practicable effort to assure that an English-language text is part of the authentic text of any multilateral treaty negotiated for the United States. Where any question exists on this subject, the negotiators should seek further instructions.

## 11 FAM 742 ENROSSING

## 11 FAM 742.1 LANGUAGE OR LANGUAGES USED IN TEXTS

The multilateral agreement drawn up at an international conference is engrossed for signature in the official language or language adopted by the conference. (See 11 FAM 741.) The engrossing ordinarily will be done by the conference secretariat.

## 11 FAM 742.2 PRINCIPLE OF THE ALTERNAT

The principle of the alternat (see 11 FAM 730.5) does not apply in the case of a multilateral agreement, except in the remote case when an agreement between three or four governments is prepared for signature in the language of all the signatories and each of those governments is to receive a signed original of the agreement. Customarily, a multilateral agreement is prepared for signature in a single original, comprising all the official languages. That original is placed in the custody of a depository (either a government or an international organization) which furnishes certified copies to all governments concerned.

*11 FAM 742.2-1 Arrangement of Texts*

The arrangement of multilateral agreement texts varies, depending largely on the number of languages used. As in the case of bilateral agreements, however, the basic alternatives in the case of multilateral agreements are "tandem," parallel columns, or facing pages, as follows:

*a. Tandem*

If an agreement is to be signed in two languages, and especially if signed in three or more languages, the texts may be arranged in tandem style, that is, one complete text following the other. This allows readily for any number of official texts; the tandem style precedent of the Charter of the United Nations is followed for the preparation of agreements formulated under the auspices of the United Nations. It is desirable, whenever practicable, that the concluding part of each text be placed with the concluding part of each of the other texts in parallel columns on the page on which the first of the signatures appears, although the tandem arrangement described at the end of 11 FAM 742.2-1c (below) can be used.

*b. Parallel Columns*

If an agreement is to be signed in only two languages, the traditionally preferred method of arrangement of the texts has been parallel, vertical columns. This method may be used also if only three languages are used, but the three columns are necessarily so narrow that the method has been rarely used in such cases. When there are four official languages, however, it is possible to use the parallel column method by placing two of the language texts on a left-hand page and the other two language texts on the facing right-hand page; this method has been used often and to good advantage in various inter-American agreements with English, Spanish, French, and Portuguese. If any of the languages is oriental, the parallel column method may be inexpedient and one of the other methods may be necessary.

*c. Facing Pages*

If an agreement is to be signed in only two languages, and circumstances make it necessary or desirable, the facing page method may be used for engrossing the texts for signature, so that one of the language texts will be on a left-hand page and the other will be on the facing right-hand page. When this method is used, it is desirable that at least the concluding part (usually beginning "IN WITNESS WHEREOF," "DONE," etc.) be engrossed in parallel columns on the page at the end of the texts in both languages so that only one set of signatures is required. If parallel columns are not feasible, the concluding paragraphs can be placed tandem fashion (one language text after another) on the page at the end of the texts in both languages.

*11 FAM 742.2-2 Arrangement of Names and Signatures*

The arrangement of names and signatures, although it may seem a minor matter, sometimes presents difficulties in the case of multilateral agreements. There may be variations of arrangements, depending on particular factors, but the arrangement most generally used is alphabetical according to the names of the countries concerned. An alphabetical listing, however, presents the further question, even when there are only two languages, of what language is to be used in determining the arrangement. It is a common practice to use the language of the host government or for an agreement formulated under the auspices of an international organization, to follow the precedents established by that organization. It is possible, in the event

that agreement could not be reached regarding the arrangement of names of countries and signatures of plenipotentiaries, to have a drawing of lots, a device seldom used. In any event, the question is one to be determined by the conference.

#### 11 FAM 742.3 CONFORMITY OF TEXTS

It is the primary responsibility of the delegations, acting in conference, to determine the conformity of the agreement texts which are to be signed. However, the conference secretariat has a responsibility for checking the texts carefully to insure that, when put in final form for signature, the texts are in essential conformity.

#### 11 FAM 743 FULL POWERS

In the case of a multilateral agreement drawn up at an international conference, this Government customarily (almost invariably, in the case of a treaty) issues to one or more of its representatives at the conference an instrument of full power authorizing signature of the agreement on behalf of the United States. In some instances, issuance of the full power is deferred until it is relatively certain that the agreement formulated is to be signed for the United States. (See 11 FAM 732.) Ordinarily, that full power is presented by the representatives to the secretary general of the conference upon arrival of the delegation at the conference site. It may be submitted in advance of arrival, but usually that is not necessary. When the conference has formally convened, it usually appoints a credentials committee, to which all full powers and other evidence of authorization are submitted for examination. The full powers and related documents are retained by the credentials committee or the secretary general until the close of the conference. At the close of the conference, the full powers, related documents, and the signed original of the agreement are turned over to the government or the international organization designated in the agreement as the depositary authority, to be placed in its archives.

#### 11 FAM 744 SIGNATURE AND SEALING

See also 11 FAM 733.

#### 11 FAM 744.1 SIGNATURE

Most multilateral agreements are signed. Some, however, are adopted by a conference or organization after which governments become parties by adherence, accession, acceptance, or some other method not requiring signature (for example, conventions drawn up and adopted at sessions of the International Labor Organization). Procedures for the deposit of an instrument of adherence, accession, or acceptance are similar to procedures for the deposit of instruments of ratification. In some cases, accession or approval can be accomplished by formal notice through diplomatic channels.

#### 11 FAM 744.2 SEALS

Multilateral treaties do not usually provide for the use of seals along with the signatures of representatives. The large number of signatures would make the use of seals difficult and cumbersome.

#### 11 FAM 745 DISPOSITION OF FINAL DOCUMENTS OF CONFERENCE

At the close of a conference, the remaining supply of working documents (for example, records of committee meetings, verbatim minutes, etc.) usually is placed in the custody of the host government or the organization which called the conference for appropriate disposition. It is not proper for definitive commitments constituting part of the agreement to be embodied in such working documents. Definitive commitments must be incorporated only in a final document to be signed or adopted as an international agreement. The final documents of the conference may include a Final Act (see 11 FAM 740.2-5) and separately, the text(s) of agreement(s). The practice of signing a Final Act is still followed in many cases. In any event, any agreement formulated at the conference must be engrossed as a separate document and signed or adopted. The signed or adopted originals of the final documents of the conference are turned over to the government or international organization designated in such documents as depositary. If the conference is not held under the auspices of an organization, it is customary for the host government to be designated depositary, but it might be appropriate, even in such case, to name an organization, such as the United Nations, as depositary. The decision is made by the

conference, with the concurrence of the government or international organization concerned.

#### 11 FAM 746 PROCEDURE FOLLOWING SIGNATURE

##### 11 FAM 746.1 UNDERSTANDINGS OR RESERVATIONS

If it is necessary to inform other governments concerned, and perhaps obtain their consent, with respect to an understanding, interpretation, or reservation included by the Senate in its resolution of advice and consent, this Government communicates with the depositary, which then carries on the necessary correspondence with the other governments concerned.

##### 11 FAM 746.2 DEPOSIT OF RATIFICATION

When the depositary for a multilateral agreement is a foreign government or an international organization, the U.S. instrument of ratification (or adherence, accession, acceptance, etc.) is sent by the Office of Assistant Legal Adviser for Treaty Affairs to the appropriate Foreign Service mission or to the U.S. representative to the organization if there is a permanent representative. The mission or the representative deposits it with the depositary authority in accordance with the terms of the accompanying instruction from the Department concerning the time of deposit. When this Government is depositary for a multilateral agreement, posts are not authorized to accept instruments of ratification of foreign governments; that is, the foreign government cannot deposit its instrument with the post. If a post is requested to transmit an instrument of ratification to the Department, it must make clear to the foreign government that the post is acting only as a transmitting agent and that the ratification cannot be considered as accepted for deposit until received and examined by the Department.

##### 11 FAM 746.3 REGISTRATION

See also 11 FAM 750.3-3.

It is generally recognized that the depositary for a multilateral agreement has a primary responsibility for its registration. Normally, the depositary has custody not only of the original document of agreement but also of instruments of ratification and other formal documents. Consequently, the depositary is the most authoritative source of information and documentation.

#### 11 FAM 747 THROUGH 749 UNASSIGNED

#### 11 FAM 750

##### RESPONSIBILITIES OF THE ASSISTANT LEGAL ADVISER FOR TREATY AFFAIRS

##### 11 FAM 750.1 PREPARATION OF DOCUMENTS, CEREMONIES, AND INSTRUCTIONS

Carrying out and providing advice and assistance respecting the provisions of this chapter are the responsibility of the Assistant Legal Adviser for Treaty Affairs, who:

a. Reviews all drafts of international agreements, proposals by other governments or international organizations, instructions and position papers, all Circular 175 requests, and accompanying memorandums of law;

b. Makes all arrangements and/or supervises ceremonies at Washington for the signature of treaties or other international agreements; and supervises the preparation of texts of treaties and other agreements to be signed at Washington;

c. Supervises preparation of the Secretary of State's reports to the President, and the President's messages to the Senate for transmission of treaties for advice and consent to ratification;

d. Prepares full powers, protocols of exchange, instruments of ratification or adherence, instruments or notifications of acceptance or approval, termination notices, and proclamations with respect to treaties or other international agreements;

e. Makes arrangements for the exchange or deposit of instruments of ratification, deposit of instruments of adherence, the receipt or deposit of instruments or notifications of acceptance or approval, and termination notices with respect to treaties or other international agreements;

f. Prepares instructions to posts abroad and notes to foreign diplomatic missions at Washington respecting matters stated in paragraph e; and

g. Takes all measures required for the transmission to the Congress of all international agreements other than treaties, as required by the Case-Zablocki Act, 1



U.S.C. 112b (see 11 FAM 724), and the publication and registration of treaties and other international agreements to which the United States is a party (see 11 FAM 725 and 11 FAM 750.3-3).

#### 11 FAM 750.2 ENROSSING DOCUMENTS FOR SIGNATURE

After the text of a treaty or other agreement is approved in writing in accordance with 11 FAM 722.7, the document is normally engrossed at the capital at which it is to be signed.

Adequate time (normally 7 business days) is allowed for the engrossing (typing on treaty paper), comparing, etc., of the treaty or other agreement to be signed, in order to assure sufficient time for the preparation of accurate texts in duplicate for signature, including, in the case of documents to be signed in a foreign language, sufficient time for the Language Services Division to prepare any translations required, check any existing foreign-language draft, and check the engrossed foreign-language text. If any question arises as to the time necessary to complete engrossing at Washington, the matter will be referred to the Assistant Legal Adviser for Treaty Affairs.

#### 11 FAM 750.3 PUBLICATION AND REGISTRATION

##### *11 FAM 750.3-1 Publication of Texts*

After the necessary action has been taken to bring into force the treaty or other international agreement concluded by the United States, it is published promptly in the Treaties and Other International Acts Series issued by the Department. After publication in that series, the text of the treaty or other agreement is printed in the annual volume(s) (which may consist of two or more bindings) of United States Treaties and Other International Agreements, as required by law (see 11 FAM 725). Treaties and other agreements concluded prior to January 1, 1950, were published in the United States Statutes at Large and for easy reference were reprinted in Bevans, Treaties and Other International Agreements of the United States of America, 1776-1949.

##### *11 FAM 750.3-2 Responsibility for Other Treaty Publications*

The Office of the Assistant Legal Adviser for Treaty Affairs prepares and maintains the annual publication, Treaties in Force, an authoritative guide to the text and status of treaties and other international agreements currently in force for the United States. It also compiles and has published, in addition to the text referred to in 11 FAM 750.3-1, other volumes containing texts of treaties and other agreements as required or authorized by law. The "Treaty Information" section of the Department of State Bulletin is compiled by that office.

##### *11 FAM 750.3-3 Registration*

Article 102 of the United Nations Charter requires that every treaty and every international agreement entered into by a member of the United Nations be registered, as soon as possible, with the Secretariat and published by it. Article 83 of the Chicago Aviation Convention of 1944 requires registration of aviation agreements with the Council of the International Civil Aviation Organization.

#### 11 FAM 750.4 UNITED STATES AS DEPOSITARY

a. Inquiries from foreign diplomatic missions at Washington and from U.S. diplomatic missions abroad with respect to the preparation or deposit of instruments relating to any multilateral agreement of which the United States is despositary are referred to the Assistant Legal Adviser for Treaty Affairs. That officer is to be notified immediately of the receipt of any such document anywhere in the Department, inasmuch as a despositary is required to ascertain whether those documents are properly executed before accepting them for deposit, to keep accurate records regarding them, and to inform other governments concerned of the order and date of receipt of such documents.

b. Before any arrangements are proposed or agreed to for the United States to serve as despositary for any international agreement, the views of the Assistant Legal Adviser for Treaty Affairs will be obtained.

#### 11 FAM 750.5 RECORDS AND CORRESPONDENCE CUSTODY

a. The Assistant Legal Adviser for Treaty Affairs compiles and maintains authoritative records regarding the negotiation, signature, transmission to the Senate, and ratification or approval, as well as the existence, status, and application, of all inter-

national agreements to which the United States is or may become a party and, so far as information is available, of agreements between other countries to which the United States is not a party. Inquiries on these subjects are addressed to, and outgoing communications cleared with, the Office of the Legal Adviser.

b. To insure that the records regarding the matters described in this section are complete and up to date, it is important that all relevant papers be referred to the Office of the Legal Adviser.

c. The Assistant Legal Adviser for Treaty Affairs is responsible for the custody of originals of bilateral agreements and certified copies of multilateral agreements pending entry into force and completion of manuscripts for publication. Following publication, such originals and certified copies are transferred to the National Archives. The Assistant Legal Adviser for Treaty Affairs retains custody of signed originals of multilateral agreements for which the United States is depositary, together with relevant instruments of ratification, adherence, acceptance, or approval, as long as those agreements remain active.

11 FAM 751 THROUGH 759 UNASSIGNED

11 FAM 760 THROUGH 790 UNASSIGNED



**APPENDIX 5.—THE VIENNA CONVENTION ON  
THE LAW OF TREATIES, SENATE EX. L, 92D  
CONGRESS 1ST SESSION, WITH LIST OF SIG-  
NATURES, RATIFICATIONS AND ACCES-  
SIONS DEPOSITED AS OF DECEMBER 11,  
2000**

---

92D CONGRESS }  
*1st Session*

SENATE

{ EXECUTIVE  
L

VIENNA CONVENTION ON THE LAW OF TREATIES

---

MESSAGE

FROM

**THE PRESIDENT OF THE UNITED STATES**

TRANSMITTING

THE VIENNA CONVENTION ON THE LAW OF  
TREATIES SIGNED FOR THE UNITED STATES  
ON APRIL 24, 1970



NOVEMBER 22, 1971.—Convention was read the first time and, together with the message and accompanying papers, was referred to the Committee on Foreign Relations and ordered to be printed for use of the Senate

---

U.S. GOVERNMENT PRINTING OFFICE

65-118

WASHINGTON : 1971

**LETTER OF TRANSMITTAL**

---

THE WHITE HOUSE, *November 22, 1971.*

*To the Senate of the United States:*

I am transmitting herewith, for the advice and consent of the Senate to ratification, the Vienna Convention on the Law of Treaties signed for the United States on April 24, 1970. The Convention is the outcome of many years of careful preparatory work by the International Law Commission, followed by a two-session conference of 110 nations convened under United Nations auspices in 1968 and 1969. The conference was the sixth in a series called by the General Assembly of the United Nations for the purpose of encouraging the progressive development and codification of international law.

The growing importance of treaties in the orderly conduct of international relations had made increasingly evident the need for clear, well-defined, and readily ascertainable rules of international law applicable to treaties. I believe that the codification of treaty law formulated by representatives of the international community and embodied in the Vienna Convention meets this need.

The international community as a whole will surely benefit from the adoption of uniform rules on such subjects as the conclusion and entry into force of treaties, their interpretation and application, and other technical matters. Even more significant, however, are the orderly procedures of the Convention for dealing with needed adjustments and changes in treaties, along with its strong reaffirmation of the basic principle *pacta sunt servanda*—the rule that treaties are binding on the parties and must be performed in good faith. The provisions on judicial settlement, arbitration and conciliation, including the possibility that a dispute concerning a peremptory norm of international law can be referred to the International Court of Justice, should do much to enhance the stability of treaty relationships throughout the world.

I am enclosing the report of the Secretary of State, describing the provisions of the Convention in detail.

The Vienna Convention can be an important tool in the development of international law. I am pleased to note that it has been endorsed by the House of Delegates of the American Bar Association and I urge the Senate to give its advice and consent to ratification.

RICHARD NIXON.

(Enclosures: (1) Report of the Secretary of State. (2) Copy of the Convention.)

## LETTER OF SUBMITTAL

DEPARTMENT OF STATE,  
*Washington, October 18, 1971.*

The PRESIDENT,  
*The White House.*

THE PRESIDENT: I have the honor to submit to you the Vienna Convention on the Law of Treaties, adopted on May 23, 1969 by the United Nations Conference on the Law of Treaties, and signed for the United States on April 24, 1970. I recommend that you transmit it to the Senate for advice and consent to ratification.

The Convention sets forth a generally agreed body of rules to govern all aspects of treaty making and treaty observance. It is the product of two sessions of a 110-nation Conference on the Law of Treaties convened in Vienna under United Nations auspices from March 21 to May 24, 1968 and from April 9 to May 23, 1969.

The Treaties Conference took as the basis of its work draft articles drawn up by the International Law Commission in the course of eighteen years of work. At its first session in 1949 the Commission had selected the law of treaties as a priority topic for codification. Growing support for a written code of international treaty law came not only from newly independent States that wished to participate in such an endeavor, but from many older States that favored clarification and modernization of the law of treaties. As a result the General Assembly of the United Nations in 1966 unanimously adopted resolution 2166 (XXI) convening the Law of Treaties Conference.

The Treaties Convention which emerged from the Vienna Conference is an expertly designed formulation of contemporary treaty law and should contribute importantly to the stability of treaty relationships. Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.

The Convention sets forth rules on such subjects as conclusion and entry into force of treaties, the observance, application, and interpretation of treaties, and depositary procedures. More importantly, it contains impartial procedures for dealing with disputes arising out of assertions of invalidity, termination and suspension of the operation of treaties, thus realizing a basic United States objective. The convention consists of eight parts. Procedures for handling most important disputes are contained in an Annex. The major provisions of the Convention are as follows:

### PART I—INTRODUCTION

The Convention applies to treaties between States (Article 1) but only to treaties concluded after the entry into force of the Convention with regard to such States (Article 4).

"Treaty" is defined as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Article 2). Thus it applies not only to formal treaties but to agreements in simplified form, such as exchanges of notes. Article 2 also defines other terms used in the Convention, but specifies that the Convention's use of terms is "without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

Although the Convention does not apply to unwritten agreements or to agreements concluded by or with international organizations, it asserts that the legal force of such other agreements or the application to them of any of the rules of international law to which they are subject independently of the Convention is not affected (Article 3).

The non-retroactivity feature (Article 4) is of substantial importance because it avoids the possibility of reopening old international disputes. This is especially true with regard to long-standing boundary disputes.

### PART II—CONCLUSION AND ENTRY INTO FORCE OF TREATIES

The rules in this part are primarily technical. Section 1 relates to such matters as Full Powers or other evidence of authority; adoption and authentication of texts; and the means of expressing consent to be bound by a treaty (Articles 7-17).

Article 18 sets forth rules governing the obligation of States not to defeat the object and purpose of a treaty prior to its entry into force. That obligation is limited

to (a) States that have signed a treaty or exchanged ad referendum instruments constituting a treaty, until such times as they make clear their intention not to become a party, and (b) States that have expressed consent to be bound, pending entry into force and provided such entry into force is not unduly delayed. This rule is widely recognized in customary international law.

Part 2 of Section II sets forth the rules on reservations to treaties (Articles 19–23). The articles reflect flexible current treaty practice with regard to multilateral treaties as generally followed since World War II. The earlier traditional rule on reservations had been that in order for a State to become party to a multilateral treaty with a reservation the unanimous consent of the other parties was required. That rule has given way in practice to a more flexible approach, particularly after the International Court of Justice in 1951 handed down its Advisory Opinion on Reservations to the Genocide Convention. The Court's opinion in the case stated, "The reserving State can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention." The compatibility rule has been incorporated in Article 19 of the Convention. It applies in those cases where the reservation is not expressly excluded by the terms of the treaty.

The right of other States to object to a reservation and to refuse treaty relations with the reserving State is maintained in Article 20. That article also provides the practical rule that a reservation is considered to have been accepted by a State that fails to object either within twelve months after being notified thereof or by the date on which it expresses its own consent to be bound, whichever is later.

Section 3 of Part II governs entry into force of treaties and provides for their provisional application, pending entry into force, if such application has been agreed.

#### PART III—OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

The articles in Section 1 relating to observance of treaties are of cardinal importance. The foundation upon which the treaty structure is based is the principle *pacta sunt servanda*, expressed in Article 26 as follows:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

The most significant action of the Law of Treaties Conference with respect to this part was the defeat of an attempt by some States to weaken the article by use of such expression as "Every valid treaty" or "Treaties which have been regularly concluded." Phrases such as these might have encouraged States to assert a right on non-performance or termination before any claim of invalidity had been established. The article was adopted in the twelfth plenary meeting without a dissenting vote.

Article 27 on internal law and observance of treaties restates the long-standing principle of customary international law that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The rule is consistent with United States practice over many years in declining to accept provisions of internal law as justifying nonperformance by a State of its treaty obligations to the United States. At the same time the article does not change the way in which the effect of a treaty within the framework of domestic law is determined. In explaining its vote in favor of Article 27, the U.S. Delegation observed:

"There is a hierarchy of differing legal rules in the internal legislation of most States. Constitutional provisions are very generally given primacy. Statutes, resolutions, and administrative provisions, all of which may be authoritative, may have different weights. Treaty provisions, when viewed as internal law, necessarily have to be fitted into that hierarchy.

"Each State is entitled to determine which legal formulation has greater internal authority in case of conflict among internal enactments. Article 27 in no way abridges that right . . ."

The articles of Section 2 contain rules on the non-retroactivity of treaties, their territorial scope and the difficult problem of application of successive treaties dealing with the same subject matter. Article 30 lays down a set of principles to determine priorities among inconsistent obligations. In essence it provides that (a) if a treaty states it is subject to another treaty, the other treaty governs; (b) as between parties to one treaty who becomes parties to a second, the second governs on any point where it is incompatible with the first; (c) if some parties to the first are not parties to the second, and vice versa, the first governs between a party to both and a party only to the first; the second governs between a party to both and a party only to the second.

The articles of Section 3 on interpretation of treaties emphasize the importance of the text in the interpretative process. Article 31 requires that a treaty "be interpreted in good faith in accordance with the ordinary meaning to be given to the



terms of the treaty in their context and in the light of its object and purpose." Context is narrowly defined as comprising, "in addition to the text, including its preamble and annexes", related agreements made by all the parties and instruments made by less than all the parties but accepted by all as related to the treaty. Elements extrinsic to the text which are to be taken into account are limited to subsequent agreements between the parties, subsequent practice establishing agreement, and relevant rules of international law.

Article 32 allows recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

Five articles in Section 4 deals with treaties and third States. Article 34 sets forth the traditional rule that a treaty does not create either obligations or rights for a third State without its consent. Subsequent articles provide that a third State must expressly consent to treaties creating obligations for it, whereas it would be assumed to assent to a treaty giving it rights, unless the treaty otherwise provides. Article 37 provides for revocation or modification of obligations or rights of third States, and Article 38 prevents the preceding articles from barring a rule set forth in a treaty from becoming binding on a third States as a customary rule of international law.

#### PART IV—AMENDMENT AND MODIFICATION OF TREATIES

Articles 39–41 lay down rules for amending and modifying treaties. Article 40 provides needed clarification in the case of multilateral treaties. It safeguards the rights of parties to participate in the amending process by requiring notification to all parties of any proposed amendment and by specifying their right to participate in the decision to be taken on the proposal and in the negotiation and conclusion of any amendment. The right to become party to the new agreement is also extended to every State entitled to become a party to the treaty.

#### PART V—INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Part V sets forth the grounds on which a claim may legitimately be made that a treaty is invalid or subject to termination, denunciation, withdrawal, or suspension. It deals with such grounds as error, fraud, coercion, breach, impossibility of performance, fundamental change of circumstances, and conflict with a peremptory norm of international law (*jus cogens*).

At the same time it contains a variety of safeguards to protect the stability of the treaty structure. Article 42 subjects all challenges of the continuing force of treaty obligations to the rules of the Law of Treaties Convention. The termination of a treaty, its denunciation or suspension, or the withdrawal of a party may take place only as a result of the application of the provisions of that treaty or the Convention. Article 43 specifies that a State that sheds a treaty obligation does not escape any obligation to which it is subject under international law independently of the treaty.

Article 44 deals with separability with respect to certain grounds of invalidity where the ground relates solely to particular clauses and where certain criteria as to feasibility and equity are met. Included in such criteria, as a result of a United States proposal, is the requirement that "continued performance of the remainder of the treaty would not be unjust."

Article 45 is a rule of "good faith and fair dealing" that will protect against ill-founded efforts to avoid meeting treaty obligations. A State may not claim that a treaty is invalid if, after becoming aware of the facts, it expressly agrees that the treaty is valid or is to remain in effect or if (and this would be the case arising most often) it is considered to have acquiesced, by reason of its conduct, in the validity of the treaty or its maintenance in force or effect.

In dealing with the invalidity articles in Section 2 of Part V (articles 46–53), the chief concern of the United States Delegation was to assure that the grounds of invalidity were stated as precisely and objectively as possible and that there would be procedural or institutional mechanisms to guard against spurious claims of treaty invalidity.

The first of the grounds for invalidity, the effect of a limitation of internal law upon the competence to conclude treaties, is stated in Article 46. It provides that a State may not invoke, as invalidating its consent to be bound, the fact that its consent has been expressed in violation of a provision of its internal law regarding competence to conclude treaties unless: (a) the violation was manifest, that is, "ob-

jectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith"; and (b) it concerns a rule of the State's internal law of fundamental importance. At the plenary meeting at which the article was adopted without negative vote, the United States Delegation emphasized that it had supported the article on the basis that it deals solely with the conditions under which a State may invoke internal law on the international plane to invalidate its consent to be bound and that it in no way impinges on internal law regarding competence to conclude treaties insofar as domestic consequences are concerned.

Article 52 states the principle that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the United Nations Charter. A proposal by 19 States that would have amended the rule by defining force to include any "economic or political pressure" was withdrawn after strong opposition by the United States and other concerned powers. Instead, a declaration condemning the threat or use of pressure in any form by a State to coerce any other State to conclude a treaty was adopted by the Conference and annexed to the Final Act.

Article 53 deals with treaties that conflict with a peremptory norm of international law, the *jus cogens* doctrine. In formulating this article, the International Law Commission started from the principle that there are rules of such fundamental character that no State has the right to set them aside by a treaty. This principle had previously been incorporated in Section 116 of the American Law Institute's *Restatement of the Foreign Relations of the United States*. Inclusion of the *jus cogens* principle in the Vienna Convention was almost universally supported, but there was considerable concern with the theoretical manner in which the norm was formulated. Through efforts by the United States and several others, the article was revised to include two important limitations. The first makes clear that in order for a treaty to be void under the article the peremptory norm violated must have existed at the time of the conclusion of the treaty. The second clarification requires a peremptory norm to be "a norm accepted and recognized by the international community of states as a whole ...". Inclusion of the latter requirement resulted in broad acceptability of the article. Many delegations had expressed the view that a norm which had not achieved recognition by substantially all States ought not to serve as the basis for claiming a treaty is void. A related article (Article 64) provides that if a new peremptory norm emerges, an existing treaty in conflict with the norm becomes void and terminates.

Section 3 of Part V is entitled Termination and Suspension of the Operation of Treaties. Articles 54, 55, 57, and 58 specify that various aspects of termination and suspension must be dealt with in conformity with the treaty or with the consent of all parties, or, if by agreement between certain of the parties, subject to the same limitations expressed in Article 41 on modification.

Paragraph 1(b) of Article 56 permits denunciation of or withdrawal from a treaty which has no provision on the subject if such right "may be implied by the nature of the treaty". At the instance of the United States Delegation a clear legislative history was established that the procedures for settlement of disputes in Section 4 (articles 65-68) apply to notices of denunciation grounded upon Article 56.

Article 60 recognizes the long-standing doctrine that a material breach of a treaty by one party may be invoked by the other party to terminate the treaty or to suspend the performance of its own obligations under the treaty.

Article 61 on supervening impossibility of performance contains the reasonable rule that a party may invoke impossibility of performance as a ground for terminating or withdrawing from a treaty if an object indispensable for the execution of the treaty permanently disappears or is destroyed. A State may not, however, invoke impossibility of performance if it is the result of a breach by that State of an international obligation.

Article 62, on fundamental change of circumstances, is a carefully phrased version of the doctrine of *rebus sic stantibus* which has been widely recognized by jurists as a ground which under certain conditions may be invoked for terminating or withdrawing from a treaty. An important feature is paragraph 2(a) which precludes invocation of the articles as a ground for terminating or withdrawing from a treaty. An important feature is paragraph 2(a) which precludes invocation of the articles as a ground for terminating or withdrawing from a treaty establishing a boundary.

Article 63 makes clear that the severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established by the treaty except to the extent that the existence of diplomatic or consular relations is indispensable to applying the treaty.

Section 4 of Part V contains articles on the procedure for invoking grounds for invalidity or termination of treaties and for judicial settlement, arbitration and conciliation. During the debates on the preceding articles on invalidity, suspension and

termination one of the major concerns of the United States and certain other countries was the need to formulate adequate provisions for dealing with an assertion of the invalidity of a treaty or a claim of a right to unilateral termination or suspension.

The International Law Commission had proposed a procedure for dealing with such assertion that would have required a State to notify the other parties of its claim, of the grounds therefor; and of the action to be taken. If no objection to the proposed action were made within three months, it could then be carried out. If objection were made, a solution was to be sought under the means indicated in Article 33 of the United Nations Charter. In the final analysis Article 33 merely provides that disputes should be settled by peaceful means of the parties' own choice. The proposed article thus left undecided the crucial question whether a party could go ahead and terminate a treaty if it did not agree with the other parties on a peaceful means of settlement or if the means selected failed to result in a settlement.

States, such as the United States, that were fighting for the stability of the treaty structure made clear that the Convention would be unacceptable unless some form of impartial disputes-settlement procedure was incorporated into it. The basis opposition to any meaningful form of disputes settlement was organized by the Communist bloc. The issue became the overriding one of the Conference. In the closing hours of the second session, the Conference succeeded in adopting a new article on the settlement of disputes, which should adequately protect United States treaty relations from unilateral claims of invalidity by our treaty partners and should contribute to the stability of treaty obligations generally.

Under the new Article—Article 66 of the Convention—any party to a dispute arising under the *jus cogens* articles may invoke the jurisdiction of the International Court of Justice unless the parties agree to submit the dispute to arbitration. In any other dispute arising under Part V—such as claims of invalidity or termination based on error, fraud, breach, or changed circumstances—any party to the dispute may set in motion a conciliation procedure. That procedure, which is set forth in the Annex to the Convention, includes establishment in each case of a conciliation commission and submission by the commission of a report to the parties and to the Secretary-General of the United Nations. The report may contain findings of fact and conclusions of law, as well as recommendations to the parties for settlement of the dispute, although it is not binding upon them. Paragraph 7 of the Annex provides that the expenses of the commission will be borne by the United Nations. The General Assembly of the United Nations on December 8, 1969 adopted Resolution 2534 (XXIV) approving the provision and requested the Secretary-General to take action accordingly.

The provisions for the settlement of disputes meet the requirements of the United States. By contributing to the prompt resolution of disputes relating to validity of treaties they should go far in helping to maintain the stability of treaty relationships throughout the world. The provision for expenses is a desirable innovation and worthwhile investment, since the concern of many newly independent and small States with the cost of third-party settlement procedures had been a very real obstacle to their general acceptability.

The Syrian Arab Republic, in depositing its accession to the Convention on October 2, 1970, made several reservations, the most serious of which was to reject the Annex on conciliation procedures. The United States Representative to the United Nations has notified the Secretary-General that the United States objects to that reservation and intends, at such time as it may become a party to the Convention, to reject treaty relations with the Syrian Arab Republic under all provisions in Part V with regard to which that State has rejected the obligatory conciliation procedures set forth in the Annex.

The final section of Part V, Consequences of the Invalidity, Termination, or Suspension of the Operation of a Treaty, includes rules for the unwinding of treaties the invalidity or termination of which has been established under the Convention.

#### PART VI—MISCELLANEOUS PROVISIONS

Article 73 excludes from the applicability of the Convention questions arising from State succession, State responsibility, or the outbreak of hostilities.

Article 74 provides that severance or absence of diplomatic or consular relations between the States does not prevent the conclusion of treaties between them. The rule accords with modern treaty practice.

PART VII—DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND  
REGISTRATION

As the depositary of more international treaties than any other country, the United States had a substantial interest in the depositary articles and was able to achieve several worthwhile improvements in these technical articles. Article 76 makes clear the international character of the depositary function and the obligation to perform it impartially. Article 77 is a comprehensive catalog of depositary functions. Sensible rules for correction of errors are provided in Article 79.

## PART VIII—FINAL PROVISIONS

Included in Articles 81–85 are standard provisions on signature, ratification, accession, entry into force, and authentic texts. Entry into force requires deposit of thirty-five instruments of ratifications or accession. This is a larger number than required by many earlier treaties, but was considered appropriate because of the fundamental importance of the Convention on the Law of Treaties.

The Vienna Convention on the Law of Treaties is a major achievement in the development and codification of international law. At the opening session of the conference in March 1968, the Legal Counsel of the United Nations, Constantin Stavropoulos, described it as the “most important . . . and perhaps also the most difficult” of the series of codification conferences called by the United Nations. By agreeing on uniform rules to govern State practice on a host of technical matters related to the negotiation, adoption, and execution of treaties, the Conference achieved one of its basic objectives. But the Convention on the Law of Treaties has a much larger significance. By codifying the doctrines of *jus cogens* and *rebus sic stantibus*, it provides a framework for necessary change. By reasserting the principle of *pacta sunt servanda*, long recognized as the keystone of the treaty structure, it strengthens the fabric of treaty relations. By requiring impartial procedures for settlement of disputes, it provides an essential element in minimizing unfounded claims that treaties should be terminated or suspended.

The United States Delegation to the Vienna Conference was led by Richard D. Kearney, United States Member of the International Law Commission. Included on the Delegation at one or both sessions were John R. Stevenson, now Legal Adviser of the Department of State, and Charles I. Bevans, Assistant Legal Adviser for Treaty Affairs; Herbert W. Briggs, Professor of International Law, Cornell University; Myres McDougal, Professor of Law, Yale University; Joseph M. Sweeney, Dean, Law School, Tulane University; and Frank Wozencraft, former Assistant Attorney General, Department of Justice. Others on the United States Delegation were Jared Carter, Robert E. Dalton, Warren Hewitt, Bruce M. Lancaster, and Herbert K. Reis from the Department of State and Ernest C. Grigg III and Robert B. Rosenstock from the United States Mission to the United Nations.

In preparing for the Conference the United States Government worked closely with the Study Group on the Law of Treaties established by the American Society of International Law in 1965. With Professor Oliver Lissitzyn of Columbia University as chairman, this group of eminent international lawyers met regularly with representatives of the Departments of State and Justice.

The Study Group also joined forces with the Special Committee on Treaty Law of the Section of International and Comparative Law of the American Bar Association, of which Eberhard Deutsch is chairman. The comprehensive knowledge, experience, and wisdom of the members of the academic and legal communities serving in these two groups were of incalculable assistance to the Delegation in the formulation of United States policy and planning for the Conference. The House of Delegates of the American Bar Association in July 1971 approved a resolution recommending that the Convention be submitted to the Senate and that the Senate advise and consent to its ratification without reservations.

I believe that the Convention on the Law of Treaties will be an important element in promoting the stability of treaty relationships. I hope that the United States will become a party in the near future.

Respectfully submitted.

WILLIAM P. ROGERS.

(Enclosure: Copy of the Vienna Convention on the Law of Treaties.)

## VIENNA CONVENTION ON THE LAW OF TREATIES

*The States Parties to the present Convention,*

*Considering* the fundamental role of treaties in the history of international relations,

*Recognizing* the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

*Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

*Affirming* that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

*Recalling* the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

*Having in mind* the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

*Believing* that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

*Affirming* that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

*Have agreed* as follows:

## PART I—INTRODUCTION

## ARTICLE 1

*Scope of the present Convention*

The present Convention applies to treaties between States.

## ARTICLE 2

*Use of terms*

1. For the purposes of the present Convention:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(e) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;

(f) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" means a State not a party to the treaty;

(i) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

## ARTICLE 3

*International agreements not within the scope of the present Convention*

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

## ARTICLE 4

*Non-retroactivity of the present Convention*

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

## ARTICLE 5

*Treaties constituting international organizations and treaties adopted within an international organization*

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

## PART II—CONCLUSION AND ENTRY INTO FORCE OF TREATIES

## SECTION 1: CONCLUSION OF TREATIES

## ARTICLE 6

*Capacity of States to conclude treaties*

Every State possesses capacity to conclude treaties.

## ARTICLE 7

*Full powers*

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

- (a) he produces appropriate full powers; or
- (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

- (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
- (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
- (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

## ARTICLE 8

*Subsequent confirmation of an act performed without authorization*

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

## ARTICLE 9

*Adoption of the text*

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.
2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

## ARTICLE 10

*Authentication of the text*

The text of a treaty is established as authentic and definitive:

- (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or
- (b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

## ARTICLE 11

*Means of expressing consent to be bound by a treaty*

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

## ARTICLE 12

*Consent to be bound by a treaty expressed by signature*

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:
  - (a) the treaty provides that signature shall have that effect;
  - (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
  - (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.
2. For the purposes of paragraph 1:
  - (a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;
  - (b) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

## ARTICLE 13

*Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty*

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

- (a) the instruments provide that their exchange shall have that effect; or
- (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

## ARTICLE 14

*Consent to be bound by a treaty expressed by ratification, acceptance or approval*

1. The consent of a State to be bound by a treaty is expressed by ratification when:

- (a) the treaty provides for such consent to be expressed by means of ratification;
  - (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
  - (c) the representative of the State has signed the treaty subject to ratification;
  - or
  - (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.
2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

## ARTICLE 15

*Consent to be bound by a treaty expressed by accession*

The consent of a State to be bound by a treaty is expressed by accession when:

- (a) the treaty provides that such consent may be expressed by that State by means of accession;
- (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

## ARTICLE 16

*Exchange or deposit of instruments of ratification, acceptance, approval or accession*

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

- (a) their exchange between the contracting States;
- (b) their deposit with the depositary; or
- (c) their notification to the contracting States or to the depositary, if so agreed.

## ARTICLE 17

*Consent to be bound by part of a treaty and choice of differing provisions*

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

## ARTICLE 18

*Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

## SECTION 2: RESERVATIONS

## ARTICLE 19

*Formulation of reservations*

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or



(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

## ARTICLE 20

*Acceptance of and objection to reservations*

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
  - (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
  - (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
  - (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.
5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

## ARTICLE 21

*Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
  - (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
  - (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

## ARTICLE 22

*Withdrawal of reservations and of objections to reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
3. Unless the treaty otherwise provides, or it is otherwise agreed:
  - (a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
  - (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

## ARTICLE 23

*Procedure regarding reservations*

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

## SECTION 3: ENTRY INTO FORCE AND PROVISION APPLICATION OF TREATIES

## ARTICLE 24

*Entry into force*

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

## ARTICLE 25

*Provisional application*

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

## PART III—OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

## SECTION 1: OBSERVANCE OF TREATIES

## ARTICLE 26

*Pacta sunt servanda*

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

## ARTICLE 27

*Internal law and observance of treaties*

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

## SECTION 2: APPLICATION OF TREATIES

## ARTICLE 28

*Non-retroactivity of treaties*

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

## ARTICLE 29

*Territorial scope of treaties*

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

## ARTICLE 30

*Application of successive treaties relating to the same subject-matter*

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

## SECTION 3: INTERPRETATION OF TREATIES

## ARTICLE 31

*General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

## ARTICLE 32

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

## ARTICLE 33

*Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

## SECTION 4: TREATIES AND THIRD STATES

## ARTICLE 34

*General rule regarding third States*

A treaty does not create either obligations or rights for a third State without its consent.

## ARTICLE 35

*Treaties providing for obligations for third States*

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

## ARTICLE 36

*Treaties providing for rights for third States*

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

## ARTICLE 37

*Revocation or modification of obligations or rights of third States*

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

## ARTICLE 38

*Rules in a treaty becoming binding on third States through international custom*

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

## PART IV—AMENDMENT AND MODIFICATION OF TREATIES

## ARTICLE 39

*General rule regarding the amendment of treaties*

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

## ARTICLE 40

*Amendment of multilateral treaties*

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

- (a) the decision as to the action to be taken in regard to such proposal;
- (b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

- (a) be considered as a party to the treaty as amended; and
- (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

## ARTICLE 41

*Agreements to modify multilateral treaties between certain of the parties only*

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- (a) the possibility of such a modification is provided for by the treaty; or
- (b) the modification in question is not prohibited by the treaty and:
  - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
  - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V—INVALIDITY, TERMINATION AND SUSPENSION OF  
THE OPERATION OF TREATIES

SECTION 1: GENERAL PROVISIONS

ARTICLE 42

*Validity and continuance in force of treaties*

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

ARTICLE 43

*Obligations imposed by international law independently of a treaty*

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

ARTICLE 44

*Separability of treaty provisions*

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

ARTICLE 45

*Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty*

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

## SECTION 2: INVALIDITY OF TREATIES

## ARTICLE 46

*Provisions of internal law regarding competence to conclude treaties*

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

## ARTICLE 47

*Specific restrictions on authority to express the consent of a State*

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

## ARTICLE 48

*Error*

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

## ARTICLE 49

*Fraud*

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

## ARTICLE 50

*Corruption of a representative of a State*

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

## ARTICLE 51

*Coercion of a representative of a State*

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

## ARTICLE 52

*Coercion of a State by the threat or use of force*

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

## ARTICLE 53

*Treaties conflicting with a peremptory norm of general international law (jus cogens)*

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

## SECTION 3: TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

## ARTICLE 54

*Termination of or withdrawal from a treaty under its provisions or by consent of the parties*

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties after consultation with the other contracting States.

## ARTICLE 55

*Reduction of the parties to a multilateral treaty below the number necessary for its entry into force*

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

## ARTICLE 56

*Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal*

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

## ARTICLE 57

*Suspension of the operation of a treaty under its provisions or by consent of the parties*

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties after consultation with the other contracting States.

## ARTICLE 58

*Suspension of the operation of a multilateral treaty by agreement between certain of the parties only*

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

- (a) the possibility of such a suspension is provided for by the treaty; or
- (b) the suspension in question is not prohibited by the treaty and:
  - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
  - (ii) is not incompatible with the object and purpose of the treaty.



2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

## ARTICLE 59

*Termination or suspension of the operation of a treaty implied by conclusion of a later treaty*

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

## ARTICLE 60

*Termination or suspension of the operation of a treaty as a consequence of its breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

- (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
  - (i) in the relations between themselves and the defaulting State, or
  - (ii) as between all the parties;
- (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
- (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

- (a) a repudiation of the treaty not sanctioned by the present Convention; or
- (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

## ARTICLE 61

*Supervening impossibility of performance*

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

## ARTICLE 62

*Fundamental change of circumstances*

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

## ARTICLE 63

*Severance of diplomatic or consular relations*

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

## ARTICLE 64

*Emergence of a new peremptory norm of general international law (jus cogens)*

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

## SECTION 4: PROCEDURE

## ARTICLE 65

*Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

## ARTICLE 66

*Procedures for judicial settlement, arbitration and conciliation*

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

## ARTICLE 67

*Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty*

1. The notification provided for under article 65 paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

## ARTICLE 68

*Revocation of notifications and instruments provided for in articles 65 and 67*

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

## SECTION 5: CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

## ARTICLE 69

*Consequences of the invalidity of a treaty*

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

## ARTICLE 70

*Consequences of the termination of a treaty*

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

## ARTICLE 71

*Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law*

1. In the case of a treaty which is void under article 53 the parties shall:
  - (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
  - (b) bring their mutual relations into conformity with the peremptory norm of general international law.
2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:
  - (a) releases the parties from any obligation further to perform the treaty;
  - (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

## ARTICLE 72

*Consequences of the suspension of the operation of a treaty*

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:
  - (a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;
  - (b) does not otherwise affect the legal relations between the parties established by the treaty.
2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

## PART VI—MISCELLANEOUS PROVISIONS

## ARTICLE 73

*Cases of State succession, State responsibility and outbreak of hostilities*

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

## ARTICLE 74

*Diplomatic and consular relations and the conclusion of treaties*

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

## ARTICLE 75

*Case of an aggressor State*

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII—DEPOSITARIES, NOTIFICATIONS, CORRECTIONS  
AND REGISTRATION

## ARTICLE 76

*Depositaries of treaties*

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

## ARTICLE 77

*Functions of depositaries*

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

## ARTICLE 78

*Notifications and communications*

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e).

## ARTICLE 79

*Correction of errors in texts or in certified copies of treaties*

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

## ARTICLE 80

*Registration and publication of treaties*

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

## PART VIII—FINAL PROVISIONS

## ARTICLE 81

*Signature*

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

## ARTICLE 82

*Ratification*

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 83

*Accession*

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE 84

*Entry into force*

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE 85

*Authentic texts*

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-third day of May, one thousand nine hundred and sixty-nine.

## ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

- (a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
- (b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

For Afghanistan:  
 ABDUL H. TABIBI<sup>1</sup>  
 Subject to the declaration attached  
 For Argentina:  
 E. DE LA GUARDIA

<sup>1</sup> *Text of the declaration:*

"Afghanistan's understanding of article 62 (fundamental change of circumstances) is as follows:

"Sub-paragraph 2(a) of this article does not cover unequal and illegal treaties, or any treaties which were contrary to the principle of self-determination. This view was also supported by the Expert Consultant in his statement of 11 May 1968 in the Committee of the Whole and on 14 May 1969 (doc. A/CONF.39/L.40) to the Conference."



- For Barbados:  
GEORGE C. R. MOE
- For Bolivia:  
J. ROMERO LOZA  
Sujeta a la declaración anexa <sup>2</sup>
- For Brazil:  
G. NASCIMENTO E SILVA
- For Cambodia:  
SARIN CHHAK
- For Chile:  
PEDRO J. RODRÍGUEZ  
EDMUNDO VARGAS
- For China:  
LIU CHIEH  
April 27, 1970
- For Colombia:  
ANTONIO BAYONA  
HUMBERTO RUIZ  
J. J. CAICEDO PERDOMO
- For the Congo (Brazzaville):  
S. BIKOUTHA  
Sous réserve de ratification par mon pays <sup>3</sup>
- For Costa Rica:  
J. L. REDONDO GÓMEZ  
Ad referendum y sujeto a las reservas anexas <sup>4</sup>
- For Denmark:  
OTTO BORCH  
April 18, 1970
- For Ecuador:  
GONZALO ESCUDERO MOSCOSO  
Con la declaración que se anexa <sup>5</sup>
- For El Salvador:  
R. GALINDO POHL  
16 de febrero de 1970
- For Ethiopia:  
KIFLE WODAJO  
30 April 1970

<sup>2</sup> (Translation by the Secretariat)  
Subject to the attached declaration.

1. The shortcomings of the Vienna Convention on the Law of Treaties are such as to postpone the realization of the aspirations of mankind.  
2. Nevertheless, the rules endorsed by the Convention do represent significant advances, based on the principles of international justice which Bolivia has traditionally supported.

<sup>3</sup> (Translation by the Secretariat)  
Subject to ratification by my country.

<sup>4</sup> (Translation by the Secretariat)  
Ad referendum and subject to the attached reservations.

1. With regard to articles 11 and 12, the delegation of Costa Rica wishes to make a reservation to the effect that the Costa Rican system of constitutional law does not authorize any form of consent which is not subject to ratification by the Legislative Assembly.  
2. With regard to article 25, it wishes to make a reservation to the effect that the Political Constitution of Costa Rica does not permit the provisional application of treaties, either.  
3. With regard to article 27, it interprets this article as referring to secondary law and not to the provisions of the Political Constitution.  
4. With regard to article 38, its interpretation is that no customary rule of general international law shall take precedence over any rule of the Inter-American System to which, in its view, this Convention is supplementary.

<sup>5</sup> (Translation by the Secretariat)  
With the attached declaration:

In signing this Convention, Ecuador has not considered it necessary to make any reservation in regard to article 4 of the Convention because it understands that the rules referred to in the first part of article 4 include the principle of the peaceful settlement of disputes, which is set forth in Article 2, paragraph 3, of the Charter of the United Nations and which as *jus cogens*, has universal and mandatory force.

Ecuador also considers that the first part of article 4 is applicable to existing treaties. It wished to place on record, in this form, its view that the said article 4 incorporates this indisputable principle that, in cases where the Convention codifies rules of *lex lata*, these rules, as pre-existing rules, may be invoked and applied to treaties signed before the entry into force of this Convention, which is the instrument codifying the rules.

- For the Federal Republic of Germany:  
ALEXANDER BÖKER  
30th April 1970
- For Finland:  
ERIK CASTRÉN
- For Ghana:  
EMMANUEL K. DADZIE  
G. O. LAMPTEY
- For Guatemala:  
ADOLFO MOLINA ORANTES  
*Ad referendum y sujeto a las reservas que constan en documento anexo*<sup>6</sup>
- For Guyana:  
JOHN CARTER
- For the Holy See:  
OPILIO ROSSI  
30 September 1969
- For Honduras:  
MARIO CARÍAS ZAPATA
- For Iran:  
A. MATINE-DAFTARY
- For Italy:  
PIERO VINCI  
22 April 1970
- For the Ivory Coast:  
LUCIEN YAPOBI  
23 July 1969
- For Jamaica:  
L. B. FRANCIS  
K. RATTRAY
- For Kenya:  
I. S. BHOI
- For Liberia:  
NELSON BRODERICK
- For Luxembourg:  
GASTON THORN  
4 September 1969
- For Madagascar:  
B. RAZAFINTSEHENO  
*Ad referendum*
- For Mexico:  
EDUARDO SUÁREZ
- For Morocco:  
TAOUFIQ KABBAJ  
Sous réserve de la déclaration ci-jointe<sup>7</sup>
- For Nepal:  
PRADUMNA LAL RAJBHANDARY

<sup>6</sup> (Translation by the Secretariat.)

*Ad referendum* and subject to the reservations contained in the attached document.

The delegation of Guatemala, in signing the Vienna Convention on the Law of Treaties, wishes to make the following reservations:

I. Guatemala cannot accept any provision of this Convention which would prejudice its rights and its claim to the Territory of Belice.

II. Guatemala will not apply articles 11, 12, 25 and 66 in so far as they are contrary to the provisions of the Constitution of the Republic.

III. Guatemala will apply the provision contained in article 38 only in cases where it considers that it is in the national interest to do so.

<sup>7</sup> (Translation by the Secretariat.)

Subject to the attached declaration.

*Text of the declaration:*

1. Morocco interprets paragraph 2(a) of article 62 (Fundamental change of circumstances) as not applying to unlawful or inequitable treaties, or to any treaty contrary to the principle of self-determination. Morocco's views on paragraph 2(a) were supported by the Export Consultant in his statements in the Committee of the Whole on 11 May 1968 and before the Conference in plenary on 14 May 1969 (see Document A/CONF.39/L.40).

2. It shall be understood that Morocco's signature of this Convention does not in any way imply that it recognized Israel. Furthermore, no treaty relationships will be established between Morocco and Israel.

- For New Zealand:  
JOHN V. SCOTT  
29 April 1970
- For Nigeria:  
T. O. ELIAS
- For Pakistan:  
A. SHAHI  
29 April 1970
- For Peru:  
LUIS ALVARADO GARRIDO  
JUAN JOSÉ CALLE
- For the Philippines:  
ROBERTO CONCEPCIÓN
- For the Republic of Korea:  
YANG SOO YU  
27 November 1969
- For the Sudan:  
AHMED SALAH BUKHARI
- For Sweden:  
TORSTEN ÖRN  
23 April 1970
- For Trinidad and Tobago:  
T. BADEN-SEMPER
- For the United States of America:  
RICHARD D. KEARNEY  
24 April 1970  
JOHN R. STEVENSON  
24 April 1970
- For Uruguay:  
EDUARDO JIMÉNEZ DE ARÉCHAGA  
ALVARO ALVAREZ
- For the United Kingdom of Great Britain and Northern Ireland:  
CARADON<sup>8</sup>  
20 April 1970  
Subject to the declaration, the text of which is attached
- For Yugoslavia:  
ALEKSANDAR JELIĆ
- For Zambia:  
LISHOMWA MUUKA

<sup>8</sup>[*Text of the declaration:*]

"In signing the Vienna Convention on the Law of Treaties, the Government of the United Kingdom of Great Britain and Northern Ireland declare their understanding that nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Justice, the Government of the United Kingdom declare that they will not regard the provisions of sub-paragraph (b) of article 66 of the Vienna Convention as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) (a) of the Declaration of the Government of the United Kingdom accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on the 1st of January, 1969.

"The Government of the United Kingdom, while reserving their position for the time being with regard to the other declarations and reservations made by various States on signing the Convention, consider it necessary to state that the United Kingdom does not accept that Guatemala has any rights or any valid claim in respect of the territory of British Honduras."

LIST OF SIGNATURES, RATIFICATIONS DEPOSITED AND ACCESSIONS DEPOSITED AS OF  
DECEMBER 11, 2000<sup>1</sup>

CONCLUDED AT VIENNA ON MAY 23, 1969

Entry into force: January 27, 1980, in accordance with article 84.<sup>2</sup>

Registration: January 27, 1980, No. 18232.

Text: United Nations, Treaty Series, vol. 1155, p. 331.

*Note:* The Convention was adopted on May 22, 1969, and opened for signature on May 23, 1969, by the United Nations Conference on the Law of Treaties. The Convention was convened pursuant to General Assembly Resolution 2166 (XXI) of December 5, 1966 and 2287 (XXII) of December 6, 1967. The Conference held two sessions, both at Neue Hofburg in Vienna, the first session from March 26 to May 24, 1968, and the second session from April 9 to May 22, 1969. In addition to the Convention, the Conference adopted the Final Act and certain declarations and resolutions, which are annexed to that Act. By unanimous decision of the Conference, the original of the Final Act was deposited in the archives of the Federal Ministry for Foreign Affairs of Austria. The text of the Final Act is included in Document A/CONF.39/11/Add.2.

Participant	Signature	Ratification, Accession ( <b>a</b> ) Succession ( <b>s</b> )
Afghanistan <sup>1</sup> .....	23 May 1969.	
Algeria <sup>2,3</sup> .....		8 Nov 1988 <b>a</b>
Argentina <sup>2,3</sup> .....	23 May 1969 .....	5 Dec 1972
Australia .....		13 Jun 1974 <b>a</b>
Austria .....		30 Apr 1979 <b>a</b>
Barbados .....	23 May 1969 .....	24 Jun 1971
Belarus <sup>3</sup> .....		1 May 1986 <b>a</b>
Belgium <sup>2</sup> .....		1 Sep 1992 <b>a</b>
Bolivia <sup>1</sup> .....	23 May 1969.	
Bosnia and Herzegovina .....		1 Sep 1993 <b>s</b>
Brazil .....	23 May 1969.	
Bulgaria <sup>2,3</sup> .....		21 Apr 1987 <b>a</b>
Cambodia .....	23 May 1969.	
Cameroon .....		23 Oct 1991 <b>a</b>
Canada <sup>1</sup> .....		14 Oct 1970 <b>a</b>
Central African Republic .....		10 Dec 1971 <b>a</b>
Chile <sup>2,4</sup> .....	23 May 1969 .....	9 Apr 1981
China, People's Republic <sup>2,3</sup> .....		3 Sep 1997 <b>a</b>
Colombia <sup>2</sup> .....	23 May 1969 .....	10 Apr 1985
Congo .....	23 May 1969 .....	12 Apr 1982
Congo, Democratic Republic of (former Zaire) .....		25 Jul 1977 <b>a</b>
Costa Rica <sup>2,3</sup> .....	23 May 1969 .....	22 Nov 1996
Cote D'Ivoire .....	23 Jul 1969.	
Croatia .....		12 Oct 1992 <b>a</b>
Cuba <sup>2</sup> .....		9 Sep 1998 <b>a</b>
Cyprus .....		28 Dec 1976 <b>a</b>
Czech Republic .....		22 Feb 1993 <b>s</b>
Czechoslovakia <sup>2,5</sup> .....		29 Jul 1987 <b>a</b>
Denmark <sup>2</sup> .....	18 Apr 1970 .....	1 Jun 1976
Ecuador <sup>1</sup> .....	23 May 1969.	
Egypt <sup>4</sup> .....		11 Feb 1982 <b>a</b>
El Salvador .....	16 Feb 1970.	
Estonia .....		21 Oct 1991 <b>a</b>
Ethiopia .....	30 Apr 1970.	
Finland <sup>3</sup> .....	23 May 1969 .....	19 Aug 1977
Germany <sup>3,4</sup> .....	30 Apr 1970 .....	21 Jul 1987
Ghana .....	23 May 1969.	
Greece .....		30 Oct 1974 <b>a</b>
Guatemala <sup>2</sup> .....	23 May 1969 .....	21 Jul 1997
Guyana .....	23 May 1969.	

<sup>1</sup> United Nations Treaty Collection [<http://untreaty.un.org/>]<sup>2</sup> The United States is a signatory but as of December 2000 has not ratified the Convention, so the Convention is not in force for the United States.

Participant	Signature	Ratification, Accession ( <b>a</b> ) Succession ( <b>s</b> )
Haiti		25 Aug 1980 <b>a</b>
Holy See	30 Sep 1969	25 Feb 1977
Honduras	23 May 1969	20 Sep 1979
Hungary <sup>2, 6</sup>		19 Jun 1987 <b>a</b>
Iran (Islamic Republic of)	23 May 1969.	
Italy	23 Apr 1970	25 Jul 1974
Jamaica	23 May 1969	28 Jul 1970
Japan <sup>1, 4</sup>		2 Jul 1981 <b>a</b>
Kazakhstan		5 Jan 1994 <b>a</b>
Kenya	23 May 1969.	
Korea, Republic of	29 Nov 1969	27 Apr 1977 <b>a</b>
Kuwait		11 Nov 1975 <b>a</b>
Kyrgyzstan		11 May 1999 <b>a</b>
Laos, People's Democratic Republic		31 Mar 1998 <b>a</b>
Latvia		4 May 1993 <b>a</b>
Lesotho		3 Mar 1972 <b>a</b>
Liberia	23 May 1969	29 Aug 1985
Liechtenstein		8 Feb 1990 <b>a</b>
Lithuania		15 Jan 1992 <b>a</b>
Luxembourg	4 Sep 1969.	
Macedonia, former Yugoslav Republic of		8 Jul 1999 <b>s</b>
Madagascar	23 May 1969.	
Malawi		23 Aug 1983 <b>a</b>
Malaysia		27 Jul 1994 <b>a</b>
Mali		31 Aug 1998 <b>a</b>
Mauritius		18 Jan 1973 <b>a</b>
Mexico	23 May 1969	25 Sep 1974
Moldova		26 Jan 1993 <b>a</b>
Mongolia <sup>2, 3, 6</sup>		16 May 1988 <b>a</b>
Morocco <sup>1, 3</sup>	23 May 1969	26 Sep 1972
Myanmar		16 Sep 1998 <b>a</b>
Nauru		5 May 1978 <b>a</b>
Nepal	23 May 1969.	
Netherlands <sup>3</sup>		9 Apr 1985 <b>a</b>
New Zealand <sup>1</sup>	29 Apr 1970	4 Aug 1971
Niger		27 Oct 1971 <b>a</b>
Nigeria	23 May 1969	31 Jul 1969
Oman		18 Oct 1990 <b>a</b>
Pakistan	29 Apr 1970.	
Panama		28 Jul 1980 <b>a</b>
Paraguay		3 Feb 1972 <b>a</b>
Peru <sup>2</sup>	23 May 1969	14 Sep 2000
Philippines	23 May 1969	15 Nov 1972
Poland		2 Jul 1990 <b>a</b>
Russian Federation <sup>2, 3</sup>		29 Apr 1986 <b>a</b>
Rwanda		3 Jan 1980 <b>a</b>
Saint Vincent and the Grenadines		27 Apr 1999 <b>a</b>
Senegal <sup>3, 4</sup>		11 Apr 1986 <b>a</b>
Slovakia		28 May 1993 <b>s</b>
Slovenia		6 Jul 1992 <b>s</b>
Solomon Islands		9 Aug 1989 <b>a</b>
Spain		16 May 1972 <b>a</b>
Sudan	23 May 1969	18 Apr 1990
Suriname		31 Jan 1991 <b>a</b>
Sweden <sup>3</sup>	23 Apr 1970	4 Feb 1975
Switzerland		7 May 1990 <b>a</b>
Syrian Arab Republic <sup>2, 7</sup>		2 Oct 1970 <b>a</b>
Tajikistan		6 May 1996 <b>a</b>
Togo		28 Dec 1979 <b>a</b>
Trinidad and Tobago	23 May 1969.	
Tunisia <sup>2</sup>		23 Jun 1971 <b>a</b>
Turkmenistan		4 Jan 1996 <b>a</b>

Participant	Signature	Ratification, Accession ( <b>a</b> ) Succession ( <b>s</b> )
Ukranian Soviet Socialist Republic <sup>2,3</sup> .....	.....	14 May 1986 <b>a</b>
United Kingdom <sup>1</sup> .....	20 Apr 1970 .....	25 Jun 1971
United Republic of Tanzania <sup>2</sup> .....	.....	12 Apr 1976 <b>a</b>
United States of America .....	24 Apr 1970.	
Uruguay .....	23 May 1969 .....	5 Mar 1982
Uzbekistan .....	.....	12 Jul 1995 <b>a</b>
Yugoslavia .....	23 May 1969 .....	27 Aug 1970
Zambia .....	23 May 1969.	

<sup>1</sup> With a statement(s).

<sup>2</sup> With a reservation(s).

<sup>3</sup> with a declaration(s).

<sup>4</sup> With an objection to a statement.

<sup>5</sup> Reservation withdrawn on October 19, 1990.

<sup>6</sup> Reservation withdrawn.

<sup>7</sup> United States objected to Syrian reservation May 24, 1971; United Kingdom objected June 25, 1971; New Zealand objected October 14, 1971; Canada objected 22, 1971; and others.



## APPENDIX 6.—GLOSSARY OF TREATY TERMINOLOGY<sup>1</sup>

---

**Abrogation:** The formal act by a state of terminating its consent to be bound by an international agreement. Sometimes used interchangeably with “denunciation.”

**Acceptance:** See “consent to be bound.”

**Accession:** A process by which a nation that was not originally a party to a treaty which has already been agreed upon by other states, becomes a party to the treaty. A treaty must specifically provide for accession in order for states to accede to it. Sometimes the terms “adherence” and “adhesion” are used interchangeably with “accession.” Also see “consent to be bound.”

**Accord:** The equivalent of agreement.

**Acte finale:** See “final act.”

**Adherence:** See “accession.”

**Adhesion:** The act of a state announcing its intent to abide by the principles of a treaty without formally becoming a party to it. See “accession.”

**Agreement pursuant to a treaty:** A type of executive agreement which is concluded by the President on the basis of prior authority contained in an existing treaty.

**Amendment:** In the context of Senate conditions for approval of a treaty, amendments are proposed Senate changes in the text of a treaty. See also “conditional approval.”

**Approval:** See “consent to be bound.”

**Arbitration:** A dispute settlement process whereby the parties agree to submit their differences to judges of their own choice, and to abide by the decision of the judges.

**Bilateral treaty:** An international agreement concluded between two states.

**Case Act:** Formally called the Case-Zablocki Act after the legislation’s sponsors (Public Law 92–403). A U.S. law requiring the President to transmit all international agreements other than treaties to the Congress within 60 days after their effective date.

**Circular 175:** An internal Department of State circular the purpose of which is to facilitate the application of orderly and uniform measures to the negotiation, signature, publication, and registration of U.S. treaties and international agreements, and to facilitate the maintenance of complete and accurate records on such agreements.

**Conciliation:** A non-binding dispute settling procedure by which a dispute is referred to a commission of persons who are empowered to examine the facts and make recommendations for settlement.

**Conclusion:** The culmination of negotiations into a specific agreement, usually marked by its signing or initialing.

**Conditional approval:** A term used to indicate Senate approval of a treaty subject to conditions such as amendments, reservations, understandings, declarations, and provisos.

**Congressional executive agreement:** A type of executive agreement which is concluded by the President with either prior or subsequent statutory authorization.

**Connally amendment:** This term refers to the reservation made by the Senate in ratifying the optional clause under Article 36, paragraph 2 of the Statute of the International Court of Justice. The reservation excludes from U.S. acceptance of the court’s compulsory jurisdiction disputes with regard to matters which are “essentially within the domestic jurisdiction of the United States of America as determined by the United States of America.”

---

<sup>1</sup>The purpose of this glossary is to assist in the recognition of terms. It is not designed to duplicate the more comprehensive treatment which may be given to these terms throughout the text of this work.



**Consent to be bound:** A formal procedure by which a nation enters into an international agreement by expressing its intent to be legally bound by the agreement. Such consent to be bound may be expressed by ratification, acceptance or approval, accession, or by signature in the case of executive agreements. In U.S. practice, it is the President who ratifies a treaty after the Senate gives its advice and consent.

**Convention:** A term which denotes an international agreement concluded at an international conference. Often used interchangeably with "treaty."

**Declaration:** A formal statement, explanation or clarification made by the Senate about its opinion or intentions on matters relating to issues raised by a treaty under consideration. Such declarations are analogous to a "sense of the Senate resolution." Other Senate statements which do not substantively modify a treaty may be entitled "declaration," "understanding," "statement," or any other descriptive term desired. See "conditional approval." The term "declaration" may also be used to signify a unilateral statement by a country. See "non-binding international agreement."

**Denunciation:** See "abrogation."

**Deposit:** Unless a multilateral treaty provides otherwise, it generally enters into force after the deposit of a specified number of instruments of ratification at a specific location. See also "exchange of ratifications."

**Entry into force:** The moment at which an international agreement becomes binding and formally enters into force. See also "exchange of ratifications" and "deposit."

**Exchange of notes:** An often-used means to conclude international agreements. Under this procedure, diplomatic notes embodying an agreement are usually exchanged between a diplomatic representative of a state and the Minister of Foreign Affairs (Secretary of State) of the country to which the diplomat is accredited.

**Exchange of ratifications:** Unless a treaty otherwise provides, bilateral treaties enter into force upon, or at a specified period after, a formal exchange of the instruments of ratification between the parties. See also "deposit."

**Executive agreement:** In the domestic law of the United States, an international agreement concluded by the President in accordance with a procedure other than that which is specified in Article II, Section 2, Clause 2 of the Constitution.

**Final act:** A formal statement or summary of the proceedings of a conference or congress. Also called "acte finale."

**Final vote:** Refers to a final Senate vote on the resolution of ratification of a treaty and the requirement for a two-thirds majority for approval.

**Gentleman's agreement:** See "non-binding international agreement."

**Invalidation of a treaty:** A process by which a state (or states) faced with an option of maintaining a treaty in force or of invoking grounds which would permit the state to terminate the treaty, chooses the latter option by invalidating the treaty. Grounds for invalidation of treaty include: fraud, corruption, coercion, error, and violation of a domestic law of fundamental importance. Violation of a peremptory rule of international law (*jus cogens*) also constitutes grounds which make a treaty invalid.

**Joint communique:** See "non-binding international agreement."

**Joint statement:** See "non-binding international agreement."

**Jus cogens:** A concept accepted by many legal scholars and by the Vienna Convention on the Law of Treaties that certain rules or norms of international law are so fundamental that states are not permitted to violate them. An agreement by two states to invade and colonize another is often cited as violating such a *jus cogens* rule against the use of aggressive force.

**Negotiation:** The exchange and discussion of proposals by representatives of governments for the purpose of reaching an agreement or understanding.

**Non-binding international agreement:** An international agreement (or statement) which does not convey an intent by the party (or parties) to be legally bound. Common forms include unilateral commitments and declarations of intent, joint communiqués and joint statements, final acts of international conferences, and so-called "gentleman's agreements."

**Pacta sunt servanda:** A well-recognized international rule that "agreements must be kept."

**Presidential or sole executive agreement:** A type of executive agreement which is concluded by the President solely on the basis of his independent authority under Article II of the Constitution.

**Proclamation:** A national act by which the terms of a treaty are "made public." In the United States, the President generally proclaims treaties. The text of the President's proclamation includes a word-by-word recitation of any understanding, declaration, or reservation contained in the Senate's resolution of advice and consent.

**Protocol:** A term used to denote an international agreement. A protocol is often used to supplement, clarify, amend, or qualify a treaty and is sometimes of a less formal nature than a treaty.

**Provisional application:** A term which refers to measures taken by nations to carry out the provisions of a treaty prior to its formal entry into force.

**Proviso:** A condition on Senate approval of a treaty which relates to issues of U.S. law and procedure and does not directly involve the other parties to a treaty. See also "conditional approval."

**Ratification:** See "consent to be bound."

**Rebus sic stantibus:** A legal maxim which refers to a fundamental change of circumstances affecting the performance of obligations under an agreement which was not foreseen by those making the agreement at the time it was concluded and which provides grounds for termination of a treaty.

**Reservation:** A formal statement or condition which limits or modifies the substance of a treaty. Such statements are traditionally formally presented at the time of signature, ratification or accession of a treaty. In U.S. practice, reservations may originate with the Senate as part of its resolution of advice and consent to a treaty. See also "conditional approval."

**Return:** See "withdrawal."

**Rule 25:** The internal rule of the Senate which prescribes the jurisdiction of all Senate committees and which gives the Senate Foreign Relations Committee exclusive jurisdiction over treaties.

**Rule 30:** The internal rule of the Senate which governs the process of treaty consideration in that body.

**Senate rule:** See "rule 25" and "rule 30."

**Sole executive agreement:** See "Presidential or sole executive agreement."

**Statement:** See "declaration."

**Suspension:** A process whereby a state unilaterally decides to hold in abeyance its compliance with the provisions of an international agreement or with certain parts thereof.

**Termination of a treaty:** A process by which a nation declares that it will no longer adhere to a treaty which was valid and in force. Termination may be similar to withdrawal, although withdrawal is frequently the act which effects termination.

**Treaty:** In the domestic law of the United States, an international agreement concluded by the President with the advice and consent of two-thirds of the U.S. Senate as specified in Article II, Section 2, Clause 2 of the Constitution. Under international law, any binding international agreement between states which expresses an intent by the parties to be legally bound by international law to specified obligations.

**Understanding:** In the context of Senate consideration of a treaty, understandings are interpretative statements designed to clarify or elaborate (rather than change) the provisions of an agreement. See also "declaration," and "conditional approval."

**Unilateral declaration:** See "non-binding international agreement."

**Vienna Convention on the Law of Treaties:** A multilateral treaty designed to govern treaty relationships among member states. As of December 11, 2000, 86 countries have ratified, or acceded to, the Vienna Convention; 5 states have succeeded to it. The United States signed it on April 24, 1970. The Senate, however, has not yet given its advice and consent to the convention.

**Withdrawal:** A means of terminating the obligations of an international agreement with respect to a withdrawing party. See "termination of a treaty." In the context of Senate consideration of a pending treaty, "withdrawal" or "return" refers to the return of a treaty from the Senate prior to the Senate's giving its advice and consent.



## APPENDIX 7.—SIMULTANEOUS CONSIDERATION OF TREATIES AND AMENDING PROTOCOLS: SELECTED PRECEDENTS

SELECTED PRECEDENTS WHERE TREATIES HAVE BEEN CONSIDERED BY THE SENATE TOGETHER WITH SPECIFIED PROTOCOLS IN ONE RESOLUTION OF RATIFICATION ALTHOUGH TRANSMITTED TO THE SENATE AT DIFFERENT TIMES

### 1. TREATY WITH MEXICO RELATING TO UTILIZATION OF THE WATERS OF CERTAIN RIVERS (Ex. A, 78-2, and Ex. H, 78-2)

On February 3, 1944, the Treaty was signed. It was transmitted to the Senate on February 15, 1944 (Ex. A, 78-2). On November 14, 1944, the Supplementary Protocol was signed. It was transmitted to the Senate on November 24, 1944 (Ex. H, 78-2).

On April 18, 1945, the Senate gave its advice and consent to both the Treaty and the Protocol in a 76-10 vote. The resolution of ratification read:

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of Executive A, Seventy-eighth Congress, second session, a treaty between the United States of America and the United Mexican States, signed at Washington on February 3, 1944, relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Tex., to the Gulf of Mexico, and Executive H, Seventy-eighth Congress, second session, a protocol, signed at Washington on November 14, 1944, supplementary to the treaty, subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty: \*\*\* [understanding omitted]<sup>1</sup>

### 2. CONVENTION BETWEEN FRANCE AND THE UNITED STATES AS TO DOUBLE TAXATION AND FISCAL ASSISTANCE AND SUPPLEMENTARY PROTOCOL (S. Ex. A, 80-1 and S. Ex. G, 80-2)

On October 18, 1946, a Convention between France and the United States was signed. It was transmitted to the Senate for advice and consent on January 10, 1947 (Ex. A, 80-1). On May 17, 1948, a Supplementary Protocol was signed. It was transmitted to the Senate for advice and consent on May 19, 1948 (Ex. G, 80-2).

On June 2, 1948, the Senate gave its advice and consent to ratification of the Convention and the Protocol. The resolution of ratification read:

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of Executive A, Eightieth Congress, first session, a convention between the United States of America and France, signed at Paris on October 18, 1946 for the avoidance of double taxation and the prevention of evasion in the case of taxes on estates and inheritances, and for the purpose of modifying and supplementing certain provisions of the convention between the two governments relating to income taxation signed at Paris on July 25, 1939.

*Resolved further (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of Executive G, Eightieth Congress, second session, a supplementary protocol, signed at Washington on May 17, 1948, modifying in certain respects the convention between the United States of America and France, signed at Paris on October 18, 1946, for the avoidance of double taxation and in the case of evasion of taxes on estates and inheritances, and for the purpose of modifying and supplementing certain provisions

<sup>1</sup> Congressional Record, vol. 91, part 3, p. 3492.

sions of the convention between the two Governments relating to income taxation signed at Paris on July 25, 1939.<sup>2</sup>

**3. TAX CONVENTION WITH CANADA AND TWO PROTOCOLS (Ex. T, 96-2; Treaty Doc. 98-7; and Treaty Doc. 98-22)**

On September 26, 1980, the Tax Convention with Canada was signed. It was transmitted to the Senate for advice and consent to ratification on November 12, 1980 (Ex. T, 96-2). On June 14, 1983, the first Protocol was signed. It was transmitted to the Senate for advice and consent to ratification on September 21, 1983 (Treaty Doc. 98-7). On March 28, 1984, the second Protocol was signed. It was transmitted to the Senate for advice and consent on April 18, 1984 (Treaty Doc. 98-22).

The Committee on Foreign Relations considered the Treaty and its two Protocols together and ordered them reported on May 8, 1984. On June 26 and June 28, 1984, the Senate considered the treaty and its two protocols and agreed to the resolution of ratification. The resolution of ratification read:

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital (the Convention) together with a related exchange of notes, signed at Washington on September 26, 1980; the Protocol Amending the 1980 Convention (the First Protocol), together with a related exchange of notes, signed at Ottawa on June 14, 1983; and the Second Protocol Amending the 1980 Convention (as amended by the First Protocol), signed at Washington on March 28, 1984.<sup>3</sup>

**4. TREATIES WITH THE U.S.S.R. ON THE LIMITATION OF UNDERGROUND NUCLEAR WEAPON TESTS AND ON UNDERGROUND NUCLEAR EXPLOSIONS FOR PEACEFUL PURPOSES AND PROTOCOLS (Ex. N, 94-2; and Treaty Doc. 101-19)**

The United States and the Soviet Union signed the Treaty on the Limitation of Underground Nuclear Weapon Tests (Threshold Test Ban Treaty) on July 3, 1974, and the Treaty on Underground Nuclear Explosions for Peaceful Purposes on May 28, 1976. The President submitted the treaties together to the Senate on July 29, 1976 (Ex. N, 94-2). The Foreign Relations Committee reported the treaties with reservations and declarations on February 27, 1987 (Exec. Rept. 100-1) but they were not considered in the Senate and were automatically referred back to the committee at the end of the 100th Congress. Protocols relating to verification of the treaties were signed on June 1, 1990, and submitted to the Senate on June 28, 1990 (Treaty Doc. 101-19).

The Senate Foreign Relations Committee reported the treaties and protocols together on September 14, 1990 (Exec. Rept. 101-31). On September 25, 1990, the Senate considered the treaties *en bloc* and gave its advice and consent to the Threshold Test Ban Treaty and its new protocol, subject to two declarations, and the Peaceful Nuclear Explosions Treaty and its protocol. The resolution of ratification read:

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to ratification of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, signed in Moscow on July 3, 1974, and the Protocol thereto, signed in Washington on June 1, 1990, subject to \*\*\* [declarations omitted].<sup>4</sup>

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to ratification of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes, signed in Washington and Moscow on May 28, 1976, and the Protocol thereto, signed in Washington on June 1, 1990, and an Agreed Statement relating to paragraph 2(c) of Article III of the treaty, signed on May 13, 1976.<sup>5</sup>

<sup>2</sup> Congressional Record, vol. 94, part 5, p. 6940.

<sup>3</sup> Congressional Record, June 28, 1984, p. S8573 (daily ed.).

<sup>4</sup> Congressional Record, September 25, 1990, pp. S13767-S13768 (daily ed.).

<sup>5</sup> Congressional Record, September 25, 1990, p. S13768 (daily ed.).

## APPENDIX 8.—TREATIES APPROVED BY THE SENATE

January 5, 1993 to October 18, 2000 (103d, 104th, 105th, and 106th  
Congresses)

(in reverse chronological order, by date of Senate approval)<sup>1</sup>

### 2000

Treaty Between the Government of the United States of America and the Government of the Republic of Uzbekistan Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on December 16, 1994. T. Doc. 104-25 reported on February 28, 1996. Exec. Rept. 106-23 reported with one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.

United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, with Annexes, adopted at Paris, June 17, 1994, and signed by the United States on October 14, 1994. T. Doc. 104-29 reported on August 2, 1996. Exec. Rept. 106-25 reported with five understandings, three declarations, and two provisos on October 4, 2000. Advice and consent given on October 18, 2000.

Inter-American Convention on Serving Criminal Sentences Abroad, done in Managua, Nicaragua, on June 9, 1993, signed on behalf of the United States at the OAS Headquarters in Washington on January 10, 1995. T. Doc. 104-35 reported on September 30, 1996. Exec. Rept. 106-21 reported with one reservation, one understanding, one declaration, and one proviso on September 29, 2000. Advice and consent given on October 18, 2000.

Inter-American Convention on Mutual Assistance in Criminal Matters, adopted at the twenty-second regular session of the Organization of American States (OAS) General Assembly meeting in Nassau, The Bahamas, on May 23, 1992, and the Optional Protocol Related to the Inter-American Convention on Mutual Assistance in Criminal Matters, adopted at the twenty-third regular session of the OAS General Assembly meeting in Managua, Nicaragua, on June 11, 1993. Both instruments signed on behalf of the United States at OAS Headquarters in Washington on January 10, 1995. T. Doc. 104-25 reported on September 3, 1997. Exec. Rept. 106-24 reported with three understandings, one declaration, and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.

Treaty Between the Government of the United States of America and the Government of Belize for the Return of Stolen Vehicles, with Annexes and Protocol, signed at Belmopan on October 3, 1996. T. Doc. 105-54 reported on June 23, 1998. Exec. Rept. 106-22 reported with one declaration and one proviso. Advice and consent given on October 18, 2000.

Treaty Between the Government of the United States of America and the Government of the Republic of Guatemala for the Return of Stolen, Robbed, Embezzled or Appropriated Vehicles and Aircraft, with Annexes and a Related Exchange of Notes, signed at Guatemala City on October 6, 1997. T. Doc. 105-58 reported on August 31, 1998. Exec. Rept. 106-22 reported with one declaration and one proviso. Advice and consent given on October 18, 2000.

Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Paraguay, signed at Washington on November 9, 1998. T. Doc. 106-4 reported on July 13, 1999. Exec. Rept. 106-26 re-

<sup>1</sup>Based on legislative calendars of the Committee on Foreign Relations, U.S. Senate, various years. Entry into force shows date treaty entered into force for the United States.

- ported with one understanding, one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Dominican Republic for the Return of Stolen or Embezzled Vehicles, with Annexes, signed at Santo Domingo on April 30, 1996. T. Doc. 106-7 reported on September 8, 1999. Exec. Rept. 106-22 reported with one declaration and one proviso on September 29, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the United States of America and Ukraine on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Kiev on July 22, 1998. T. Doc. 106-16 reported on November 10, 1999. Exec. Rept. 106-24 reported with one understanding, one declaration and two provisos on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the United States of America and the Government of France on Mutual Legal Assistance in Criminal Matters, signed at Paris on December 10, 1998. T. Doc. 106-17 reported on January 31, 2000. Exec. Rept. 106-24 reported with one understanding, one declaration and two provisos on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the United States of America and the Hellenic Republic on Mutual Legal Assistance in Criminal Matters, signed at Washington on May 26, 1999. T. Doc. 106-18 reported on February 1, 2000. Exec. Rept. 106-24 reported with one understanding, one declaration and two provisos on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the United States of America and the Government of the Arab Republic of Egypt on Mutual Legal Assistance in Criminal Matters, signed at Cairo on May 3, 1998, and a Related Exchange of Diplomatic Notes. T. Doc. 106-19 reported on February 2, 2000. Exec. Rept. 106-24 reported with one understanding, one declaration and two provisos on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the United States of America and the Government of Romania on Mutual Legal Assistance in Criminal Matters, signed at Washington on May 26, 1999. T. Doc. 106-20 reported on February 3, 2000. Exec. Rept. 106-24 reported with one understanding, one declaration and two provisos on October 4, 2000. Advice and consent given on October 18, 2000.
- International Plant Protection Convention (IPPC), adopted at the Conference of the Food and Agriculture Organization (FAO) of the United Nations at Rome on November 17, 1997. T. Doc. 106-23 reported on March 23, 2000. Exec. Rept. 106-27 reported with three understandings, one declaration and two provisos on October 5, 2000. Advice and consent given on October 18, 2000.
- Extradition Treaty Between the Government of the United States of America and the Government of the Republic of South Africa, signed at Washington on September 16, 1999. T. Doc. 106-24 reported on May 18, 2000. Exec. Rept. 106-26 reported with one understanding, one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on September 29, 1999. T. Doc. 106-25 reported on May 23, 2000. Exec. Rept. 106-23 reported with one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Santiago, Chile, on April 17, 1998. T. Doc. 106-26 reported on May 23, 2000. Exec. Rept. 106-23 reported with one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Denver on July 1, 1995. T. Doc. 106-27 reported on May 23, 2000. Exec. Rept. 106-23 reported with one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at San Salvador on March 10, 1999. T. Doc. 106-28 reported on May 23, 2000. Exec. Rept. 106-23 reported with one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.

- Treaty Between the Government of the United States of America and the Government of the Republic of Croatia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Zagreb on July 13, 1996. T. Doc. 106-29 reported on May 23, 2000. Exec. Rept. 106-23 reported with one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Amman on July 2, 1997. T. Doc. 106-30 reported on May 23, 2000. Exec. Rept. 106-23 reported with one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on December 1, 1998. T. Doc. 106-31 reported on May 23, 2000. Exec. Rept. 106-23 reported with one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Extradition Treaty with the Government of the United States of America and the Government of the Democratic Socialist Republic of Sri Lanka, signed at Washington on September 30, 1999. T. Doc. 106-34 reported on June 27, 2000. Exec. Rept. 106-26 reported with one understanding, one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Republic of Cyprus on Mutual Legal Assistance in Criminal Matters, signed at Nicosia on December 20, 1999. T. Doc. 106-35 reported on July 13, 2000. Exec. Rept. 106-24 reported with one understanding, one declaration and two provisos on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Republic of South Africa on Mutual Legal Assistance in Criminal Matters, signed at Washington on September 16, 1999. T. Doc. 106-36 reported on July 13, 2000. Exec. Rept. 106-24 reported with one understanding, one declaration and two provisos on October 4, 2000. Advice and consent given on October 18, 2000.
- Extradition Treaty Between the Government of the United States of America and the Government of Belize, signed at Belize on March 30, 2000. T. Doc. 106-38 reported on July 27, 2000. Exec. Rept. 106-26 reported with one understanding, one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 nautical miles. T. Doc. 106-39 reported on July 27, 2000. Exec. Rept. 106-19 reported with one declaration and one proviso on September 29, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Republic of Costa Rica for the Return of Stolen, Embezzled, or Appropriated Vehicles and Aircraft, with Annexes and a Related Exchange of Notes, signed at San Jose on July 2, 1999. T. Doc. 106-40 reported on September 5, 2000. Exec. Rept. 106-22 reported with one declaration and one proviso on September 29, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on January 14, 1998. T. Doc. 106-42 reported on September 5, 2000. Exec. Rept. 106-23 reported with one declaration and one proviso on October 4, 2000. Advice and consent given on October 18, 2000.
- Protocol Amending the 1950 Consular Convention Between the United States of America and Ireland, signed at Washington on June 16, 1998. T. Doc. 106-43 reported on September 5, 2000. Exec. Rept. 106-20 reported with one declaration and one proviso on September 29, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the United States of America and the Government of the Republic of Panama for the Return of Stolen, Robbed, or Converted Vehicles and Aircraft, with Annexes, signed at Panama on June 6, 2000, and a Related Exchange of Notes of July 25, 2000. T. Doc. 106-44 reported on September 5, 2000. Exec.



- Rept. 106–22 reported with one declaration and one proviso on September 29, 2000. Advice and consent given on October 18, 2000.
- Protocol Between the Government of the United States of America and the Government of the Republic of Panama Amending the Treaty Concerning the Treatment and Protection of Investments of October 27, 1982. Protocol was signed at Panama City on June 1, 2000. T. Doc. 106–46 reported on September 12, 2000. Exec. Rept. 106–23 reported on October 4, 2000. Advice and consent given on October 18, 2000.
- Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on August 1, 1997, together with an Amendment to the Treaty Set Forth in an Exchange of Diplomatic Notes dated August 8, 2000, and August 25, 2000. T. Doc. 106–47 reported with one declaration and one proviso on October 4, 2000. Exec. Rept. 106–23 reported on October 4, 2000. Advice and consent given on October 18, 2000.
- Inter-American Convention for the Protection and Conservation of Sea Turtles, with Annexes, done at Caracas December 1, 1996 (the “Convention”), which was signed by the United States, subject to ratification, on December 13, 1996. T. Doc. 105–48 reported on May 22, 1998. Exec. Rept. 106–18 reported with three understandings, five declarations, and two provisos on September 5, 2000. Advice and consent given on September 20, 2000.
- Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, adopted and opened for signature at the conclusion of the Seventeenth Session of the Hague Conference on Private International Law on May 29, 1993. T. Doc. 105–51 reported on June 11, 1998. Exec. Rept. 106–14 reported with six declarations. Advice and consent given on September 20, 2000.
- Convention (No. 176) Concerning Safety and Health in Mines, adopted by the International Labor Conference at its 82d Session in Geneva on June 22, 1995. T. Doc. 106–8 reported on September 9, 1999. Exec. Rept. 106–16 reported with two understandings, two declarations and two provisos on September 5, 2000. Advice and consent given on September 20, 2000.
- Food Aid Convention 1999, which was open for signature at the U.N. Headquarters, New York, from May 1 through June 30, 1999. The Convention was signed by the United States on June 16, 1999. T. Doc. 106–14 reported on October 13, 1999. Exec. Rept. 106–17 reported with three declarations and one proviso on September 5, 2000. Advice and consent given on September 20, 2000.
- Inter-American Convention against Corruption (“the Convention”), adopted and opened for signature at the Specialized Conference of the Organization of American States (OAS) at Caracas, Venezuela, on March 29, 1996. The Convention was signed by the United States on June 27, 1996, at the twenty-seventh regular session of the OAS General Assembly meeting in Panama City, Panama. T. Doc. 105–39 reported on April 1, 1998. Exec. Rept. 106–15 reported with six understandings, one declaration, and three provisos on June 30, 2000. Advice and consent given on July 27, 2000.

#### 1999

- Convention Between the United States of America and the Republic of Estonia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Washington on January 15, 1998. T. Doc. 105–55 reported on June 26, 1998. Exec. Rept. 106–3 reported with one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999. Entered into force: December 30, 1999.
- Convention Between the United States of America and the Republic of Lithuania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Washington on January 15, 1998. T. Doc. 105–56 reported on June 26, 1998. Exec. Rept. 106–4 reported with one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999. Entered into force: December 30, 1999.
- Convention Between the United States of America and the Republic of Latvia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Washington on January 15, 1998. T. Doc. 105–57 reported on June 26, 1998. Exec. Rept. 106–5 reported with one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999. Entered into force: December 30, 1999.
- The Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea, signed at Washington on June 9, 1998. T. Doc. 106–2 reported on March 2, 1999. Exec. Rept. 106–13 reported

- with one understanding, one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999. Entered into force: December 20, 1999.
- Convention Between the Government of the United States of America and the Government of the Republic of Venezuela for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, together with a Protocol, signed at Caracas on January 25, 1999. T. Doc. 106-3 reported on June 29, 1999. Exec. Rept. 106-6 reported with two understandings, two declarations and one proviso on November 3, 1999. Advice and consent given on November 5, 1999. Entered into force: December 30, 1999.
- Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, adopted by the International Labor Conference at its 87th Session in Geneva on June 17, 1999. T. Doc. 106-5 reported on August 5, 1999. Exec. Rept. 106-12 reported with two understandings, one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999.
- Convention Between the United States of America and the Republic of Slovenia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Ljubljana on June 21, 1999. T. Doc. 106-9 reported on September 13, 1999. Exec. Rept. 106-7 reported with one reservation, one understanding, one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999.
- Convention Between the Government of the United States of America and the Government of the Italian Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fraud or Fiscal Evasion, signed at Washington on August 25, 1999, together with a Protocol. T. Doc. 106-11 reported on September 21, 1999. Exec. Rept. 106-8 reported with one reservation, one understanding, one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999.
- Convention Between the Government of the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Washington on August 19, 1999, together with a Protocol. Treaty Doc. 106-12 reported on September 21, 1999. Exec. Rept. 106-9 reported with one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999. Entered into force: March 31, 2000.
- Protocol Amending the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Estates, Inheritances, and Gifts, signed at Bonn on December 3, 1980, signed at Washington on December 14, 1998. T. Doc. 106-13 reported on September 21, 1999. Exec. Rept. 106-10 reported with one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999.
- Convention Amending the Convention Between the Government of the United States of America and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, signed at Dublin on July 28, 1997. T. Doc. 106-15 reported on October 29, 1999. Exec. Rept. 106-11 reported with one declaration and one proviso on November 3, 1999. Advice and consent given on November 5, 1999.
- Protocols to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: (A) Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II or the Amended Mines Protocol); (B) Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III or the Incendiary Weapons Protocol); and (C) Protocol on Blinding Laser Weapons (Protocol IV). T. Doc. 105-1 reported on January 7, 1997. Exec. Rept. 105-21 reported Protocol II with one reservation, nine understandings and 14 conditions, with minority views, on October 10, 1998. Exec. Rept. 106-2 reported Protocol II with one reservation, nine understandings and 13 conditions. Advice and consent on Protocol II given on May 20, 1999. Protocol IV entered into force: July 30, 1998.
- Convention on Nuclear Safety, done at Vienna on September 20, 1994. T. Doc. 104-6 reported on May 11, 1995. Exec. Rept. 106-1 reported with six conditions and two understandings on March 24, 1999. Advice and consent given on March 25, 1999. Entered into force: July 10, 1999.

**1998**

- Agreement Between the Government of the United States of America and the Government of Hong Kong on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Hong Kong on April 15, 1997. T. Doc. 105-6 reported on May 6, 1997. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: January 21, 2000.
- Agreement Between the Government of the United States of America and the Government of Hong Kong for the Transfer of Sentenced Persons, signed at Hong Kong on April 15, 1997. T. Doc. 105-7 reported on May 6, 1997. Exec. Rept. 105-24 reported with one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: April 21, 1999.
- Extradition Treaty Between the United States of America and the Government of the Grand Duchy of Luxembourg, signed at Washington on October 1, 1996. T. Doc. 105-10 reported on July 8, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998.
- Treaty Between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg on Mutual Legal Assistance in Criminal Matters, signed at Washington on March 13, 1997, and a Related Exchange of Notes. T. Doc. 105-11 reported on July 8, 1997. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998.
- Treaty Between the United States of America and the Government of the Republic of Poland on Mutual Legal Assistance in Criminal Matters, signed at Washington on July 10, 1996. T. Doc. 105-12 reported on July 8, 1997. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998.
- Extradition Treaty Between the United States of America and France, signed at Paris on April 23, 1996. T. Doc. 105-13 reported on July 9, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998.
- Extradition Treaty Between the United States of America and the Republic of Poland, signed at Washington on July 10, 1996. T. Doc. 105-14 reported on July 9, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: September 17, 1999.
- Third Supplementary Extradition Treaty Between the United States of America and the Kingdom of Spain, signed at Madrid on March 12, 1996. T. Doc. 105-15 reported on July 10, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: July 25, 1999.
- Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Cyprus, signed at Washington on June 17, 1996. T. Doc. 105-16 reported on July 29, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: September 14, 1999.
- World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, done at Geneva on December 20, 1996, and signed by the United States on April 12, 1997. T. Doc. 105-17 reported on July 29, 1997. Exec. Rept. 105-25 reported with one reservation, two declarations and three provisos on October 14, 1998. Advice and consent given on October 21, 1998.
- Extradition Treaty Between the United States of America and the Argentine Republic, signed at Buenos Aires on June 10, 1997. T. Doc. 105-18 reported on July 30, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: June 15, 2000.
- Extradition Treaties Between the Government of the United States of America and the governments of six countries comprising the Organization of Eastern Caribbean States: Antigua and Barbuda, signed at St. John's on June 3, 1996; Dominica, signed at Roseau on October 10, 1996; Grenada, signed at St. George's on May 30, 1996; St. Lucia, signed at Castries on April 18, 1996; St. Kitts and Nevis, signed at Basseterre on September 18, 1996; and St. Vincent and the Grenadines, signed at Kingstown on August 15, 1996. T. Doc. 105-19 reported on July 30, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on Octo-

- ber 21, 1998. Entered into force with Antigua and Barbuda: July 1, 1999. Entered into force with St. Vincent and the Grenadines: September 8, 1999. Entered into force with Grenada: September 14, 1999. Entered into force with St. Lucia: February 2, 2000. Entered into force with St. Kitts and Nevis: February 23, 2000. Entered into force with Dominica: May 25, 2000.
- Extradition Treaty Between the Government of the United States of America and the Government of Barbados, signed at Bridgetown on February 28, 1996. T. Doc. 105-20 reported on July 31, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: March 3, 2000.
- Extradition Treaty Between the Government of the United States of America and the Government of Trinidad and Tobago, signed at Port of Spain on March 4, 1996. T. Doc. 105-21 reported on July 31, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: November 29, 1999.
- Treaty Between the Government of the United States of America and the Government of Trinidad and Tobago on Mutual Legal Assistance in Criminal Matters, signed at Port of Spain on March 4, 1996. T. Doc. 105-22 reported on September 3, 1997. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: November 29, 1999.
- Treaty Between the Government of the United States of America and the Government of Barbados on Mutual Legal Assistance in Criminal Matters, signed at Bridgetown on February 28, 1996. T. Doc. 105-23 reported on September 3, 1997. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: March 3, 2000.
- Treaties on Mutual Legal Assistance Between the Government of the United States of America and the governments of four countries comprising the Organization of Eastern Caribbean States: Antigua and Barbuda, signed at St. John's on October 31, 1996; Dominica, signed at Roseau on October 10, 1996; Grenada, signed at St. George's on May 30, 1996; and St. Lucia, signed at Castries on April 18, 1996. T. Doc. 105-24 reported on September 3, 1997. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force with Antigua and Barbuda: July 1, 1999. Entered into force with Grenada: September 14, 1999. Entered into force with St. Lucia: February 2, 2000. Entered into force with Dominica: May 25, 2000.
- Treaty Between the Government of the United States of America and the Government of Australia on Mutual Legal Assistance in Criminal Matters, signed at Washington on April 30, 1997. T. Doc. 105-27 reported on September 18, 1997. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998.
- Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India, signed at Washington on June 25, 1997. T. Doc. 105-30 reported on September 23, 1997. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: July 21, 1999.
- Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Zimbabwe signed at Harare on July 25, 1997. T. Doc. 105-33 reported on January 28, 1998. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: April 26, 2000.
- Treaty Between the United States of America and the Republic of Latvia on Mutual Legal Assistance in Criminal Matters signed at Washington on June 13, 1997. T. Doc. 105-34 reported on January 28, 1998. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent (with Technical Amendment) given on October 21, 1998. Entered into force: September 17, 1999.
- Treaty Between the Government of the United States of America and the Government of the Republic of Venezuela on Mutual Legal Assistance in Criminal Matters signed at Caracas on October 12, 1997. T. Doc. 105-38 reported on March 27, 1998. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998.

- Treaty Between the Government of the United States of America and the Government of the State of Israel on Mutual Legal Assistance in Criminal Matters, signed at Tel Aviv on January 26, 1998, and a Related Exchange of Notes signed the same date. T. Doc. 105-40 reported on April 2, 1998. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given (with Technical Amendment) on October 21, 1998. Entered into force: May 25, 1999.
- Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 16, 1998. T. Doc. 105-41 reported on April 20, 1998. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: August 26, 1999.
- Treaty Between the Government of the United States of America and the Government of the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters, signed at Brasilia on October 14, 1997. T. Doc. 105-42 reported on April 28, 1998. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998.
- Treaty Between the Government of the United States of America and the Government of Saint Vincent and the Grenadines on Mutual Legal Assistance in Criminal Matters, and a related Protocol, signed at Kingstown on January 8, 1998. T. Doc. 105-44 reported on May 13, 1998. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: September 8, 1999.
- Protocol to the Extradition Treaty Between the United States of America and the United Mexican States of May 4, 1978, signed at Washington on November 13, 1997. T. Doc. 105-46 reported on May 21, 1998. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998.
- Treaty Between the United States of America and the Czech Republic on Mutual Legal Assistance in Criminal Matters, signed at Washington on February 4, 1998. T. Doc. 105-47 reported on May 22, 1998. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998.
- Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Austria, signed at Washington on January 8, 1998. T. Doc. 105-50 reported on June 11, 1998. Exec. Rept. 105-23 reported with one understanding, one declaration and one proviso on October 14, 1998. Advice and consent given on October 21, 1998. Entered into force: January 1, 2000.
- Treaty Between the Government of the United States of America and the Government of the Republic of Estonia on Mutual Legal Assistance in Criminal Matters, signed at Washington on April 2, 1998. T. Doc. 105-52 reported on June 19, 1998. Exec. Rept. 105-22 reported with one understanding, one declaration and two provisos on October 14, 1998. Advice and consent given on October 21, 1998.
- Two Related Protocols, done at Montreal on September 25, 1975: Additional Protocol No. 3 To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as Amended by Protocols done at the Hague, September 28, 1955, and at Guatemala City, March 8, 1971; and Montreal Protocol No. 4 to Amend the same. Ex. B, 95-1 (T. Doc. 95-2A and B) reported on January 14, 1977. Exec. Rept. 97-45 reported with conditions and recommendations on December 16, 1981. Exec. Rept. 98-1 reported with three conditions on February 10, 1983. Exec. Rept. 101-21 reported with three conditions and minority views on June 28, 1990. Exec. Rept. 102-1 reported with three conditions on February 5, 1991. Exec. Rept. 105-20 reported with one declaration and two provisos on August 25, 1998. Advice and consent given on Montreal Protocol No. 4 on September 28, 1998 (Protocol No. 3 returned to the President pursuant to resolution of ratification). Entered into force: March 4, 1999.
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"), adopted at Paris on November 21, 1997, by a conference held under the auspices of the Organization for Economic Cooperation and Development (OECD). The Convention was signed at Paris on December 17, 1997, by the United States and 32 other nations. T. Doc. 105-43 reported on May 4, 1998. Exec. Rept. 105-19 reported with one understand-

- ing, one declaration and three provisos on July 16, 1998. Advice and consent given on July 31, 1998. Entered into force: February 15, 1999.
- [Amendments to the] Convention on the International Maritime Organization. Original Convention signed at Geneva, March 6, 1948 (IMO Convention). Amendments reported in T. Doc. 104-36, October 1, 1996. Exec. Rept. 105-18 reported with one declaration and one proviso on June 19, 1998. Advice and consent given on June 26, 1998.
- International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, and signed by the United States on October 25, 1991. T. Doc. 104-17 reported on September 5, 1995. Exec. Rept. 105-15 reported with one reservation, two declarations and one proviso, on June 19, 1998. Advice and consent given on June 26, 1998.
- Grains Trade Convention and Food Aid Convention Constituting the International Grains Agreement, 1995, signed by the United States on June 26, 1995. T. Doc. 105-4 reported on April 7, 1997. Exec. Rept. 105-16 reported with one declaration and one proviso on June 19, 1998. Advice and consent given on June 26, 1998. [International Grains Agreement, 1995, entered into force July 1, 1995.]
- Trademark Law Treaty, done at Geneva on October 27, 1994, with Regulations, signed by the United States on October 28, 1994. T. Doc. 105-35 reported on January 29, 1998. Exec. Rept. 105-17 reported with two declarations and one proviso on June 19, 1998. Advice and consent given on June 26, 1998.
- Protocols to the North Atlantic Treaty of 1949 on the Accession of Poland, Hungary, and the Czech Republic, opened for signature at Brussels on December 16, 1997, and signed on behalf of the United States of America and other parties to the North Atlantic Treaty. T. Doc. 105-36 reported on February 11, 1998. Exec. Rept. 105-14 reported with seven declarations and four conditions on March 6, 1998. Advice and consent given on April 30, 1998. Entered into force: December 4, 1998.

#### 1997

- Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, signed at Washington on September 26, 1980 as Amended by the Protocols signed on June 14, 1983, March 28, 1984, and March 17, 1995, signed at Ottawa on July 29, 1997. T. Doc. 105-29 reported on September 23, 1997. Exec. Rept. 105-12 reported with one declaration and one proviso on October 30, 1997. Advice and consent given on October 31, 1997. Entered into force: December 16, 1997.
- Agreement Between the Government of the United States of America and the Government of the Republic of Turkey for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, together with a Related Protocol, signed at Washington on March 28, 1996. T. Doc. 104-30 reported on September 3, 1996. Exec. Rept. 105-6 reported with one declaration and one proviso, on October 30, 1997. Advice and consent given on October 31, 1997. Entered into force: December 19, 1997.
- Convention Between the Government of the United States of America and the Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Washington on May 31, 1996. T. Doc. 104-31 reported on September 3, 1996. Exec. Rept. 105-7 reported with one understanding, two declarations, and one proviso, on October 30, 1997. Advice and consent given on October 31, 1997. Entered into force: February 1, 1998.
- Convention Between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Luxembourg on April 3, 1996. T. Doc. 104-33 reported on September 4, 1996. Exec. Rept. 105-8 reported with one reservation, two declarations, and one proviso, on October 30, 1997. Advice and consent given on October 31, 1997.
- Convention Between the Government of the United States of America and the Government of the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Bangkok on November 26, 1996. T. Doc. 105-2 reported on January 28, 1997. Exec. Rept. 105-9 reported with one declaration and one proviso on October 30, 1997. Advice and consent given on October 31, 1997. Entered into force: December 15, 1997.
- Convention Between the Government of the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on

- Income, signed at Washington on October 2, 1996, together with a Protocol to the Convention. T. Doc. 105-8 reported on June 25, 1997. Exec. Rept. 105-10 reported with two declarations and one proviso on October 30, 1997. Advice and consent given on October 31, 1997. Entered into force: December 19, 1997.
- Convention Between the United States of America and the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, signed at Cape Town on February 17, 1997. T. Doc. 105-9 reported on June 26, 1997. Exec. Rept. 105-11 reported with one declaration and one proviso on October 30, 1997. Advice and consent given on October 31, 1997. Entered into force: December 28, 1997.
- Convention Between the United States of America and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, signed at Dublin on July 28, 1997, together with a Protocol and Exchange of Notes done on the same date. T. Doc. 105-31 reported on September 24, 1997. Exec. Rept. 105-13 reported with one understanding, two declarations and one proviso on October 30, 1997. Advice and consent given on October 31, 1997. Entered into force: December 17, 1997.
- Constitution and Convention of the International Telecommunication Union (ITU), with Annexes, signed at Geneva on December 22, 1992, and Amendments to the Constitution and Convention, signed at Kyoto on October 14, 1994, together with declarations and reservations by the United States as contained in the Final Acts. T. Doc. 104-34 reported on September 13, 1996. Exec. Rept. 105-3 reported with two understandings, two declarations, and one proviso, on October 20, 1997. Advice and consent given on October 23, 1997. Entered into force: October 26, 1997.
- Protocol Between the United States and Canada Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States, with a Related Exchange of Notes, signed at Washington on December 14, 1995. T. Doc. 104-28 reported on August 2, 1996. Exec. Rept. 105-5 reported with one understanding, one declaration, and one proviso, on October 22, 1997. Advice and consent given on October 23, 1997. Entered into force: October 7, 1999.
- Protocol Between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for the Protection of Migratory Birds and Game Mammals, signed at Mexico City on May 5, 1997. T. Doc. 105-26 reported on September 15, 1997. Exec. Rept. 105-5 reported with one declaration, one understanding, and one proviso on October 22, 1997. Advice and consent given on October 23, 1997. Entered into force: December 30, 1999.
- Treaty on Maritime Boundaries Between the United States of America and the United Mexican States, signed at Mexico City on May 4, 1978. Ex. F, 96-1 (T. Doc. 96-6) reported on January 23, 1979. Exec. Rept. 96-49 reported on August 5, 1980. Exec. Rept. 105-4 reported with one declaration and one proviso on October 22, 1997. Advice and consent given on October 23, 1997. Entered into force: November 13, 1997.
- Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders, signed at Hong Kong on December 20, 1996. T. Doc. 105-3 reported on March 3, 1997. Exec. Rept. 105-2 reported with two understandings, two declarations and one proviso on August 19, 1997. Advice and consent given on October 23, 1997. Entered into force: January 21, 1998.
- Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe (CFE) of November 19, 1990, adopted at Vienna on May 31, 1996 ("the Flank Document"). Flank Document is Annex A of the Final Document of the First CFE Review Conference. T. Doc. 105-5 reported on April 7, 1997. Exec. Rept. 105-1 reported with 14 conditions on May 9, 1997. Advice and consent given on May 14, 1997. Entered into force: May 15, 1997.
- Convention on Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. T. Doc. 103-21 reported on November 23, 1993. Exec. Rept. 104-33 reported with seven conditions and 11 declarations on September 11, 1996. Advice and consent given, in the form of amended resolution of ratification with 28 conditions, on April 24, 1997. Entered into force: April 29, 1997.

#### 1996

- Convention Between the United States of America and the Government of the Republic of Kazakhstan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, together with

- the Protocol and the Two Related Exchanges of Notes, signed at Almaty on October 24, 1993. T. Doc. 103-33 reported on September 19, 1994. Exec. Rept. 104-34 reported with a proviso on September 25, 1996. Advice and consent given on September 28, 1996. Entered into force: December 30, 1996. [See also T. Doc. 104-15.]
- Exchange of Notes dated at Washington July 10, 1995, relating to the Convention Between the United States of America and the Government of the Republic of Kazakhstan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, together with Related Protocol signed at Almaty on October 24, 1993. T. Doc. 104-15 reported on August 3, 1995. Exec. Rept. 104-34 reported with a proviso on September 25, 1996. Advice and consent given on September 28, 1996. Entered into force: December 30, 1996. [See also T. Doc. 104-34.]
- Protocol Between the United States of America and the Government of the Kingdom of the Netherlands in Respect of the Netherlands Antilles Amending Article VIII of the 1948 Convention with Respect to Taxes on Income and Certain Other Taxes as Applicable to the Netherlands Antilles, signed at Washington on October 10, 1995. T. Doc. 104-23 reported on January 3, 1996. Exec. Rept. 104-35 reported on September 25, 1996. Advice and consent given on September 28, 1996. Entered into force: December 30, 1996.
- International Rubber Agreement, 1995, done at Geneva on February 17, 1995. T. Doc. 104-27 reported on June 19, 1996. Exec. Rept. 104-21 reported with one declaration on June 26, 1996. Advice and consent given on September 25, 1996. Entered into force, provisionally: February 6, 1997. Entered into force, definitively: February 14, 1997.
- Treaty Between the United States of America and the Republic of Korea on Mutual Legal Assistance in Criminal Matters, signed at Washington on November 23, 1993, together with a Related Exchange of Notes. T. Doc. 104-1 reported on January 12, 1995. Exec. Rept. 104-22 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: May 23, 1997.
- Treaty Between the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 6, 1994, together with a Related Exchange of Notes. T. Doc. 104-2 reported on January 23, 1995. Exec. Rept. 104-23 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: December 2, 1996.
- Treaty Between the United States of America and the Government of the Republic of Hungary on Extradition, signed at Budapest on December 1, 1994. T. Doc. 104-5 reported on May 8, 1995. Exec. Rept. 104-27 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: March 18, 1997.
- Extradition Treaty Between the United States of America and the Kingdom of Belgium signed at Brussels on April 27, 1987. T. Doc. 104-7 reported on July 12, 1995. Exec. Rept. 104-28 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: September 1, 1997.
- Supplementary Treaty on Extradition Between the United States of America and the Kingdom of Belgium To Promote the Repression of Terrorism, signed at Brussels on April 27, 1987. T. Doc. 104-8 reported on June 12, 1995. Exec. Rept. 104-28 reported on July 30, 1996. Advice and consent given on August 2, 1996.
- Extradition Treaty Between the United States of America and the Government of the Swiss Confederation, signed at Washington on November 14, 1990. T. Doc. 104-9 reported on June 12, 1995. Exec. Rept. 104-32 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: September 10, 1997.
- Extradition Treaty Between the United States of America and the Government of the Republic of the Philippines, signed at Manila on November 13, 1994. T. Doc. 104-16 reported on September 5, 1995. Exec. Rept. 104-29 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: November 22, 1996.
- Treaty Between the United States of America and the Government of the Republic of the Philippines on Mutual Legal Assistance in Criminal Matters, signed at Manila on November 13, 1994. T. Doc. 104-18 reported on September 5, 1995. Exec. Rept. 104-26 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: November 22, 1996.
- Treaty Between the United States of America and the Government of the Republic of Hungary on Mutual Legal Assistance in Criminal Matters, signed at Budapest on December 1, 1994. T. Doc. 104-20 reported on September 6, 1995. Exec.



- Rept. 104-25 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: March 18, 1997.
- Treaty Between the United States of America and the Government of the Republic of Austria on Mutual Legal Assistance in Criminal Matters, signed at Vienna on February 23, 1995. T. Doc. 104-21 reported on September 6, 1995. Exec. Rept. 104-24 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: August 1, 1998.
- Extradition Treaty Between the United States of America and the Government of the Republic of Bolivia, signed at La Paz on June 27, 1995. T. Doc. 104-22 reported on October 10, 1995. Exec. Rept. 104-31 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: November 21, 1996.
- Extradition Treaty with Malaysia, signed at Kuala Lumpur on August 3, 1995. T. Doc. 104-26 reported on May 17, 1996. Exec. Rept. 104-30 reported on July 30, 1996. Advice and consent given on August 2, 1996. Entered into force: June 2, 1997.
- Treaty Between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, with Annex and Protocol, signed at Washington on February 4, 1994. T. Doc. 103-35 reported on September 21, 1994. Exec. Rept. 104-11 reported on June 20, 1996. Advice and consent given on June 27, 1996. Entered into force: March 7, 1997.
- Treaty Between the United States of America and the Republic of Belarus Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, Protocol, and Related Exchange of Letters, signed at Minsk on January 15, 1994. T. Doc. 103-36 reported on September 26, 1994. Exec. Rept. 104-12 reported on June 20, 1996. Advice and consent given on June 27, 1996.
- Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Related Exchange of Letters, done at Washington on March 4, 1994. T. Doc. 103-37 reported on September 27, 1994. Exec. Rept. 104-13 reported on June 20, 1996. Advice and consent given on June 27, 1996. Entered into force: November 16, 1996.
- Treaty Between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on October 6, 1994. T. Doc. 104-10 reported on June 26, 1995. Exec. Rept. 104-15 reported on June 20, 1996. Advice and consent given on June 27, 1996. Entered into force: January 1, 1997.
- Treaty Between the United States of America and the Government of the Republic of Latvia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on January 13, 1995. T. Doc. 104-12 reported on July 10, 1995. Exec. Rept. 104-16 reported on June 20, 1996. Advice and consent given on June 27, 1996. Entered into force: December 26, 1996.
- Treaty Between the United States of America and the Government of the Republic of Georgia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on March 7, 1994. T. Doc. 104-13 reported on July 10, 1995. Exec. Rept. 104-17 reported on June 20, 1996. Advice and consent given on June 27, 1996. Entered into force: August 17, 1997.
- Treaty Between the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on September 26, 1994. T. Doc. 104-14 reported on July 11, 1995. Exec. Rept. 104-18 reported on June 20, 1996. Advice and consent given on June 27, 1996. Entered into force: December 26, 1996.
- Treaty Between the United States of America and the Government of the Republic of Estonia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, done at Washington on April 19, 1994. T. Doc. 103-38 reported on September 27, 1994. Exec. Rept. 104-14 reported on June 20, 1996. Advice and consent given on June 27, 1996. Entered into force: February 16, 1997.
- Treaty Between the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on January 11, 1995. T. Doc. 104-19 reported on September 6, 1995. Exec. Rept. 104-19 reported on June 20, 1996. Advice and consent given on June 27, 1996. Entered into force: January 4, 1998.
- Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation

and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, with Annexes, adopted on August 4, 1995, and signed by the United States on December 4, 1995. T. Doc. 104-24 reported on February 20, 1996. Exec. Rept. 104-20 reported with one declaration on June 26, 1996. Advice and consent given on June 27, 1996.

Treaty Between the United States of America and the Russian Federation of Further Reduction and Limitation of Strategic Offensive Arms (the START II Treaty), signed at Moscow on January 3, 1993 (including Elimination and Conversion Protocol, Exhibitions and Inspections Protocol; and Memorandum of Attribution). T. Doc. 103-1 reported on January 20, 1993. Exec. Rept. 104-10 reported with additional views on December 15, 1995. Advice and consent given on January 26, 1996.

#### 1995

Convention Between the United States of America and the Portuguese Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, together with a Related Protocol, signed at Washington on September 6, 1994. T. Doc. 103-34 reported on September 19, 1994. Exec. Rept. 104-8 reported on August 10, 1995. Advice and consent given on August 11, 1995. Entered into force: December 18, 1995.

Convention Between the United States of America and the Government of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Stockholm on September 1, 1994, together with a Related Exchange of Notes. T. Doc. 103-29 reported on September 14, 1994. Exec. Rept. 104-4 reported on August 10, 1995. Advice and consent given on August 11, 1995. Entered into force: October 26, 1995.

Convention Between the United States of America and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, with Protocol, signed at Washington on March 4, 1994. T. Doc. 103-30 reported on September 14, 1994. Exec. Rept. 104-5 reported on August 10, 1995. Advice and consent given on August 11, 1995. Entered into force: November 16, 1996. [See also T. Doc. 104-11.]

Exchange of Notes dated at Washington May 26 and June 6, 1995, Relating to the Convention Between the United States of America and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, with Protocol, signed at Washington on March 4, 1994. T. Doc. 104-11 reported on June 30, 1995. Exec. Rept. 104-5 reported on August 10, 1995. Advice and consent given on August 11, 1995. [See also T. Doc. 103-30.]

Additional Protocol that Modifies the Convention Between the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Washington on September 18, 1992. Additional Protocol signed at Mexico City on September 8, 1994. T. Doc. 103-31 reported on September 19, 1994. Exec. Rept. 104-6 reported on August 10, 1995. Advice and consent given on August 11, 1995. Entered into force: October 26, 1995.

Convention Between the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Paris on August 31, 1994, together with Two Related Exchanges of Notes. T. Doc. 103-32 reported on September 19, 1994. Exec. Rept. 104-7 reported on August 10, 1995. Advice and consent given on August 11, 1995. Entered into force: December 30, 1995.

Revised Protocol Amending the Convention Between the United States and Canada with Respect to Taxes on Income and Capital, signed at Washington on September 28, 1980, as Amended by the Protocols signed on June 14, 1983, and March 28, 1984. T. Doc. 104-4 reported on April 24, 1995. Exec. Rept. 104-9 reported on August 10, 1995. Advice and consent given on August 11, 1995. Entered into force: November 9, 1995.

Treaty Between the United States of America and the Republic of Panama on Mutual Assistance in Criminal Matters, with Annexes and Appendices, signed at Panama on April 11, 1991. T. Doc. 102-15 reported on October 24, 1991. Exec. Rept. 104-3 reported on May 5, 1995. Advice and consent given on May 16, 1995. Entered into force: September 6, 1995.

Extradition Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan, signed at Washington on March 28, 1995. T. Doc. 104-3 reported on April 24, 1995. Exec. Rept. 104-2

reported on May 2, 1995. Advice and consent given on May 3, 1995. Entered into force: July 29, 1995.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, and Two Accompanying Protocols on Non-Detectable Fragments (Protocol I) and on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). T. Doc. 103-25 reported on May 12, 1994. Exec. Rept. 104-1 reported on March 22, 1995. Advice and consent given on March 24, 1995. Entered into force: September 24, 1995.

#### 1994

Two Treaties Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, both signed at London on November 5, 1993, on the Delimitation in the Caribbean of a Maritime Boundary Relating to: (A) the U.S. Virgin Islands and Anguilla; and (B) Puerto Rico/U.S. Virgin Islands and the British Virgin Islands, with Annex. T. Doc. 103-23 reported on March 9, 1994. Exec. Rept. 103-35 reported on September 29, 1994. Advice and consent given on October 6, 1994. Entered into force: June 1, 1995.

Headquarters Agreement Between the Government of the United States of America and the Organization of American States, signed at Washington on May 14, 1992. T. Doc. 102-40 reported on September 21, 1992. Exec. Rept. 103-37 reported on September 30, 1994. Advice and consent given on October 6, 1994.

Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Which Was Adopted at Rome by Consensus by the Conference of the United Nations Food and Agriculture Organization on November 24, 1993. T. Doc. 103-24 reported on April 26, 1994. Exec. Rept. 103-32 reported on September 26, 1994. Advice and consent given on October 6, 1994.

Certified Copy of the Convention (No. 150) Concerning Labor Administration; Role, Functions and Organization, adopted by the International Labor Conference at its 64th Session in Geneva on June 7, 1978. T. Doc. 103-26 reported on August 2, 1994. Exec. Rept. 103-33 reported on September 26, 1994. Advice and consent given on October 6, 1994. Entered into force: March 3, 1996.

Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, with Annex, done at Washington on June 16, 1994. T. Doc. 103-27 reported on August 9, 1994. Exec. Rept. 103-36 reported on September 29, 1994. Advice and consent given on October 6, 1994. Entered into force: December 8, 1995.

Second Protocol Amending the 1975 Convention Between the Government of the United States of America and the Government of the State of Israel with Respect to Taxes on Income (as Amended by the Protocol signed on May 30, 1980), signed at Jerusalem on January 26, 1993. T. Doc. 103-16 reported on October 19, 1993. Exec. Rept. 103-21 reported with an understanding and declaration on November 18, 1993. Advice and consent given on September 22, 1994. Entered into force: December 30, 1994.

International Convention on the Elimination of All Forms of Racial Discrimination, done at New York on December 21, 1965. Signed on behalf of the United States on September 23, 1966. Ex. C 95-2 reported on February 23, 1978. Exec. Rept. 103-29 reported on June 2, 1994. Advice and consent given on June 24, 1994. Entered into force for the United States: November 20, 1994.

"Protocol of Washington" Adopted on December 14, 1992, by the Sixteenth Special Session of the General Assembly of the Organization of American States (OAS), and signed by the United States on January 23, 1993, and the "Protocol of Managua" Adopted by the Nineteenth Special Session of the OAS General Assembly on June 10, 1993, and signed that day by the United States. T. Doc. 103-22 reported on January 26, 1994. Exec. Rept. 103-28 reported on May 5, 1994. Advice and consent given on May 17, 1994.

#### 1993

Protocol Amending the Convention Between the United States of America and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Signed on December 31, 1983, Which Protocol was signed at Washington on December 18, 1991. T. Doc 102-41 reported on September 30, 1992. Exec. Rept. 103-18 reported with a reservation on November 18, 1993. Advice and consent given on November 20, 1993. Entered into force: December 29, 1993.

- Convention Between the United States of America and the Czech Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Prague on September 16, 1993. T. Doc. 102-17 reported on October 21, 1993. Exec. Rept. 103-22 reported on November 18, 1993. Advice and consent given on November 20, 1993. Entered into force: December 23, 1993.
- Convention Between the United States of America and the Slovak Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Bratislava on October 8, 1993. T. Doc. 102-18 reported on October 21, 1993. Exec. Rept. 103-23 reported on November 18, 1993. Advice and consent given on November 20, 1993. Entered into force: December 30, 1993.
- Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Washington on October 13, 1993. T. Doc. 102-19 reported on October 25, 1993. Exec. Rept. 103-19 reported on November 18, 1993. Advice and consent given on November 20, 1993. Entered into force: December 1, 1993.
- Convention Between the United States of America and the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, together with a Related Protocol, signed at Washington on June 17, 1992. T. Doc. 102-39 reported on September 8, 1992. Exec. Rept. 103-17 reported on November 18, 1993. Advice and consent given on November 20, 1993. Entered into force: December 16, 1993.
- Protocol Adopted June 5, 1992, by the Conference of Plenipotentiaries of the Contracting Parties to the International Convention for the Conservation of Atlantic Tunas (ICCAT), signed by the United States on October 22, 1992, to Amend Paragraph 2 of Article X of ICCAT. T. Doc. 103-4 reported on April 20, 1993. Exec. Rept. 103-24 reported on November 19, 1993. Advice and consent given on November 20, 1993. [Original convention entered into force March 21, 1969.]
- Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Washington on December 18, 1992. T. Doc. 103-6 reported on May 12, 1993. Exec. Rept. 103-19 reported on November 18, 1993. Advice and consent given on November 20, 1993. Entered into force: December 1, 1993.
- Convention Between the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, together with a Related Protocol, signed at Washington on September 18, 1992. T. Doc. 103-7 reported on May 20, 1993. Exec. Rept. 103-20 reported with an understanding and a reservation on November 18, 1993. Advice and consent, with Executive Amendment, given on November 20, 1993. Entered into force: December 28, 1993.
- Convention on the Making of Plastic Explosives for the Purpose of Detection, with Technical Annex, done at Montreal on March 1, 1991. T. Doc. 103-8 reported on June 29, 1993. Exec. Rept. 103-15 reported with a declaration on November 18, 1993. Advice and consent, with Executive Amendment, given on November 20, 1993.
- Amendment to the Montreal Protocol on Substances That Deplete the Ozone Layer, adopted at Copenhagen on November 23-25, 1992, by the Fourth Meeting of the Parties to the Montreal Protocol. T. Doc. 103-9 reported on July 20, 1993. Exec. Rept. 103-25 reported on November 19, 1993. Advice and consent given on November 20, 1993. Entered into force: June 14, 1993.
- Multilateral United Nations Convention on the Limitation Period in the International Sale of Goods, done at New York on June 14, 1974, together with the 1980 Protocol Amending that Convention, done at Vienna on April 11, 1980. T. Doc. 103-10 reported on August 6, 1993. Exec. Rept. 103-16 reported with a declaration on November 18, 1993. Advice and consent given on November 20, 1993.
- Treaty Between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol and Related Exchanges of Letters, signed at Bucharest on May 28, 1992. T. Doc. 102-36 reported on August 3, 1992. Exec. Rept. 103-7 reported on September 15, 1993. Advice and consent given on November 17, 1993. Entered into force: January 15, 1994.
- Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment with Protocol, signed at Washington on November 14, 1991; and an Amendment to the Proto-

- col Effected by Exchange of Notes at Buenos Aires on August 24 and November 6, 1992. T. Doc. 103-2 reported on January 21, 1993. Exec. Rept. 103-8 reported on September 15, 1993. Advice and consent given on November 17, 1993. Entered into force: October 20, 1994.
- Treaty Between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and Related Exchange of Letters, signed at Washington on September 23, 1992. T. Doc. 103-3 reported on January 21, 1993. Exec. Rept. 103-9 reported on September 15, 1993. Advice and consent given on November 17, 1993. Entered into force: June 2, 1994.
- Treaty Between the United States of America and the Republic of Kyrgyzstan Concerning the Encouragement and Reciprocal Protection of Investment, signed at Washington on January 19, 1993. T. Doc. 103-13 reported on September 8, 1993. Exec. Rept. 103-12 reported on September 15, 1993. Advice and consent given on November 17, 1993. Entered into force: January 12, 1994.
- Treaty Between the United States of America and the Republic of Moldova Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and Related Exchange of Letters, signed at Washington on April 21, 1993. T. Doc. 103-14 reported on September 8, 1993. Exec. Rept. 103-13 reported on September 15, 1993. Advice and consent given on November 17, 1993. Entered into force: November 25, 1994.
- Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and Related Exchange of Letters, signed at Washington on August 27, 1993. T. Doc. 103-15 reported on September 10, 1993. Exec. Rept. 103-14 reported on September 15, 1993. Advice and consent given on November 17, 1993. Entered into force: May 11, 1997.
- Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Reciprocal Encouragement and Protection of Investment, signed at Washington on May 19, 1992. T. Doc. 103-12 reported on September 8, 1993. Exec. Rept. 103-11 reported on September 15, 1993. Advice and consent given on October 21, 1993. Entered into force: January 12, 1994.
- Treaty on Open Skies, with Twelve Annexes, signed at Helsinki on March 24, 1992. T. Doc. 102-37 reported on August 12, 1992. Exec. Rept. 103-5 reported on August 2, 1993. Advice and consent given on August 6, 1993.

## **APPENDIX 9.—TREATIES REJECTED BY THE SENATE**

---

**January 5, 1993 to December 31, 2000 (103d, 104th, 105th, and 106th  
Congresses)**

**(in reverse chronological order, by date of Senate action)<sup>1</sup>**

### **1999**

Comprehensive Nuclear Test-Ban Treaty, opened for signature and signed by the United States at New York on September 24, 1996. Treaty includes two Annexes, a Protocol, and two Annexes to the Protocol. T. Doc. 105-28 reported on September 23, 1997. Senate rejected by a vote of 48-51, 1 Present, on October 13, 1999. The Treaty reverted to the Senate Foreign Relations Committee at the end of the 106th Congress, where it remains pending.

---

<sup>1</sup>Based on legislative calendars of the Committee on Foreign Relations, U.S. Senate, various years.



**APPENDIX 10.—LETTER OF RESPONSE FROM  
ACTING DIRECTOR THOMAS GRAHAM, JR.  
TO SENATOR PELL ACCEPTING THE NAR-  
ROW INTERPRETATION OF THE ABM TREA-  
TY**

---

UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY,  
WASHINGTON, DC,  
*July 13, 1993.*

The HON. CLAIBORNE PELL,  
*Chairman, Committee on Foreign Relations,  
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: On May 18, 1993, during hearings you chaired concerned START II, you asked whether it was the position of the Clinton administration that the narrow interpretation is the proper and legally correct interpretation of the ABM Treaty. I agreed to provide a response for the record. I am pleased to provide that answer in an enclosure to this letter.

Because of the importance of this matter and your interest in it over the years, and in the expectation that the committee may desire to handle it in a special way, I want to draw your personal attention to this answer rather than simply transmitting it through routine channels. I am also advising other interested Members of Congress of the answer for the record. Please let me know if you have any further questions on this matter.

Sincerely,

THOMAS GRAHAM, JR.  
*Acting Director.*

Enclosure:

*Question:* Would you please state, for the record, whether or not it is the position of the Clinton administration that the narrow interpretation is the proper and legally correct interpretation of the ABM Treaty?

*Answer:* It is the position of the Clinton administration that the "narrow" or "traditional" interpretation of the ABM Treaty is the correct interpretation and therefore that the ABM Treaty prohibits the development, testing, and deployment of sea-based, air-based, space-based, and mobile land-based ABM systems and components without regard to the technology utilized.

○