Conditional Approval of Treaties By the U.S. Senate

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Recommended Citation
Conditional Approval of Treaties By the U.S. Senate

KEVIN C. KENNEDY*

I. INTRODUCTION

Article II, Section 2 of the U.S. Constitution provides that "[the President] shall have power, by and with the Advice and Consent of the Senate, to make treaties." Beginning in the late 1980s and continuing into the 1990s, the Senate approved several human rights treaties that the political process had previously set aside.1 The Senate included a package of conditions in its advice and consent resolutions regarding ratification of these treaties.2 Five "principles" seem to have guided this package of reservations, understandings, and declarations: (1) in the event of a conflict between the treaty and the Constitution, the Constitution will control; (2) adherence to the treaty will not affect any change in existing U.S. law; (3) no dispute arising under the treaty will be submitted to the International Court of Justice; (4) the federal government will implement the treaty to the extent it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise the state and local governments will implement the treaty (the so-called "federalism clause"); and (5) the

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treaty will not be self-executing. In some cases, the executive branch, rather than the Senate, proposed the package of conditions.

The Senate’s decision to consent to ratification of human rights treaties with a conditional package of reservations, understandings, and declarations has not only been criticized, but has raised several questions as well. Does the Senate’s use of reservations, understandings, and declarations signal a change from past Senate practice in the treaty approval process? Is this a new development, recent trend, or the latest in a long series of conditional Senate approvals? Has past Senate practice been to give unconditional approval to treaties submitted for its advice and consent or to condition its approval? In other words, is the use of treaty conditions aberrational or standard practice? Is the Senate singling out human rights conventions? What does the historical record


indicate?

In its 200-year history, the United States has entered into over 12,000 bilateral and multilateral treaties and international agreements. Of these 12,000 treaties and international agreements, the Senate has ratified only 1,286 pursuant to its Article II, Section 2 advice-and-consent power. Although the Senate has unconditionally approved these 1,286 treaties and international agreements, it has conditionally approved 195, approximately 15% of the total treaties and international agreements.

This Article examines the incidence of reservations, amendments, understandings, declarations, and other conditions that the Senate has included as part of its advice and consent to treaty ratification. Part II of this Article examines the history of the Senate's role in the treaty-making process and its power to conditionally approve treaties. Part III identifies thirteen catego-

6. This figure is derived from the numerically-arranged Treaties and Other International Acts Series (T.I.A.S.), which the Department of State began issuing in 1946. The last international agreement in the T.I.A.S. to be considered for this Article was the Agreement on Civil Aviation Cooperation, Mar. 14, 1986, U.S.-P.R.C., T.I.A.S. No. 12,006.

Before 1946, the Department of State issued U.S. treaties and international agreements in two publications. One publication was Treaty Series (T.S.), which the State Department prepared and numbered 1 to 994. T.S. consisted of treaties, conventions, and selected executive agreements. It used fractions to number some early treaties with a single country, eleven of which were Article II, Section 2 treaties. Early treaties entered into with Algiers, for example, were numbered T.S. No. 1 and T.S. No. 1-1/2. Consequently, the actual number of treaties in T.S. is slightly greater than 994. T.S. also includes the nine treaties that were grandfathered under Article VI of the Constitution and that the Continental Congress approved—T.S. Nos. 82, 83, 83-1/4, 83-1/2, 102, 104, 249, 250, and 346. T.I.A.S. superseded T.S. at the end of 1945.


The third and current treaty source, T.I.A.S., continued the sequential numbering of the combined T.S. and E.A.S. numbers with T.I.A.S. No. 1501 in 1945.

7. See infra notes 37-50 for a list of all treaties that have received Senate advice and consent to ratification.

8. See infra Appendices 3-15.

9. This Article will not revisit the issue of whether the Senate has been impermissibly excluded from the treaty-negotiation phase of the treaty-making process. See CONGRESSIONAL RESEARCH SERVICE, 98TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 93-99 (Comm. Print 1984) [hereinafter THE ROLE OF THE SENATE]; LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 131 (1972); Arthur Bestor, The Respective Roles of the
eries of treaties that have been concluded as Article II, Section 2 treaties. Further, Part III analyzes the incidence of conditional approvals over the past 200 years. Part IV discusses the twelve types of conditions that the Senate has used in conditionally approving treaties. Finally, Part V analyzes whether the Senate has conditionally approved certain categories of treaties more than others. This Article concludes that the incidence of conditional approvals has been relatively constant over time and that the Senate has not singled out any category of treaties for conditional approval.

II. THE HISTORY OF THE TREATY-MAKING POWER

The Articles of Confederation vested the treaty-making power in “the United States in Congress assembled.” Under this system, the Continental Congress micromanaged the treaty-making process by appointing the negotiators, issuing their instructions, supervising their progress, and accepting or rejecting the agreements. To bring a treaty into effect under the Articles of Confederation, nine out of the thirteen original states had to assent to the treaty. The Framers’ dissatisfaction with the treaty-making power under the Articles of Confederation was a major reason for organizing the Constitutional Convention. The Framers wanted to ensure states’ adherence to treaties that the federal government concluded.

The Framers did not devote much attention to the mechanics of treaty-making. They did, however, define the roles of the Senate and the President in the treaty-making process.

The first draft of the Constitution gave the Senate sole treaty-making power. Constitutional Framer James Madison argued, however, that the President should be involved in the treaty-making process because the Senate only represented the states.

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11. See HENKIN, supra note 9, at 129.
12. See id. at 373.
13. See id. at 129; THE ROLE OF THE SENATE, supra note 9, at 26.
15. See id. at 26-27.
After much debate, the Framers approved the President's role in the process, subject to the advice and consent of the Senate.\textsuperscript{16}

The Framers intended the Senate and the President to share the treaty-making power. Thus, from the initiation to the conclusion of treaty negotiations,\textsuperscript{17} both the President and the Senate were to be the "treaty-makers."\textsuperscript{18} Indeed, the Senate and President were partners during the first treaty-making process. That experience, however, led to the exclusion of the entire Senate in the negotiation phase of the treaty-making process by all presidents following George Washington.

In 1789, President Washington functioned in accordance with the Framers' intent when he consulted extensively with the Senate over a proposed treaty with the southern Native Americans.\textsuperscript{19} President Washington, however, found the process so frustrating and tedious, that he never again consulted with the Senate on proposed treaty negotiations.\textsuperscript{20} In 1793, President Washington negotiated a treaty with Native Americans without consulting the Senate during the negotiation phase. The Senate retaliated by refusing to give its advice and consent to ratification.\textsuperscript{21} Thus, the Senate defeated the first treaty negotiated exclusively under the executive branch's direction.\textsuperscript{22}

Over the next twenty years, the Senate ceased to be a "council of advice" in the negotiation phase of the treaty-making process.\textsuperscript{23} This change led to the two-step, Article II, Section 2 treaty-making process in effect today. First, the President negotiates a treaty which, in his judgment, the circumstances warrant; second, the Senate rejects the treaty, approves it, or approves it with condi-

\textsuperscript{16} See id. at 28.
\textsuperscript{17} See THE ROLE OF THE SENATE, supra note 9, at 28.
\textsuperscript{18} See HENKIN, supra note 9, at 130-31.
\textsuperscript{19} See THE ROLE OF THE SENATE, supra note 9, at 31.
\textsuperscript{20} See id. at 33; HENKIN, supra note 9, at 131. Washington did, however, subsequently seek the Senate's advice on a proposed treaty with Algiers before opening negotiations via written communications. See THE ROLE OF THE SENATE, supra note 9, at 33-34.
\textsuperscript{21} See THE ROLE OF THE SENATE, supra note 9, at 34.
\textsuperscript{22} See id. Four subsequent treaties negotiated exclusively by the executive branch, however, did receive Senate advice and consent. See id.
\textsuperscript{23} See id. at 35-36.
The Senate’s power to conditionally approve a treaty was established early in U.S. history. The Senate included a reservation in its advice and consent to the Jay Treaty, the first U.S. treaty following the adoption of the Constitution. Soon thereafter, in its 1798 resolution advising and consenting to ratification of the Treaty of Amity, Commerce, and Navigation with Tunisia, the Senate imposed a condition that article XIV of the treaty be suspended and renegotiated. Pursuant to that condition, article XIV and two others were renegotiated before the Senate gave its advice and consent to ratification in 1799.

In sum, despite the Framers’ intention that the Senate and the President collaborate in the initiation and conduct of treaty negotiations, the Senate’s role in the treaty-making process established in the first twenty years of U.S. history remained what it is today. The Senate approves or rejects completed treaties, as well as informal substitutes for the full Senate’s participation in the negotiation of a treaty have evolved over the years. Presidents have consulted Senate leaders and have even appointed senators to delegations negotiating treaties. See id. at 96-99; HENKIN, supra note 9, at 131-32; Kevin C. Kennedy, Congressional-Executive Tensions in Managing the Arms Control Agenda—Who’s in Charge? 16 N.C.J. INT’L L. & COM. REG. 15, 17 (1991) (discussing the inclusion of U.S. senators in the SALT II negotiating team).

24. See id. at 36. Informal substitutes for the full Senate’s participation in the negotiation of a treaty have evolved over the years. Presidents have consulted Senate leaders and have even appointed senators to delegations negotiating treaties. See id. at 96-99; HENKIN, supra note 9, at 131-32; Kevin C. Kennedy, Congressional-Executive Tensions in Managing the Arms Control Agenda—Who’s in Charge? 16 N.C.J. INT’L L. & COM. REG. 15, 17 (1991) (discussing the inclusion of U.S. senators in the SALT II negotiating team).


26. See HENKIN, supra note 9, at 133 n.18. Although it was the first treaty negotiated after the Constitution’s adoption, the Jay Treaty was the second treaty approved by the Senate, the first treaty being the Convention on Functions and Privileges of Consular Officers, Nov. 14, 1788, U.S.-Fr., 8 Stat. 106.


28. See id.

29. See id.; THE ROLE OF THE SENATE, supra note 9, at 36. An early use of a Senate amendment to a treaty also prevented the treaty from entering into force at a certain time.

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 which he called “new, unauthorized and not to be sanctioned.” Gradually, however, other countries became used to the American practice.

Id. (footnote omitted).

30. See THE ROLE OF THE SENATE, supra note 9, at 104.

31. This Article does not examine the Senate’s rejection of treaties. For a survey of past instances in which the Senate played a role in a treaty not entering into force, see 133
as approves completed treaties subject to reservations, declarations, understandings, and other conditions to which the President must accede before ratifying the treaty.32

III. THE SUBJECT MATTER OF ARTICLE II, SECTION 2 TREATIES

What is the proper subject for an Article II, Section 2 treaty, as opposed to an executive agreement?33 The State Department has identified seven criteria to determine whether an international agreement should be concluded as an Article II, Section 2 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 will require enabling legislation;
4. Past practice;
5. Congressional preferences;
6. The degree of formality desired; and
7. The need for prompt conclusion.34

No bright-line tests have emerged from these executive

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32. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314(1)-(2) (1987). The Restatement unequivocally states that Senate reservations and understandings bind the President:

(1) When the Senate of the United States gives its advice and consent to a treaty on condition that the United States enter a reservation, the President, if he makes the treaty, must include the reservation in the instrument of ratification or accession, or otherwise manifest that the adherence of the United States is subject to the reservation.

(2) When the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding.

Id.

33. For a discussion of this issue, see THE ROLE OF THE SENATE, supra note 9, at 17-21.

34. See id. at 19.
branch guidelines. Notwithstanding the Constitution's establishment of Article II, Section 2 as the preeminent method for making treaties and international agreements, actual U.S. practice for the past 200 years indicates that only 10% of the over 12,000 treaties and international agreements have been concluded as Article II, Section 2 treaties.\(^{35}\)

The Senate has given its advice and consent to treaties and conventions that cover a wide array of subjects. For ease of reference, the 1,286 Article II treaties have been classified into the following thirteen subject headings:\(^{36}\)

1. Peace (including arms control, disarmament, neutrality, and pacific settlement of disputes) (see Appendix 3);
2. Commerce and navigation (including aviation and miscellaneous commercial treaties) (see Appendix 4);
3. Extradition (see Appendix 5);
4. Diplomatic and consular relations (see Appendix 6);
5. Immigration (see Appendix 7);
6. Intellectual property (see Appendix 8);
7. Tax (including miscellaneous fiscal treaties) (see Appendix 9);
8. Claims (including inheritance and return of property) (see Appendix 10);
9. Boundary and land cessions (see Appendix 11);
10. Health and human rights (including drug trafficking, law enforcement, and miscellaneous humanitarian conventions) (see Appendix 12);
11. International organizations (see Appendix 13);
12. International environmental (see Appendix 14); and
13. Telecommunications (including cultural and information

\(^{35}\) The literature on the Framers' intent on this issue is extensive. See id. at 71 n.86 and sources cited therein.

\(^{36}\) In some cases, a treaty's subject matter cannot be categorized because it crosses over into one or more other subjects. For example, some treaties of friendship, commerce, and navigation could be categorized either as peace treaties or commercial treaties. See, e.g., Treaty of Amity, Commerce, and Navigation, supra note 25; Treaty of Peace, Amity, Commerce, and Navigation, May 22, 1882, U.S.-Korea, 23 Stat. 720. In some instances, treaties establishing commercial relations also involved the establishment of diplomatic and consular relations. See, e.g., Treaty of Friendship, Commerce, and Consular Rights, June 24, 1925, U.S.-Hung., 44 Stat. 2441. Treaties dealing with more than one subject have been categorized according to the dominant purpose of the treaty.
Conditional Approval of Treaties

The Senate's constitutional authority to include binding conditions as an indivisible part of its advice and consent to ratification has never seriously been questioned, largely because of the premise that if the Senate may withhold its consent, then a fortiori it may condition its consent.\textsuperscript{37} As a result, when the Senate conditions its consent to a treaty, the President must include that reservation in the instrument of ratification.\textsuperscript{38}

The following three tables show the number of Article II, Section 2 treaties approved by the Senate in four time periods: 1795-1845, 1846-1895, 1896-1945, and 1945-1990. The first table shows the number of unconditional and conditional treaties for those four periods:

\begin{center}
\begin{tabular}{|c|c|c|c|c|}
\hline
& 1795-1845 & 1846-1895 & 1896-1945 & 1945-1990 \\
\hline
Unconditional & 70 & 182 & 462 & 379 \\
Conditional & 7 & 42 & 68 & 78 \\
Total & 77 & 224 & 530 & 457 \\
Conditional Treaties as % of Total & 9\% & 18.8\% & 12.8\% & 17.1\% \\
\hline
\end{tabular}
\end{center}

The average percentage of conditional treaty approvals over 200 years is fifteen percent. This average is not exceeded by more

\textsuperscript{37} See Henkin, \textit{supra} note 9, at 133-34; Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869). The question whether amendments and reservations are sound constitutional policy is another matter. \textit{See} Henkin, \textit{supra} note 3.

\textsuperscript{38} \textit{See} \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 314(1) (1987). Comment b to section 314 states: "[Because] the President can make a treaty only with the advice and consent of the Senate, he must give effect to conditions imposed by the Senate on its consent." \textit{Id.} at cmt. b. Other commentators take the view that Senate reservations do not necessarily change U.S. legal obligations under a treaty unless explicitly included in the instrument of ratification. Former Yale Law School Dean Eugene Rostow once observed that a Senate reservation "has the same effect as a letter from my mother." \textit{The SALT II Treaty: Hearings Before the Committee on Foreign Relations,} 96th Cong. 393 (1979) (testimony of Eugene V. Rostow, Chairman, Executive Committee).
than three percent in any of the four time periods. Of the four time periods, a higher percentage of conditional approvals exists for the period between 1846-1895 than for the post-World War II period.

The next two tables represent the number of unconditional and conditional bilateral treaties, and unconditional and conditional multilateral treaties, respectively, for the same four time periods:\(^{39}\)

**Table 2**

<table>
<thead>
<tr>
<th>Article II, Section 2 Bilateral Treaties</th>
<th>1795-1845</th>
<th>1846-1895</th>
<th>1896-1945</th>
<th>1946-1990</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unconditional</td>
<td>70</td>
<td>167</td>
<td>366</td>
<td>181</td>
</tr>
<tr>
<td>Conditional</td>
<td>7</td>
<td>38</td>
<td>33</td>
<td>37</td>
</tr>
<tr>
<td>Total</td>
<td>77</td>
<td>205</td>
<td>399</td>
<td>218</td>
</tr>
<tr>
<td>Conditional Treaties as % of Total</td>
<td>9%</td>
<td>18.5%</td>
<td>8.3%</td>
<td>17%</td>
</tr>
</tbody>
</table>

**Table 3**

<table>
<thead>
<tr>
<th>Article II, Section 2 Multilateral Treaties</th>
<th>1846-1895</th>
<th>1896-1945</th>
<th>1946-1990</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unconditional</td>
<td>14</td>
<td>93</td>
<td>198</td>
</tr>
<tr>
<td>Conditional</td>
<td>2</td>
<td>36</td>
<td>42</td>
</tr>
<tr>
<td>Total</td>
<td>16</td>
<td>129</td>
<td>240</td>
</tr>
<tr>
<td>Conditional Treaties as % of Total</td>
<td>12.5%</td>
<td>28%</td>
<td>17.5%</td>
</tr>
</tbody>
</table>

As tables 2 and 3 demonstrate, the incidence of conditional Senate approvals is not increasing for either bilateral or multilat-

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\(^{39}\) The Senate approved a multilateral treaty for the first time in 1866. Thus, there are no statistics on multilateral treaties prior to that year. *See* Convention on Indemnities, Oct. 22, 1864, 14 Stat. 665.
eral treaties. On the contrary, the incidence is actually declining for multilateral treaties, which include human rights conventions. At best, the incidence of conditional treaty approvals has oscillated over the past 200 years. For bilateral treaties, peaks occurred in the periods 1846-1895 and 1946-1990, preceded by troughs in the periods immediately prior to them. For multilateral treaties, a peak occurred in the period 1896-1945, with troughs immediately preceding and following that period.

In addition, table 2 shows, in absolute terms, that the number of conditional bilateral treaties has remained relatively constant over the past 150 years. Table 3 shows a similar trend for conditional multilateral treaties over the past 100 years. Moreover, table 1 shows that, as a percentage of all Article II, Section 2 treaties, the number of conditional treaties has never exceeded nineteen percent of the total number of Article II, Section 2 treaties approved by the Senate during any of the fifty-year periods reflected in the tables.

IV. TYPES OF SENATE CONDITIONS

The Senate has used twelve types of conditions in consenting to treaty ratification. The differences among some of the twelve types are formal only and differ in substance marginally, if at all. Four types of conditions account for ninety percent of all conditions used: understandings (71), reservations (62), amendments (61), and declarations (17). Although amendments and reservations both revise U.S. treaty obligations, amendments change actual treaty text, whereas reservations are Senate qualifications that alter U.S. obligations under a treaty without changing the actual treaty language. Understandings and declarations are typically either interpretations of specific treaty language that tend to narrow the scope of U.S. obligations under the treaty, or statements preventing particular treaty provisions from taking binding effect on the United States.

42. See infra notes 75-80, and accompanying text.
The Senate initially used an amendment to condition its approval to treaty ratification in 1845. The following table indicates the number of times that the Senate has used the four most common types of conditions since that date:

<table>
<thead>
<tr>
<th>Type of Condition</th>
<th>1845-1895</th>
<th>1896-1945</th>
<th>1946-1990</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amendments</td>
<td>36</td>
<td>22</td>
<td>3</td>
</tr>
<tr>
<td>Declarations</td>
<td>0</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>Reservations</td>
<td>1</td>
<td>17</td>
<td>44</td>
</tr>
<tr>
<td>Understandings</td>
<td>1</td>
<td>38</td>
<td>32</td>
</tr>
</tbody>
</table>

As this table shows, the use of amendments gradually declined in frequency over the period between 1845 to 1990, while the use of reservations steadily increased.

A. Amendments

Amendments that are proposed changes in treaty text rank third (61) in terms of use after reservations (62) and understandings (71). The Senate has included amendments in its advice and consent resolutions in several categories of treaties, but over half of all amendments have been in connection with either commerce and navigation treaties (15) or extradition treaties (20). In addition...

43. See Convention on the Mutual Abolition of Taxes on Emigration; Jan. 21, 1845, U.S.-Bavaria (Germany), 9 Stat. 826. Before 1845, the Senate attached conditions to six treaties. See infra Appendix 1. The Senate did not, however, use reservations, amendments, understandings, or declarations in any of those treaties.

44. See Convention of Friendship, Reciprocal Establishments, Commerce, and Extradition, Nov. 25, 1850, U.S.-Switz., 11 Stat. 587 (substantial amendments resulting in a new draft that was eventually resubmitted to the Senate and ultimately ratified by the President); Treaty of Amity, Commerce, Navigation, and Extradition, Oct. 1, 1855, U.S.-Two Sicilies, 11 Stat. 639 (amendments making minor deletions and modifications to treaty articles on extradition); Treaty of Amity and Commerce, May 29, 1856, U.S.-Thail., 11 Stat. 683 (amendment striking an article that placed travel restrictions on U.S. citizens in Thailand, but including it as a regulation to the treaty); Treaty of Peace, Friendship, Commerce, and Navigation, May 13, 1858, U.S.-Bol., 12 Stat. 1003 (amendment deleting a clause, which provided that U.S. citizens in Bolivia who were not Roman Catholic would...
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be buried without any ceremonies of the deceased's faith); Treaty Supplemen ting Treaty of Peace, Amity, and Commerce, July 28, 1868, U.S.-P.R.C., 16 Stat. 739 (amendments making minor additions to two articles, adding a clause regarding naturalization, deleting an article on the harmonization of weights and measures with no substitute article, and deleting an article with substitute language providing for reciprocal educational opportunities); Convention for Commercial Reciprocity, Jan. 30, 1875, U.S.-Haw. Islands, 14 Stat. 625 (amendments making minor additions to five articles); Treaty of Friendship and Commerce, Jan. 17, 1878, U.S.-Samoa, 20 Stat. 704 (amendments making two minor changes to an article); Convention on Commerce, supra note 3 (amendments adding language that treaty was not self-executing); Convention Supplementing the Convention for Commercial Reciprocity, Dec. 6, 1884, U.S.-Haw. Islands, 25 Stat. 1399 (amendment adding an article that gave the United States the exclusive right to enter and build facilities at Pearl Harbor); Convention on Import Duties and Consuls, July 3, 1886, U.S.-Zanzibar, 25 Stat. 1438 (amendments making minor deletion and addition); Treaty of Amity, Commerce, and Navigation, Oct. 2, 1886, U.S.-Tonga, 25 Stat. 1440 (amendment striking an article that gave U.S. vessels, which delivered mail, free access to Tongan ports provided the vessels delivered Tongan mail and substituting it with an article that conditioned access to Tongan ports); Treaty of Amity, Commerce, and Navigation, Jan. 24, 1891, U.S.-Congo, 27 Stat. 926 (amendments deleting an article on extradition with no substitute language and deleting all treaty references to the President as "His Excellency"); Treaty on Import Duties, May 31, 1902, U.S.-Gr. Brit., 32 Stat. 1959 (amendment making a date correction); Convention on Commercial Relations, supra note 3 (amendment adding a clause that made the Convention non-self-executing); Convention on the Collection and Application of Customs Revenues, Feb. 8, 1907, U.S.-Dom. Rep., 38 Stat. 1880 (amendment making two minor deletions).

45. The only types of conditions the Senate has attached to extradition treaties have been amendments and understandings, and it has included understandings only twice. See Convention on the Extradition of Criminals, Sept. 12, 1853, U.S.-Bavaria (Germany), 10 Stat. 1022 (amendment extending the period for the exchange of ratifications from nine months to fifteen months); Convention on the Extradition of Criminals, July 3, 1856, U.S.-Aus., 11 Stat. 691 (amendment providing for prospective application of the treaty and prohibiting its application to political offenses); Additional Article Supplemen ting Convention on the Extradition of Criminals, Feb. 10, 1858, U.S.-Fr., 11 Stat. 741 (amendment adding to and clarifying a list of extraditable offenses); Treaty on the Extradition of Criminals, Dec. 11, 1861, U.S.-Mex., 12 Stat. 1199 (amendment adding to and clarifying a list of extraditable offenses); Convention on the Extradition of Criminals, Mar. 23, 1868, U.S.-Italy, 15 Stat. 629 (amendment adding to and clarifying a list of extraditable offenses); Convention on the Extradition of Criminals, June 25, 1870, U.S.-Nicar., 14 Stat. 815 (amendment adding to and clarifying a list of extraditable offenses); Treaty on the Extradition of Criminals, Apr. 29, 1886, U.S.-Japan, 24 Stat. 1015 (amendments adding to and clarifying a list of extraditable offenses and adding procedural protections); Convention on the Extradition of Criminals, Mar. 28, 1887, U.S.-Russ., 28 Stat. 1059 (amendments clarifying a list of extraditable offenses and adding procedural protections); Convention on the Extradition of Criminals, May 7, 1888, U.S.-Colom., 26 Stat. 1534 (amendment adding to and clarifying a list of extraditable offenses); Convention on the Extradition of Criminals, July 12, 1889, U.S.-Gr. Brit., 26 Stat. 1508 (amendment adding to and clarifying a list of extraditable offenses); Convention on the Extradition of Criminals, supra note 40 (amendment adding to and clarifying a list of extraditable offenses); Treaty on the Extradition of Criminals, Oct. 28, 1896, U.S.-Orange Free State, 31 Stat. 1813 (amendment clarifying a list of extraditable offenses and adding an article providing
to the amendments in these two categories of treaties, the Senate has requested amendments to peace treaties (3), treaties establishing diplomatic and consular relations (3), immigration treaties (4), tax treaties (1), claims treaties (9), and boundary and


46. See Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922 (amendments redrafting three articles, deleting one article, and making minor changes to two articles); Treaty for the Advancement of Peace, Sept. 20, 1913, U.S.-Guat., 38 Stat. 1840 (amendment striking an article concerning an agreement not to increase military programs); Treaty for the Advancement of Peace, Nov. 3, 1913, U.S.-Hond., 38 Stat. 1672 (amendment striking an article concerning an agreement not to increase military programs).

47. Amendments are the only type of condition that the Senate has added to the 38 treaties establishing diplomatic and consular relations. See Convention on the Rights, Privileges, and Duties of Consular Officers, supra note 3 (amendment deleting “the President of” from the title of the treaty and adding the phrase “so long and to the same extent as the said laws shall remain in force” after the phrase “In all States of the Union whose existing laws permit it”); Convention on the Rights, Immunities, and Privileges of Consular Officers, Mar. 9, 1880, U.S.-Belg., 21 Stat. 776 (amendment deleting one word from treaty); Convention on the Rights and Privileges of Consuls, Dec. 2, 1902, U.S.-Greece, 33 Stat. 2122 (amendment adding a paragraph that required consular officers to appear in criminal cases but preserved their Sixth Amendment rights).

48. Amendments are the only type of condition that the Senate has added to the 37 immigration treaties. See Convention on the Mutual Abolition of Taxes on Emigration, supra note 43 (amendment deleting the words “real and” from the phrase “real and personal property” in article controlling testamentary and inter vivos dispositions of property); Treaty on Naturalization, Feb. 22, 1868, U.S.-North German Confederation, 15 Stat. 615 (amendment giving retroactive and prospective effect to article on naturalization); Convention on Naturalization, July 10, 1868, U.S.-Mex., 15 Stat. 687 (amendment adding a phrase that permitted the introduction of evidence to rebut the presumption that renewal of residency in one country was ipso facto renunciation of naturalization in the other country); Convention on Naturalization, May 26, 1869, U.S.-Swed.-Nor., 17 Stat. 809 (amendment extending the time for the exchange of ratification from twelve months to twenty-four months).

land cession treaties.\textsuperscript{51} Most Senate amendments have been modest and of a clerical or technical nature.\textsuperscript{52} On occasion, however, the Senate has requested extensive amendments to treaty text.\textsuperscript{53}

\textbf{B. Conditions}

Unlike amendments, which are changes to treaty text, conditions are additions to treaty text. The two types, however, are often indistinguishable. The Senate has qualified its consent to ratification (amendment covering tax treatment of corporate dividends).


\textsuperscript{52} See, e.g., Treaty on Extradition, June 19, 1909, U.S.-Dom. Rep., art. II, 36 Stat. 2468 (amendment of article II, paragraph 7(a) deleting the words "or by statute" from the end of the phrase, "Piracy, as commonly known and defined by the laws of Nations" in the list of extraditable offenses).

by imposing conditions on six occasions. 54 The Senate first imposed a condition in 1794 in connection with its consent to the Jay Treaty. 55 The Senate gave its advice and consent to the treaty on condition that an article be added to suspend the operation of article 12 to the extent that it reserved the right to restrict trade between the United States and the British West Indies to Great Britain. 56

The Senate imposed a condition on its advice and consent to treaty ratification for the second time three years later, as part of its consent to the Treaty of Amity, Commerce, and Navigation with Tunis. 57 The Senate conditioned its advice and consent on the suspension of article XIV relating to the payment of duties on merchandise. 58

The Senate did not use a condition again until more than 100 years later. 59 As part of a 1916 treaty with Denmark, which ceded Denmark's insular possessions in the West Indies to the United States, the Senate included both an understanding 60 and a condition as part of its consent. 61 In order to avoid any church-state entanglements, the Senate gave its consent with the understanding that the treaty did not impose any trust upon the United States in connection with funds of the Danish National Church. 62 To buttress this understanding, the Senate added the condition that the understanding be expressly accepted in an exchange of notes between the two governments. 63 This condition is barely distinguishable, if at all, from the very understanding itself.

56. See id.
58. See id.
59. See Treaty on the Cession of the Danish West Indies, supra note 54.
60. See discussion infra Part IV.L.
61. See Treaty of the Cession of the Danish West Indies, supra note 54.
62. See id.
63. See id.
In 1925, the Senate imposed two conditions to its consent to the Inter-American Convention for the Protection of Commercial, Industrial, and Agricultural Trademarks and Commercial Names,64 requiring the addition of two phrases to two articles in the English text so that the English text paralleled the Spanish, French, and Portuguese texts.65

The only condition imposed by the Senate that did not call for additions or changes to treaty text, and therefore did not amount to an amendment, was in connection with its consent to the International Sanitary Convention in 1928.66 The Senate included both understandings and conditions that construed and narrowed U.S. obligations under the Convention, but did not require any changes in actual treaty text.67

The last time the Senate used the term "condition" in its advice and consent to treaty ratification was in 1978 in connection with the Treaty on the Permanent Neutrality and Operation of the Panama Canal.68 The first of two conditions called for a Protocol of Exchange which provided that nothing in the treaty precluded a future agreement between Panama and the United States regarding the stationing of military forces in the Canal Zone.69 This condition, which became an integral part of the treaty, closely resembled an amendment.70 The second condition provided as follows:

Notwithstanding the provisions of Article V or any other provision of the Treaty, if the Canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each independently have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Re-

64. Inter-American Convention for the Protection of Commercial, Industrial, and Agricultural Trademarks and Commercial Names, supra note 54.
65. See id.
67. See id.
68. Treaty on the Permanent Neutrality and Operation of the Panama Canal, supra note 51.
69. See id. at 5.
70. In connection with its consent to that same treaty, the Senate used the term "amendments" to describe two textual changes that it required as part of its consent. See id. at 3-4.
public of Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.71

This second condition more closely resembled an understanding or a reservation, although the Senate included five other "understandings" and four "reservations" in its advice and consent to ratification.72

C. Declarations

Declarations are unilateral interpretations of treaty text that narrow the scope of U.S. obligations under the treaty.73 Thus, declarations are similar to reservations or understandings.74

The Senate has attached declarations to its resolutions of advice and consent seventeen times. The Senate has included declarations with peace treaties (5),75 commercial treaties (2),76 an intellectual property treaty,77 health and human rights treaties (2),78 an international environmental treaty,79 and telecommunications treaties (6).80 For example, in the 1973 Geneva Agree-

71. Id. at 4.
72. See id. at 5-9.
73. For example, in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, the Senate issued two "declarations" that limited the application of the Convention on the basis of reciprocity and to commercial disputes as defined under U.S. law.
74. See infra notes 114-123, 132-143 and accompanying text for a discussion of reservations and understandings.
80. See Agreement on Telegraph Regulations, Aug. 5, 1949, 2 U.S.T. 17; Agreement
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ment on Telegraph and Telephone Regulations,81 the Senate declared: "[T]he United States of America does not accept any obligation in respect of the application of any provision of the Telegraph Regulations... to service over telecommunication channels other than those open to public correspondence."82 Furthermore, in the 1970 Patent Cooperation Treaty,83 the Senate issued the following three declarations:

(1) Under Article 64(1)(a), the United States of America shall not be bound by the Provisions of Chapter II of the Treaty;

(2) Under Article 64(3)(a), as far as the United States of America is concerned, international publication of international applications is not required; and

(3) Under Article 64(4)(a)[,] the filing outside of the United States of an international application designating this country is not equated to an actual filing in the United States for prior art purposes.84

In addition, the Senate issued the following declaration in the 1936 Convention on the Extension and Fulfillment of Existing Treaties:85

The United States of America holds that the reservations [by other governments] to this Convention do not constitute an amendment to the text, but that such reservations, interpretations, and definitions by separate governments are solely for the benefit of such respective governments and are not intended to be controlling upon the United States of America.86

By comparison, the declaration attached to the 1907 Convention for the Pacific Settlement of International Disputes87 does not

81. Agreement on Telegraph and Telephone Regulations, supra note 80.
82. Id. at 3294.
84. Id. at 7645.
87. Convention on the Pacific Settlement of International Disputes, supra note 75.
fit into either the reservation or understanding category. This declaration on U.S. foreign policy effectively restated the Monroe Doctrine:

Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely [U.S.] questions.  

This declaration represented an inter-branch memorandum of understanding on foreign policy from the Senate to the State Department.

Similarly, the declaration in the two Treaties on the Execution of Penal Sentences with Mexico and Canada was neither a reservation nor an understanding. This declaration put Mexico and Canada on notice that “the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to [in the Treaty] has been enacted.” In addition to giving instructions to the President, these declarations preempted self-executing prisoner-exchange treaties.

D. Exceptions

Exceptions are tantamount to treaty amendments because they preclude entire articles or declarations from affecting the United States. The Senate has used exceptions on four occasions. Notwithstanding this use of the advice and consent power “a la carte,” these four treaties were subject to the Senate exceptions. The Senate excepted to certain treaty articles three times and

88. Id.
89. Treaty on the Execution of Penal Sentences with Mexico, supra note 78.
90. Treaty on the Execution of Penal Sentences with Canada, supra note 78.
91. Treaty on the Execution of Penal Sentences with Mexico, supra note 78, at 7399 n.1; Treaty on the Execution of Penal Sentences with Canada, supra note 78, at 6263 n.1.
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once to a declaration made by Great Britain in the 1815 Treaty of Commerce and Navigation.93

E. Exclusions

The Senate has conditioned its advice and consent to a treaty on the exclusion of an entire portion of the treaty text only once.94 In its advice and consent to ratification of the Hague Convention on the Rights and Duties of Neutral Powers in Naval War,95 the Senate excluded article 23 of the Convention from its advice and consent to ratification,96 but couched the exclusion in terms of both a reservation to, and an exclusion of, that article from the Convention.97 Perhaps the Senate did so to exercise excessive caution and to make absolutely clear that article 23 would not become part of U.S. obligations under the Convention.

This lone Senate exclusion is no different from an amendment. The aim of both exclusions and amendments is to remove an entire article from a treaty.

F. Explanations

The Senate has attached an explanation to its advice and consent to treaty ratification on only one occasion.98 The Senate gave its advice and consent to the Convention on the Organization for Economic Cooperation and Development (OECD Convention)99 with the following interpretation and explanation:

[N]othing in the convention, or the advice and consent of the Senate to the ratification thereof, confers any power on the Executive to bind the United States in substantive matters beyond what the Executive now has, or to bind the United States without compliance with applicable procedures imposed by domes-

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94. See Convention of the Rights and Duties of Neutral Powers in Naval War, supra note 41.
95. Id.
96. See id.
97. See id.
99. Id. at 1750.
tic law, or confers any power on the Congress to take action in fields previously beyond the authority of Congress, or limits Congress in the exercise of any power it now has.100

This explanation is a version of the Bricker amendment,101 a Senate understanding that the Convention does not confer any powers on the President and Congress other than those already found in the Constitution.102

**G. Interpretations**

The Senate has included interpretations in its advice and consent to treaty ratification in two instances.103 On both occasions, however, the "interpretation" was paired with either an understanding or explanation to apply to a single subject matter. Thus, the use of the term "interpretation" was surplusage. First, as noted previously in connection with the OECD Convention, the Senate attached an interpretation and explanation that was directed to a single issue.104 Similarly, the Senate's advice and consent to ratification of the Statute of the International Atomic Energy Agency was subject to the following interpretation and understanding:

(1) any amendment to the Statute shall be submitted to the Senate for its advice and consent, as in the case of the Statute itself, and (2) the United States will not remain a member of the Agency in the event of an amendment to the Statute being adopted to which the Senate by a formal vote shall refuse advice and consent.105

Thus, the Senate's use of the term "interpretation" with another conditional term to cover a single subject matter, has added emphasis, but no substance.

100. *Id.* at 1751.
102. *See id.*
104. *See supra* notes 98-100 and accompanying text.
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H. Provisos

The Senate has attached provisos on two occasions. The first proviso was in the 1800 Treaty of Friendship and Commerce with France. This proviso called for the deletion of the treaty article that established the duration of the treaty and substituted an article providing that the treaty would be in force for eight years. This proviso essentially constituted an amendment of the treaty.

The second proviso was in the 1946 Constitution of the World Health Organization. This proviso gave the United States the right to withdraw from the Organization on one year's notice, provided that "the financial obligations of the United States to the Organization shall be met in full for the Organization's current fiscal year." This proviso, in effect, constituted an understanding.

I. Recommendations

The Senate has included a recommendation in its advice and consent to treaty ratification only once. In the International Convention for the Prevention of Pollution of the Sea by Oil, the Senate recommended that the parties consider amending the Convention at the earliest practicable date to achieve the following:

1. International uniformity in fines and penalties;
2. International uniformity of enforcement;
3. A more realistic definition of what shall constitute oil pollution;
4. The right of access of each contracting government to the

108. See id.
112. Id.
official reports of other contracting governments filed with the bureau which relate to its own vessels; and

(5) A more flexible arrangement for fixing the time within which contracting governments shall notify the bureau whether or not they accept an amendment.113

Among all the Senate treaty conditions, this recommendation is sui generis; it has no analogue to any other Senate condition because it is purely prospective and precatory in nature.

J. Reservations

Of the twelve types of conditions that the Senate has used to qualify its approval of treaties, reservations rank second (62),114 after understandings (71), in frequency of use. The Senate has included reservations in its advice and consent to most categories of trea-


114. In several cases, the Senate paired its reservations with another condition, such as an exclusion or understanding; however, the Senate's conditional approval applied only to a single treaty article. See, e.g., Treaty on the Isle of Pines, Mar. 2, 1904, U.S.-Cuba, 44 Stat. 1997 (reservation and understanding stating that all treaties between the United States and Cuba should apply to the inhabitants of the Isle of Pines and construing the term “other foreigners” in article III to mean foreigners who receive the most favorable treatment from Cuba); Convention on the Rights and Duties of Neutral Powers in Naval War, supra note 41 (reservation to and exclusion of article 23); Treaty on Insular Possessions in the Pacific, Dec. 13, 1921, 43 Stat. 1646, 25 L.N.T.S. 183 (reservation and understanding stating that the treaty did not commit the United States to any alliance or common defense); Agreement Supplemenuting the Treaty on Insular Possessions in the Pacific, Feb. 6, 1922, 43 Stat. 1652 (reservation and understanding stating that the Agreement did not prevent the United States from entering into separate agreements with the other parties concerning mandate territories and that the Senate would not submit a dispute for resolution that was exclusively within the domestic jurisdiction of the respective State-parties); Treaty of Friendship, Commerce, and Consular Rights, June 19, 1928, U.S.-Aus., 47 Stat. 1876 (reservation and understanding stating that most-favored-nation trading status would expire after twelve months unless Congress terminated it sooner); Constitution of the World Health Organization, supra note 106 (reservation and understanding stating that the United States reserved the right to withdraw from the Organization on one-year’s notice); Constitution of the International Refugee Organization, opened for signature Dec. 15, 1946, 62 Stat. 3037, 18 U.N.T.S. 3 (reservation and condition stating that Senate approval of the Constitution did not authorize the President to take any action inconsistent with U.S. immigration laws); Convention on the Intergovernmental Maritime Consultative Organization, done Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 3 (reservation and understanding stating that the Convention would not alter U.S. antitrust laws); Agreement on Telegraph Regulations, supra note 80 (reservations and declarations stating that U.S. adherence to the Agreement did not constitute acceptance of any obligation in connection with several articles of the Agreement).
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113. See Convention on the Rights and Duties of Neutral Powers in Naval War, supra note 41 (reservation to and exclusion of article 23); Treaty for the Settlement of Differences, Apr. 6, 1914, U.S.-Colom. (reservation rendering an article, which permitted free passage of Colombian troops through the Panama Canal, inapplicable in war); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, done June 17, 1925, 26 U.S.T. 571, 91 L.N.T.S. 65 (reservation indicating that the Protocol would not bind the United States in regard to an enemy State, if such State violated the Protocol); Inter-American Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1089, 135 L.N.T.S. 187 (reservation to article 12, section 2); Treaty on Nonaggression and Conciliation, Oct. 10, 1933, 47 Stat. 3363, 163 L.N.T.S. 393 (reservation indicating that "[i]n adhering to this treaty the United States does not thereby waive any rights it may have under other treaties or conventions or under international law"); Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (reservation indicating that U.S. government policy is non-interference in hemispheric relations).

tax treaties (18), boundary and land cession treaties (6),

tended national treatment to occupations and professions, inapplicable to certain public positions and state-licensed professions); Treaty of Friendship, Commerce, and Navigation, June 3, 1953, U.S.-G.D.R., 5 U.S.T. 1939 (reservation rendering an article, which extended national treatment to occupations and professions, inapplicable to certain public positions and state-licensed professions).

117. See Protocol to the Convention for the Protection of Industrial Property, Apr. 15, 1891, 27 Stat. 958 (reservation requiring that Congress first approve any increase in the U.S. share of expenses).


119. See Treaty on the Isle of Pines, supra note 114 (reservation and understanding providing that all treaties between the United States and Cuba should apply to the inhabi-
health and human rights conventions (9), international organization conventions (6), an environmental treaty, and tele-

tants of the Isle of Pines and construing the term "other foreigners" in article III to mean foreigners who receive the most favorable treatment from Cuba); Treaty on Insular Possessions in the Pacific, supra note 114 (reservation and understanding stating that the Treaty did not commit the United States to any alliance or common defense); Agreement Supplementing the Treaty on Insular Possessions in the Pacific, supra note 114 (reservation and understanding stating that the Agreement did not prevent the United States from entering into separate agreements with the other parties concerning mandate territories and that the Senate would not submit a dispute that was exclusively within the domestic jurisdiction of the respective State-parties for resolution); Treaty on the Use of the Niagara River, Feb. 27, 1950, U.S.-Can., 1 U.S.T. 694 (reservation giving the United States the right to redevelop and use its share of waters made available under the Treaty); Treaty on the Permanent Neutrality and Operation of the Panama Canal, supra note 54 (reservations providing for the negotiation of an agreement permitting the American Battle Monuments Commission to administer a cemetery in the Canal Zone and restricting the use of Canal revenue for Canal maintenance); Panama Canal Treaty, Sept. 7, 1977, U.S.-Pan., 33 U.S.T. 39 (reservations providing that the U.S. right to keep the Canal open by force would not be interpreted as a right to intervene in Panama's internal affairs and restricting the use of accumulated Canal Zone revenues).

120. See Convention on Liquor Traffic in Africa, Sept. 10, 1919, 46 Stat. 2199, 8 L.N.T.S. 11 (reservation requiring that any dispute under the Convention be submitted for resolution to the Permanent Court of Arbitration at the Hague); Convention on the Suppression of Slave Trade, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (reservation limiting an article on forced labor by providing that forced labor may only be exacted for public purposes); Convention on Limiting Narcotic Drugs, July 13, 1931, 48 Stat. 1543, 139 L.N.T.S. 301 (reservations permitting the United States to maintain import and export controls more stringent than those contained in the Convention and requiring an import license from the country of destination as a condition precedent to granting permission for transit shipment through the United States of drugs regulated under the Convention); International Sanitary Convention for Aerial Navigation, opened for signature Apr. 12, 1933, 49 Stat. 3279, 161 L.N.T.S. 65 (reservations providing that amendments to the Convention only bound the United States when the United States accepted them and giving the United States the right to decide whether a foreign district was to be considered infected and what measures to apply to aircraft entering the United States); Convention on the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (reservation preserving the right of the United States to use the Red Cross insignia); Convention on the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (reservation giving the United States the right to impose the death penalty for violations of the Convention); Protocol on the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 287 (reservations interpreting the Protocol as permitting the taxation of nonresident refugees as nonresident aliens and accepting the obligation to extend welfare benefits to refugees but only to the extent not inconsistent with the Social Security Act); Convention on Psychotropic Substances, done Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (reservation excepting from the Convention's coverage peyote that the Native American Church harvested and distributed for use); Convention on the Civil Aspects of International Child Abduction, done Oct. 25, 1980, T.I.A.S. No. 11, 670.

121. See Constitution of the World Health Organization, supra note 106 (reservation
communications treaties (3). Most Senate reservations have been intended to either preclude or preserve certain rights that the United States may possibly lose or waive by entering into a treaty.

K. Statements

The Senate has used statements six times in conditioning its approval to treaties: a peace treaty and health and human rights treaties (5). Four of the six statements were made by the Senate and understanding stating that the United States reserved the right to withdraw from the Organization on one year's notice); Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 (reservations rendering an article, which exempted persons from military service, inapplicable to U.S. nationals and permanent resident aliens and circumscribing privileges and immunities to activities performed in an official capacity); Constitution of the International Refugee Organization, supra note 114 (reservation and condition providing that Senate approval of the Constitution did not authorize the President to take any action inconsistent with U.S. immigration laws); Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (reservation requiring the inclusion of a "federalism" clause in the instrument of ratification); Convention on the Intergovernmental Maritime Consultative Organization, supra note 114 (reservation and understanding providing that the Convention would not alter U.S. antitrust laws); Convention Establishing a Customs Cooperation Council, done Dec. 15, 1950, 22 U.S.T. 320, 157 U.N.T.S. 129 (reservation limiting the scope of privileges and immunities to those generally accorded international organizations under U.S. law).

122. See International Convention for the Prevention of Pollution of the Sea by Oil, supra note 111 (reservations providing that the United States was under no obligation to construct disposal facilities and that amendments to the Convention only bound the United States when the United States accepted them).

123. See Agreement on Telegraph Regulations, supra note 80 (reservations and declarations stating that U.S. adherence to the Agreement did not constitute acceptance of any obligation in connection with several articles in the Agreement); Protocol Revising the Convention on International Expositions, done Nov. 30, 1972, 32 U.S.T. 4283 (reservation providing that the United States would make every reasonable effort to ensure, but not guarantee, that U.S. juristic persons fulfilled their obligations in organizing expositions); Agreement on Partial Revision of Radio Regulations, done June 8, 1974, 28 U.S.T. 3909 (reservation providing that the United States reserved the right to take such measures as may be necessary to protect its maritime radiotelephony interests).

124. See Agreement on the Status of Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 (statement that the Agreement did not prevent the exclusion of persons who were deemed a security threat from the United States).

125. See General Act on Slave Trade, July 2, 1890, 27 Stat. 886 (statement disclaiming any U.S. interest in the other signatories' possessions or protectorates within Africa); Convention on the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, supra note 120 (statement rejecting other parties' reservations to the Convention); Convention on the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (statement rejecting other parties' reservations to the Convention); Convention on the
in connection with its approval of the four Geneva Conventions on the Protection of War Victims. Each of the four statements provide as follows: “Rejecting the reservations which States have made with respect to the Geneva convention . . . the United States accepts treaty relations with all parties to that convention, except as to the changes proposed by such reservations.”

These statements are similar to reservations. Nevertheless, in the Geneva Convention on the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, the Senate included conditions denominated as reservations concerning the use of the Red Cross emblem. Similarly, in the Geneva Convention on the Protection of Civilians in Time of War, the Senate included conditions denominated as reservation concerning the right to impose the death penalty. Thus, although statements and reservations may be fungible labels, the Senate has differentiated the two within a single treaty and has not used them interchangeably.

L. Understandings

Of the 195 treaties that the Senate has conditionally approved, 71 contain understandings. The Senate first used an

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127. See sources cited supra note 126.

128. Convention on the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, supra note 120.

129. See Convention on the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, supra note 120, 6 U.S.T. at 3214.

130. Convention on the Protection of Civilians in Time of War, supra note 120.


132. In several instances, the Senate added a single condition to its advice and consent, but labelled the condition a “reservation and understanding” or a “declaration and understanding.” See, e.g., Treaty of Friendship, Commerce, and Consular Rights, supra note 36 (“reservation and understanding” providing that the Treaty did not affect the countries’
understanding in the 1883 Treaty of Peace, Amity, Commerce, and Navigation with Korea. The Senate has used understandings as part of its conditional advice and consent in every category of treaties with three exceptions: immigration treaties, claims settlement treaties, and treaties on diplomatic and consular relations. The Senate has included understandings with peace treaties (12), commerce and navigation treaties (18), extradition

existing immigration laws or their right to enact immigration laws); Convention on the Abolition of Import and Export Prohibitions and Restrictions, supra note 76 ("understanding and declaration" providing that prohibition on trade in prison-made goods included goods that were the product of forced or slave labor). In other instances, the Senate has included several conditions with its advice and consent and has denominated the conditions generally as understandings in connection with another type of condition, but has not distinguished which conditions were understandings and which were, for example, conditions or reservations. See, e.g., Inter-American Convention for the Protection of Commercial, Industrial, and Agricultural Trademarks and Commercial Names, supra note 54 (understandings or conditions adding several phrases to the Convention, interpreting two clauses in the Convention, and preserving any common law intellectual property rights that U.S. persons acquired or would acquire); Treaty of Commerce, Navigation, and Consular Rights, supra note 114 (understanding and reservation providing an article on tariff treatment of parties' goods should remain in force for twelve months, and thereafter, legislation inconsistent with the article's provisions could terminate the article).


134. See General Act of the International Conference of Algeciras, Apr. 7, 1906, 34 Stat. 2905 (understanding providing that U.S. participation in the Conference was not to be considered a departure from U.S. foreign policy forbidding participation in the settlement of European political questions); Convention on the Pacific Settlement of International Disputes, supra note 75 (understanding requiring that the United States submit all disputes to the permanent court by special agreement between the parties); Convention on the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241 (understanding requiring that the United States submit all disputes to the permanent court by special agreement between the parties); Convention on the Rights and Duties of Neutral Powers in Naval War, supra note 41 (understanding interpreting an article regarding the obligation of neutral powers to demand the return of ships captured in neutral waters); Treaty Establishing Friendly Relations, Sept. 10, 1919 (understanding providing that the United States could submit a dispute under the Convention for resolution to the tribunal created under the Convention for the Pacific Settlement of Disputes); Treaty on Inter-American Arbitration, Aug. 24, 1921, U.S.-Aus., 482 Stat. 1946 (understanding providing that the United States should not participate as a member of any body without congressional authorization); Treaty Establishing Friendly Relations, Aug. 29, 1921, U.S.-Hung., 482 Stat. 1951 (understanding providing that the United States should not participate as a member of any body without congressional authorization); Treaty on the Limitation and Reduction of Naval Armament, Apr. 22, 1930, 486 Stat. 2858 (understanding requiring that no secret agreements exist to modify any of the Treaty's provisions); Convention Revising General Act of Berlin, Jan. 5, 1929, 49 Stat. 3152, 130 L.N.T.S. 135 (understanding requiring that two-thirds of the Senate approve any special agreement submitting a dispute for resolution under the Treaty); Treaty of Mutual Defense, Oct. 1,
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1996, U.S.-Korea, 5 U.S.T. 2368 (understanding providing that neither party was obligated to come to the aid of the other except in case of an external armed attack); Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, done Feb. 14, 1967, 22 U.S.T. 754 (understandings providing that the parties retained the right to extend transit privileges to non-parties and that an armed attack by one of the parties with the assistance of a nuclear-weapons State was inconsistent with the obligation not to threaten the use of nuclear weapons); Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, done Feb. 14, 1967, 33 U.S.T. 1792 (understandings providing that the parties retained the right to extend transit privileges to non-parties, that an armed attack by one of the parties assisted by a nuclear-weapons State was inconsistent with the obligation not to threaten the use of nuclear weapons, that the definition of "nuclear weapon" encompassed all nuclear explosive devices, and that the Protocol did not prevent the United States from collaborating with the other parties for the purpose of carrying out nuclear explosions for peaceful purposes).

135. See Treaty of Peace, Amity, Commerce, and Navigation, supra note 36 (understanding providing an article on transport of native produce did not prohibit U.S. ships from shipping produce from one Korean port to another); Agreement on Corporations and Other Commercial Associations, June 25, 1904, U.S.-Russ., 36 Stat. 2163 (understanding providing that regulations referred to in the Agreement include those established by the states of the Union); Treaty on Commerce and Navigation, Feb. 21, 1911, U.S.-Japan, 37 Stat. 1504 (understanding providing that the Treaty did not repeal or affect U.S. immigration laws); Treaty of Friendship, Commerce, and Consular Rights with Germany, supra note 116 (understanding providing that the Treaty did not affect the countries' existing immigration laws or their right to enact immigration laws); Treaty of Friendship, Commerce, and Consular Rights, supra note 36 (understanding and reservation providing that the Treaty did not affect the countries' existing immigration laws or their right to enact immigration laws); Convention on the Abolition of Import and Export Prohibitions and Restrictions, supra note 76 (understanding and declaration providing that the prohibition on trade in prison-made goods included goods that were the product of forced or slave labor); Treaty of Commerce, Navigation, and Consular Rights, supra note 36 (understanding and reservation providing that an article on tariff treatment of parties' goods should remain in force for twelve months, and thereafter, legislation inconsistent with the article's provisions could terminate the article); Convention on Salmon Fisheries, May 26, 1930, U.S.-U.K., T.S. No. 918 (understandings on the scope of powers and composition of the International Pacific Salmon Fisheries Commission); Convention on Bills of Lading, adopted Oct. 24, 1936, T.S. No. 950, 40 U.N.T.S. 153 (understandings interpreting certain definitional terms, reserving to the United States the right to inspect vessels for Convention compliance, and excepting some U.S. territories from coverage); Convention on Shipowners' Liability, adopted Oct. 24, 1936, T.S. No. 951, 40 U.N.T.S. 169 (understandings construing certain definitional terms and excepting some U.S. territories from coverage); Declaration on the Juridical Personality of Foreign Companies, supra note 116 (understanding and reservation providing that the United States was not obligated to use its personnel and facilities to enforce compliance with the Convention if such use would impair the delivery of essential services by such personnel or facilities); Treaty of Friendship, Commerce, and Navigation, adopted June 29, 1946, 5 U.S.T. 605, 94 U.N.T.S. 11 (understandings providing that the United States could issue limited certificates not covered by the Convention and defining the term "seagoing vessel" in the Convention); International Sugar Agreement, supra note 116 (understandings providing that copyright protection should be extended to translations and that the Treaty did not obligate either party to extend most-favored-nation treatment with respect to
treaties (2), an intellectual property treaty, tax treaties (11), boundary and land cession treaties (10), health and hu-

136. See Treaty on Extradition, Nov. 10, 1922, U.S.-Costa Rica, 43 Stat. 1621 (understanding prohibiting extradition from Costa Rica where the death penalty may be imposed in the United States); Convention on Extradition, Dec. 26, 1933, 49 Stat. 311 (understanding excluding five articles as well as a section of a sixth article).

137. See Inter-American Convention for the Protection of Commercial, Industrial, and Agricultural Trademarks and Commercial Names, supra note 54 (understandings or conditions adding several phrases to the Convention, interpreting two clauses in the Convention, and preserving any common law intellectual property rights that U.S. persons acquired or would acquire).

138. See Convention on Double Taxation of Income, Dec. 13, 1946, U.S.-S. Afr., 3 U.S.T. 3821 (understanding construing an article dealing with reciprocal tax collection); Convention on Double Taxation of Income, Apr. 10, 1947, U.S.-S. Afr., 3 U.S.T. 3792 (understanding construing an article dealing with reciprocal tax collection); Convention on Double Taxation of Income, June 13, 1949, U.S.-Nor., 2 U.S.T. 2323 (understanding construing an article dealing with reciprocal tax collection); Convention on Double Taxation of Estates, Feb. 20, 1950, U.S.-Greece, 5 U.S.T. 47 (understanding construing an article dealing with reciprocal tax collection); Convention on Double Taxation of Income, Oct. 1, 1976, U.S.-Phil., 34 U.S.T. 1277 (understandings providing that Congress should have access to information exchanged under the Convention to carry out its oversight responsibilities and construing articles to prevent taxation of certain corporate income); Convention on Double Taxation of Income, Aug. 1, 1977, U.S.-Morocco, 33 U.S.T. 2545 (understanding providing that Congress should have access to information exchanged under the Convention to carry out its oversight responsibilities); Protocol Amending Convention on Double Taxation of Income, Mar. 21, 1980, U.S.-Malta, 34 U.S.T. 3527 (understanding providing that Congress should have access to information exchanged under the Convention to carry out its oversight responsibilities); May 21, 1980, U.S.-Jam., 33 U.S.T. 2865 (understanding providing that Congress should have access to information exchanged under the Convention to carry out its oversight responsibilities); Convention on Double Taxation of Income, May 21, 1980, U.S.-Jam., 33 U.S.T. 2903 (understanding providing that Congress should have access to information exchanged under the Convention to carry out its oversight responsibilities); Convention on Double Taxation of Income, Aug. 24, 1980, U.S.-Egypt, 33 U.S.T. 1809 (understanding providing that Congress should have access to information exchanged under the Convention to carry out its oversight responsibilities); Sept. 19, 1980, U.S.-Nor., 33 U.S.T. 2828 (understanding providing that Congress should have access to information exchanged under the Convention to carry out its oversight responsibilities).

139. See Treaty on the Isle of Pines, supra note 114 (understanding and reservation providing that all future treaties between the parties should apply to the Isle of Pines); Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448 (understanding pro-
Conditional Approval of Treaties

man rights treaties (7),140 international organization treaties (3),141

140. See International Sanitary Convention, Jan. 17, 1912, 42 Stat. 1823, 4 L.N.T.S. 281 (understanding providing that the Convention did not prevent the United States from carrying out special quarantine measures); International Sanitary Convention, supra note 54 (understandings and conditions providing that U.S. ratification of the Convention did not constitute recognition of any foreign government and did not create any obligations toward governments not recognized by the United States and that the United States reserved the power to determine whether a foreign district was infected); Convention on the Rights and Duties of States in the Event of Civil Strife, Feb. 20, 1928, 46 Stat. 2749, 134 L.N.T.S. 45 (understanding that an article on insurgent vessels did not apply when a state of belligerency had been recognized); Convention for Safety of Life at Sea, May 31, 1929, 50 Stat. 1121, 136 L.N.T.S. 81 (understandings providing that the Convention did not authorize holding any seaman against his will in a U.S. port, that the Convention was not to be interpreted as nullifying the U.S. Seaman's Act as interpreted by the U.S. Supreme Court, and that the Convention did not prevent the United States from exercising rights of inspection in U.S. waters); Convention on Limiting Narcotic Drugs, supra note 120 (understanding providing that U.S. ratification of the Convention did not constitute recognition of any foreign government and did not create any obligations toward governments not recognized by the United States); Convention on Child Employment at Sea, adopted Oct. 24, 1936, 54 Stat. 1705, 40 U.N.T.S. 205 (understandings construing terms and excepting certain U.S. territories from the Convention's coverage); Agreement on Application of Atomic Energy Safeguards, done Nov. 18, 1977, U.S.-Int's Atomic Energy Agency, 32 U.S.T. 3059 (understandings providing that the President would notify the Senate if other nuclear facilities were added to the list, that he would consult licensees concerning application of international safeguards, that he would establish an interagency mechanism for resolving disputes over the application of international safeguards, that
international environmental treaties (4),\textsuperscript{142} and telecommunication treaties (3).\textsuperscript{143}

Senate understandings, like Senate reservations, have two primary objectives: (1) to construe and often circumscribe present and future U.S. treaty obligations, and (2) to interpret and construe treaty language.

\section{V. Conditional Approval As a Percentage of All Approved Treaties by Treaty Category}

Overall, the Senate has conditionally approved slightly more
than fifteen percent of all Article II, Section 2 treaties.\footnote{144} The following table shows that among the thirteen categories of Article II, Section 2 treaties, no category has received a substantially disproportionate number of conditional approvals.

TABLE 5

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<th>Type of Treaty (Total number of treaties in this category)</th>
<th>A</th>
<th>C</th>
<th>D</th>
<th>Ex</th>
<th>E</th>
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<th>R</th>
<th>S</th>
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<td>2</td>
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<td>6</td>
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KEY TO ABBREVIATIONS

\begin{itemize}
\item A = amendment
\item C = condition
\item D = declaration
\item E = explanation
\item Ex = exclusion
\item I = interpretation
\item P = proviso
\item Rec = recommendation
\item R = reservation
\item S = statement
\item U = understanding
\item CA = total number of treaties conditionally approved
\end{itemize}

*This number is not the total of the various types of conditions listed in the row as more than one condition may have been used in the conditional approval of a single treaty.

Dividing the number in the last column, which is the number of treaties in a particular treaty category that received conditional

\footnote{144. See infra Appendix 1; supra Tables 1-3.}
Senate approval, by the number in the first column, which is the total number of treaties in a treaty category approved by the Senate, yields the percentage of conditionally approved treaties for that category:

- Peace (24/242) 10%
- Commerce and Navigation (47/273) 17%
- Extradition (22/138) 16%
- Diplomatic and Consular (3/38) 8%
- Immigration (5/37) 14%
- Intellectual Property (3/44) 7%
- Tax (23/97) 24%
- Claims (9/80) 11%
- Boundary and Land Cessions (15/73) 20%
- Health and Human Rights (21/99) 21%
- International Organizations (8/48) 17%
- International Environmental (4/55) 7%
- Telecommunications (11/62) 18%
- Total (195/1286) 15%

These figures show that the treaty categories with a higher percentage of conditionally approved treaties than the fifteen percent average are commerce and navigation, extradition, tax, boundary and land cessions, health and human rights, international organizations, and telecommunications. The tax category has received the highest percentage of conditional approvals - twenty-four percent. This category is followed by health and human rights, with twenty-one percent. These figures indicate that the Senate has not singled out any category of treaty for significantly disparate use of conditions.

VI. CONCLUSION

Over its 200-year history, the Senate has attached conditions to its advice and consent to treaties sparingly. The Senate has conditionally approved only 195 of 1,286 Article II, Section 2 treaties. The incidence of conditional treaty approvals has been relatively constant over time. Human rights conventions may have received more conditional approvals than some other types of treaties. However, as Professor Henkin has observed, "Treaties are not fungible: one rejection of a Treaty of Versailles is not bal-
anced by consent to ten extradition treaties."\(^{145}\) Whether or not treaties are fungible involves value judgments regarding the importance of one type of treaty over another. That judgment in turn will determine whether an unconditional approval of one type of treaty offsets the conditional approval of another type. Although box scores do not reveal the whole story, they nevertheless shed light on the consistency of recent trends when measured against past practice. As the historical record demonstrates, the Senate's recent practice of conditionally approving human rights conventions, while perhaps regrettable, is not unprecedented.

\(^{145}\) HENKIN, \textit{supra} note 9, at 132.
## APPENDIX 1

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<tr>
<th>Year of Senate Approval</th>
<th>Unconditional Bilateral</th>
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<th>Conditional Bilateral</th>
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The following table lists by year the type of condition, if any, that the Senate attached to its resolution of advice and consent to ratification.

**APPENDIX 2**

The following table lists by year the type of condition, if any, that the Senate attached to its resolution of advice and consent to ratification.

**KEY TO ABBREVIATIONS**

- **R** = reservation
- **A** = amendment
- **D** = declaration
- **U** = understanding
- **S** = statement
- **Exl** = exclusion
- **P** = proviso
- **C** = condition
- **Exc** = exception
- **I** = interpretation
- **Exp** = explanation
- **Rec** = recommendation
## Conditional Approval of Treaties

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### APPENDIX 3

The following is a list of all Article II, Section 2 treaties in the category of Peace, Arms Control, Disarmament, Neutrality, and Pacific Settlement of Disputes.

<table>
<thead>
<tr>
<th>No.</th>
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<tr>
<td>52.</td>
<td>Prohibiting Discharge of Projectiles and Explosives From Balloons, Oct. 18, 1907, 36 Stat. 2415.</td>
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Conditional Approval of Treaties

232. Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 95 L.N.T.S. 65.
237. Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin
The following is a list of all Article II, Section 2 treaties in the category of Navigation; Aviation; Commerce and Navigation; Friendship, Commerce, and Navigation; and Miscellaneous Trade and Commercial Treaties.

58. Establishment of Tariff Duties with Respect to Japan, June 25, 1866, U.S.-Japan, T.S. No 188(S).
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725, 18 Stat. (2) 625.
85. Friendship, Commerce, and Navigation; Extradition, June 5, 1873, U.S.-Peru,
2136.
120. Convention on Relations with Cuba, Jan 20, 1904, U.S.-Cuba, 33 Stat. 2261.
148. Convention on Uniformity of Nomenclature for Classification of Merchandise, May 3,
1923, 44 Stat. 2559.


175. Agreement on Coffee, Nov. 28, 1940, 55 Stat. 1143.

213. Importation of Commercial Samples and Advertising Material, done Nov. 7, 1952, 8
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**Conditional Approval of Treaties**


APPENDIX 5

The following is a list of all Article II, Section 2 treaties in the category of Extradition.

4. Extradition, Sept. 12, 1853, U.S.-Germany (Bavana), 10 Stat. 1022
9. Extradition, Nov. 9, 1843, U.S.-Fr., 8 Stat. 580
14. Extradition, Jan. 18, 1855, U.S.-Germany (Hanover), 10 Stat. 1138
17. Extradition, Jan. 21, 1869, U.S.-Italy, 16 Stat. 767
27. Extradition, Aug. 11, 1874, U.S.-Ottoman Empire, 19 Stat. 572
29. Extradition, Nov. 28, 1899, U.S.-Peru, 31 Stat. 1921
30. Extradition, June 16, 1852, and Nov. 16, 1852, U.S.-Germany (Prussia and German Confederation), 10 Stat. 964


Extradition, Apr. 6, 1904, U.S.-Cuba, 33 Stat. 2263.


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The following is a list of all Article II, Section 2 treaties in the category of Diplomatic and Consular Relations.

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U.N.T.S. 312.

APPENDIX 7

The following is a list of all Article II, Section 2 treaties in the category of Immigration, Emigration, and Naturalization.


APPENDIX 8

The following is a list of all Article II, Section 2 treaties in the category of Intellectual Property.

32. Protection of Industrial Property, Nov. 6, 1925, 47 Stat. 1789.
35. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2732.
39. Nice Agreement Concerning the International Classification of Goods and Services For the Purpose of Registration of Marks, July 14, 1867, 23 U.S.T. 1353.

APPENDIX 9

The following is a list of all Article II, Section 2 treaties in the category of Tax and Miscellaneous Fiscal Treaties.

APPENDIX 10

The following is a list of all Article II, Section 2 treaties in the category of Claims.

70. Tenure and Disposition of Real and Personal Property, May 27, 1936, 55 Stat. 1101.

APPENDIX 11

The following is a list of all Article II, Section 2 treaties in the category of Boundaries, Land Purchases, Land Cessions, Boundary Waters, and Waterways.

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42. Supplement to Four Power Treaty (insular possessions and dominions in the Pacific), Feb. 6, 1922, 43 Stat. 1652.
43. Treaty on Spitsbergen (Svalbard), Status of, Feb. 9, 1920, 43 Stat. 1892.
64. Agreement on the Reversion to Japan of the Ryukyu and Daito Islands, June 17, 1971, U.S.-Japan, 23 U.S.T. 446.

APPENDIX 12

The following is a list of all Article II, Section 2 treaties in the category of Human Rights, Health, Drugs, Morals, Law Enforcement, and Miscellaneous Humanitarian Conventions.

68. Agreement on Narcotic Drugs (limitation on regulation of poppy plant cultivation and production of, trade in, and use of opium), protocol dated June 23, 1953, 14 U.S.T. 10.
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APPENDIX 13

The following is a list of all Article II, Section 2 treaties in the category of International Organizations.

46. Inter-American Institute for Cooperation on Agriculture, Mar. 6, 1979, 32 U.S.T. 3779.
### APPENDIX 14

The following is a list of all Article II, Section 2 treaties in the category of International Environmental, Global Commons, and Conservation.

37. Agreement on Fisheries (shrimp), May 9, 1972, U.S.-Brazil, 23 U.S.T. 1504.

**APPENDIX 15**

The following is a list of all Article II, Section 2 treaties in the category of Telecommunications, Transportation, Cultural, and Information Exchange.

34. Telecommunications, Nov. 29, 1958, 10 U.S.T. 2423.