



## Santa Clara Journal of International Law

Volume 14 | Issue 2

Article 1

5-23-2016

# Conditions in U.S. Treaty Practice: New Data and Insights on a Growing Phenomenon

Cindy Galway Buys

Follow this and additional works at: <http://digitalcommons.law.scu.edu/scujil>

 Part of the [International Law Commons](#)

### Recommended Citation

Cindy Galway Buys, *Conditions in U.S. Treaty Practice: New Data and Insights on a Growing Phenomenon*, 14 SANTA CLARA J. INT'L L. 363 (2016).

Available at: <http://digitalcommons.law.scu.edu/scujil/vol14/iss2/1>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# Conditions in U.S. Treaty Practice: New Data and Insights on a Growing Phenomenon

Cindy Galway Buys\*

---

\* Cindy Galway Buys is a Professor of Law and the Director of International Law Programs at Southern Illinois University School of Law. I owe a special thank you to my research assistants who spent many hours assisting with the empirical data and other research for this article: Rebecca Warren, Stephanie Macuiba, Julia Wykoff and Kristen Winkler. I would also like to express my appreciation to the participants in the 2014 Central States Law Schools Association Conference and the 2014 American Society of International Law Research Forum for their helpful feedback. In this regard, special thanks for to discussant, Daniel Abebe, and co-panelist, Mark Pollack, for their insightful comments.

## I. Introduction

The United States Senate often adds various types of conditions, also known as reservations, understandings, and declarations (“RUDs”), to its advice and consent to multilateral treaties. The ability to add conditions to a treaty likely increases the number of States willing to join a treaty and abide by the international norms set forth therein because it allows States to modify their treaty obligations in ways that do not conflict with the basic object and purpose of the treaty to address domestic concerns.<sup>1</sup> However, the use of conditions also has the potential to undermine the integrity of the treaty by allowing States to opt out of important legal obligations.<sup>2</sup> Depending on the type of condition, they can also create legal uncertainty regarding treaty obligations and relationships. This paper examines treaty practice with respect to use of conditions to determine how and when conditions are being used, with a particular focus on U.S. treaty practice and the effect of those conditions on the United States’ legal obligations.

Drawing on a database of almost 400 multilateral treaties to which the United States is a party, this article demonstrates the U.S. Senate’s use of such conditions has grown significantly over the last few decades, particularly with respect to the use of conditions other than reservations.<sup>3</sup> The Senate purports to use conditions to modify the United States’ legal obligations; to clarify ambiguous treaty terms, and to address how a treaty is to be implemented in U.S. law. However, the legal effect of the Senate’s use of conditions, both in U.S. law and international law, is often murky. Accordingly, this article examines Senate practice with respect to its advice and consent function for multilateral treaties to determine what is happening in this area of the law and whether changes should be made.

The article begins by explaining the domestic and international legal authority for the use of conditions in U.S. treaty practice. The article then describes different

- 
1. See Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 29) (allowing states to condition their consent to treaties may also lower negotiation costs because states do not have to agree to every word of a treaty before finalizing the text).
  2. See *id.*
  3. The scope of this article and the data on which it relies are limited to multilateral international agreements adopted by the United States between 1960 and 2009 through the Senate advice and consent process of Article II of the U.S. Constitution. Although the U.S. Senate sometimes adds conditions to bilateral agreements, such conditions raise different legal issues because they usually must be accepted by the other party before a valid agreement is formed. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313 cmt. f (AM. LAW INST. 1987). See also Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition Its Consent to Treaties*, 67 CHI.-KENT L. REV. 533, 542 (1991). As explained below, in most cases under international law, treaty parties may unilaterally add conditions to multilateral treaties without obtaining all the other parties’ consent.

types of conditions the Senate has attached to multilateral international agreements to which the United States is a party, and how and when the Senate adds conditions to such agreements. Utilizing a database containing 380 multilateral treaties to which the United States is a party, the article shows changes in Senate practice over time. The article identifies the types of conditions most frequently added by the Senate, and examines whether the Senate is more likely to add conditions to treaties depending on the treaty's subject matter. Based on this behavior, the article proposes some theories as to why the U.S. Senate is more likely to add conditions to certain types of treaties than others. The article also considers whether a prohibition on treaty reservations significantly lessens the likelihood the United States will join a particular treaty.

Next, the article analyzes the extent to which U.S. practice is consistent or inconsistent with international law and practice, including the extent to which other States use certain types of conditions when joining multilateral treaties. This examination shows that U.S. treaty practice is not entirely consistent with international practice, especially with respect to the use of "understandings." It also highlights legal problems that may arise through the use of some types of conditions.

The article then examines the impact on and response of the other branches of the federal government to the Senate's actions. Specifically, the article discusses the extent to which the executive and judicial branches of U.S. government are or should be bound by the different types of conditions proposed by the Senate. Finally, the article concludes with some recommendations regarding changes in treaty practice for the future.

## **II. Background**

### ***A. U.S. Senate Advice and Consent Power***

Under Article II, section 2 of the U.S. Constitution, the President makes treaties, while the Senate gives its advice and consent to a treaty's ratification.<sup>4</sup> In U.S. practice, presidents initiate the treaty process by negotiating and signing multilateral agreements.<sup>5</sup> As the U.S. Supreme Court has stated, the President "makes treaties with the advice and consent of the Senate; but he alone negotiates."<sup>6</sup> Once the treaty negotiations are concluded and the President signs the treaty, the

---

4. U.S. CONST. art. II, § 2.

5. FRANK ET AL., U.S. FOREIGN RELATIONS LAW: CASES, MATERIALS AND SIMULATIONS 284 (4th ed. 2012).

6. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

executive branch then submits the treaty to the Senate for its advice and consent.<sup>7</sup>

Pursuant to Senate Rules XXX and XXV, after an initial reading, the Presiding Officer refers the treaty to the Senate Committee on Foreign Relations.<sup>8</sup> The treaty remains on the Committee's calendar from Congress to Congress until the Committee reports it to the full Senate or recommends its return to the President or until the Committee is discharged of the treaty by the Senate.<sup>9</sup> The Committee Chairman decides whether and when to schedule one or more public hearings on the treaty.<sup>10</sup> The Committee Chairman also decides on the timing of mark-ups.

If the Committee favorably reports the treaty to the full Senate, the Senate first considers the text of the treaty itself.<sup>11</sup> It also considers whether to add conditions or various types of RUDs to its advice and consent to U.S. ratification of a particular treaty.<sup>12</sup> Sometimes, the President will recommend to the Senate that certain conditions be added to a treaty, as in the cases of the International Covenant on Civil and Political Rights (ICCPR)<sup>13</sup> and the Convention Against Torture (CAT).<sup>14</sup> More often, it is the Senate Foreign Relations Committee that proposes conditions.

There are two methods by which the Senate may condition its consent to a treaty.<sup>15</sup> First, the Senate may include one or more conditions in its resolution of ratification.<sup>16</sup> Second, it may insert in the resolution of ratification a condition that the text of the treaty be amended, which operates as a directive to the President to go back to the treaty negotiating table.<sup>17</sup> When the resolution of ratification is presented to the full Senate, it will incorporate the Senate Foreign Relation Committee's proposed amendments or conditions.<sup>18</sup> Additional conditions may be

---

7. FRANK ET AL., *supra* note 6, at 286-87.

8. Standing Rules of the U.S. Senate, *available at* [http://www.senate.gov/reference/reference\\_index\\_subjects/Rules\\_and\\_Procedure\\_vrd.htm](http://www.senate.gov/reference/reference_index_subjects/Rules_and_Procedure_vrd.htm); *see also*, COMM. ON FOREIGN RELATIONS, 106TH CONG., CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, A STUDY PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE 120 (Comm. Print 2001), *available at* <http://www.gpo.gov/fdsys/granule/CPRT-106SPRT66922/CPRT-106SPRT66922/content-detail.html> [hereinafter CONGRESSIONAL RESEARCH SERVICE].

9. *Id.* at 122.

10. *Id.*

11. VALERIE HEITSHUSEN, CONG. RESEARCH SERV., CRS 98-384, SENATE CONSIDERATION OF TREATIES 1 (2014), *available at* [http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26\\*2%3C4P%3C%3B%3F%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2%3C4P%3C%3B%3F%0A).

12. FRANK ET AL., *supra* note 6, at 287-88.

13. *See* Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 523 (1991).

14. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rpt. No. 101-30, at 2, 7-8 (1990).

15. Glennon, *supra* note 4, at 542.

16. *Id.*

17. *Id.*

18. *See* HEITSHUSEN, *supra* note 12, at 2.

proposed during the full Senate's consideration of the resolution of ratification.<sup>19</sup> The inclusion of a condition in the resolution of ratification requires only a majority vote,<sup>20</sup> while the final vote on the resolution of ratification requires a two-thirds majority.<sup>21</sup>

While the U.S. Constitution is silent as to the Senate's authority to condition its consent to treaties, it is well settled that the Senate has the power to do so.<sup>22</sup> However, as discussed in more detail below, the Senate's power to condition its consent is not unlimited, as it must be exercised consistently with the system of shared power over foreign relations under the U.S. Constitution.<sup>23</sup> The attachment of various conditions is also governed by international law.<sup>24</sup>

If two-thirds of the Senators give their consent to the treaty, the Senate returns the treaty to the President, who decides whether to proceed with the ratification process. If the Senate has added conditions to the treaty, the President has several options as to how to respond to those conditions. If the President deems the conditions acceptable, he may proceed with treaty ratification, usually by signing an instrument of ratification including the conditions and depositing that instrument of ratification with the appropriate body.<sup>25</sup> If the President deems one or more of the conditions unacceptable, he may refuse to ratify the treaty. He may also wait and resubmit the original treaty to the Senate at a later date for reconsideration, perhaps after an election has changed the political makeup of the Senate.<sup>26</sup> He may also decide to renegotiate parts of the treaty with the other treaty partners before resubmitting it to the Senate.<sup>27</sup> If the Senate has added a reservation that changes the United States' legal obligations under the treaty, the President is expected to

---

19. *Id.*

20. *Id.*

21. U.S. CONST. art. II, § 2.

22. *Haver v. Yaker*, 76 U.S. 32 (1869) ("The Senate are not required to adopt or reject [a treaty] as a whole, but may modify or amend it."); *Power Authority of the State of New York v. Federal Power Comm'n*, 247 F.2d 538 (D.C. Cir. 1957) ("Unquestionably the Senate may condition its consent to a treaty upon a variation of its terms."); *Beazley v. Johnson*, 242 F.3d 248, 266 (5th Cir. 2001) (U.S. Senate's reservation to the International Covenant on Civil and Political Rights is valid); *see also* Glennon, *supra* note 4, at 534.

23. *See* Damrosch, *supra* note 14, at 527.

24. *See, e.g.*, Vienna Convention on the Law of Treaties, art. 19 and 20, May 23, 1969, 1155 U.N.T.S. 331. Although the United States is not a party to the Vienna Convention on the Law of Treaties (VCLT), it considers many of the provisions of the VCLT to constitute customary international law on the law of treaties. *See Vienna Convention on the Law of Treaties*, U.S. DEPT. OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Feb. 20, 2016) [hereinafter VCLT]; *see also* Assistant Legal Advisor for Treaty Affairs at the Department of State and Secretary of State Roger's Report to the President, Oct. 18, 1971, 65 DEPT ST. BULL. 684, 685 (1971); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2nd Cir. 2000).

25. FRANK ET AL., *supra* note 6, at 289.

26. *Id.*

27. *Id.*

notify the other treaty parties to allow them an opportunity to respond.<sup>28</sup> If the President objects to any of the conditions added by the Senate, this is the best time to do so.<sup>29</sup> Otherwise, the President is likely to have difficulty in rejecting those conditions at a later date.<sup>30</sup>

## ***B. Types/Definitions of Conditions***

### ***1. Reservations***

Reservations are perhaps the easiest type of condition to understand because they have the most accepted definition and legal effect. The Vienna Convention on the Law of Treaties (VCLT) defines a 'reservation' as "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 modify the legal effect of certain provisions of a treaty in their application to that State."<sup>31</sup> It is important to note in this regard that it does not matter what a State calls the condition it attaches to a treaty. If the condition attached to the treaty purports to exclude, limit, or modify a state's legal obligations, it will be treated as a reservation.<sup>32</sup>

Under the VCLT, the default rule is that reservations are permitted so long as they are not prohibited by the treaty and they are not incompatible with the object and purpose of the treaty.<sup>33</sup> When a State makes a reservation to a treaty, the other States who are parties to the treaty may respond in a number of ways. As a general rule, the non-reserving State may accept or object to the reservation.<sup>34</sup> If the non-reserving State accepts the reservation, the reserving State and the accepting State enter into a treaty relationship absent the provision of the treaty that was subject to the reservation. If the non-reserving State objects to the reservation, it may choose whether to remain in a treaty relationship with the reserving State or whether the reservation is so objectionable that it does not wish for the treaty to enter into force

---

28. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 313 cmt. c-e (AM. LAW INST. 1987).

29. Glennon, *supra* note 4, at 553.

30. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 314 cmt. b (AM. LAW INST. 1987) ("Since 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."). *See also* Part V.5 below.

31. VCLT, *supra* note 25, art. 2.1(d). Although the United States is not a party to the VCLT, the Restatement (Third) on Foreign Relations Law appears to largely accept this definition. *See* RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW § 313 cmt. a (AM. LAW INST. 1987).

32. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 313 cmt. g (AM. LAW INST. 1987). *See, e.g.*, Anglo-French Continental Shelf Case, 54 I.L.R. 6, 40 (1977) (Permanent Court of Arbitration determines a so-called "interpretative declaration" made by France to a treaty is actually a reservation because it purports to modify the legal effect of the treaty).

33. VCLT, *supra* note 25, art. 19.

34. VCLT, *supra* note 25, art. 20.

at all between the reserving and objecting State.<sup>35</sup> If the non-reserving State remains silent, i.e., neither expressly accepts nor objects to a reservation within one year of notification of the reservation, the State will be deemed to have consented to the reservation.<sup>36</sup>

For example, when the United States joined the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>37</sup> it made two reservations: one stating that the United States must give its explicit consent on a case-by-case basis before the International Court of Justice (ICJ) may take jurisdiction over any disputes relating to the United States' obligations under the Genocide Convention and the other stating that the U.S. Constitution will take priority over the Convention in any case of conflict.<sup>38</sup> Several other States objected to one or both of these reservations, including Mexico and the Netherlands. Both stated that, in their view, the United States' reservation regarding ICJ jurisdiction is contrary to the object and purpose of the Convention. Mexico also claimed the United States could not invoke domestic law as a reason for not complying with the treaty.<sup>39</sup> However, only the Netherlands does not consider the United States a party to the treaty as a result of the incompatible reservation.<sup>40</sup> By contrast, Mexico does consider the United States to

---

35. *Id.*

36. *Id.*

37. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

38. *Id.* The exact language of the United States' reservations is as follows: "(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." Chapter IV Human Rights, U.N. TREATY COLLECTION, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en).

39. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. Mexico's response to the U.S. reservation is as follows: "The Government of Mexico believes that the reservation made by the United States Government to article IX of the aforesaid Convention should be considered invalid because it is not in keeping with the object and purpose of the Convention, nor with the principle governing the interpretation of treaties whereby no State can invoke provisions of its domestic law as a reason for not complying with a treaty. If the aforementioned reservation were applied, it would give rise to a situation of uncertainty as to the scope of the obligations which the United States Government would assume with respect to the Convention. Mexico's objection to the reservation in question should not be interpreted as preventing the entry into force of the 1948 Convention between the [Mexican] Government and the United States Government." Chapter IV Human Rights, U.N. TREATY COLLECTION, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en).

40. The Netherlands' objection to the U.S. reservations states: "With regard to the reservations made by the United States of America: As concerns the first reservation, the Government of the Kingdom of the Netherlands recalls its declaration, made on 20 June 1966 on the occasion of the accession of the Kingdom of the Netherlands to the Convention [...] stating that in its



be a party to the Convention, even though Mexico objected to these conditions. This example illustrates the different options available to States when responding to treaty conditions.

As shown above, reservations have an accepted legal meaning in both international and U.S. law. When the U.S. Senate gives its advice and consent to ratification of a treaty subject to a reservation, it knows that it is changing the legal obligations of the United States under the treaty and that the United States' treaty partners will be notified and given an opportunity to accept or reject the reservation. Although a complex web of treaty relationships may develop as a result, these relationships are at least transparent, which is not always the case with other types of conditions as demonstrated below. Because reservations have a clearer legal definition and have been studied more extensively in international law and are thus more understood,<sup>41</sup> this article will focus more on other types of conditions, such as understandings and declarations.

## 2. *Understandings*

Unlike reservations, the VCLT does not provide a definition of an "understanding" of a treaty provision, nor does the United Nations Treaty Collection include "understanding" in its definition of treaty terms. Likewise, the International Law Commission's 2011 *Guide to Practice on Reservations to Treaties* does not include the term.<sup>42</sup> Hence, the use of the term "understanding" has a less settled meaning in international law.

In U.S. Senate practice, the term "understanding" has been used to denote "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

---

opinion the reservations in respect of article IX of the Convention, made at that time by a number of states, were incompatible with the object and purpose of the Convention, and that the Government of the Kingdom of the Netherlands did not consider states making such reservations parties to the Convention. Accordingly, the Government of the Kingdom of the Netherlands does not consider the United States of America a party to the Convention." Chapter IV Human Rights, U.N. TREATY COLLECTION, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en).

41. See, e.g., Edward T. Swaine, *Reserving*, YALE J. INT'L L. 307 (2006); David Auerswald & Forrest Maltzman, *Policymaking through Advice and Consent: Treaty Consideration by the United States Senate*, 65 J. POLITICS 1097 (2003); John King Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372, 379 (1980).

42. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third Session: Guide to Practice on Reservations to Treaties, U.N. Doc. A/66/10/Add. 1, para. 75 (2011), available at <http://legal.un.org/ilc/reports/2011/english/addendum.pdf> [hereinafter Guide to Practice on Reservations to Treaties].

by the agreement.”<sup>43</sup> For example, when the United States ratified the Inter-American Convention Against Terrorism, the United States included an “understanding” stating: “The United States of America understands that the term ‘international humanitarian law’ in paragraph 2 of article 15 of the Convention has the same substantive meaning as the law of war.”<sup>44</sup>

The Congressional Research Service (“CRS”), which offered the above-quoted definition of an “understanding,” admits, “The actual effect of a particular proposed understanding may, of course, be debatable.”<sup>45</sup> For example, when Congress passed a joint resolution in 1947 approving the Headquarters Agreement between the United Nations and the United States, it included a statement that “[n]othing in this agreement shall be construed as in any way diminishing, abridging or weakening the right of the United States to safeguard its security and completely to control the entrance of aliens into any territory of the United States other than the headquarters district and its immediate vicinity.”<sup>46</sup> The text of this joint resolution was communicated to the United Nations. Upon receipt, neither the U.N. Secretary General nor the General Assembly commented upon it.<sup>47</sup> In 1953, the United States invoked the joint resolution to justify its denial of visas to representatives of two nongovernmental organizations whom the United States considered a security threat.<sup>48</sup> The United Nations claimed it was not bound by the joint resolution, but the United States took the position that its consent to the Headquarters Agreement was subject to it.<sup>49</sup> The disagreement was never conclusively resolved.<sup>50</sup> In fact, the issue has come up again several times since then, including most recently in April 2014 when the United States denied a visa to the Iranian Ambassador to the United

---

43. CONGRESSIONAL RESEARCH SERVICE, *supra* note 9, at 125; *see also* FRANK ET AL., *supra* note 6, at 288.

44. Inter-American Convention Against Terrorism, AG/RES. 1840 (XXXII-O/02), June 3, 2002, 42 I.L.M. 19 (2003), *available at* <http://www.oas.org/juridico/english/signs/a-66.html#United States of America>.

45. CONGRESSIONAL RESEARCH SERVICE, *supra* note 9, at 125. Likewise, the U.N. Final Clauses of Multilateral Treaties Handbook states, “The determination of whether a statement is a declaration or an unauthorized reservation may become complex.” U.N. OFFICE OF LEGAL AFFAIRS, FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK, U.N. Sales No. E.04.V.3 (2003), *available at* <https://treaties.un.org/doc/source/publications/FC/English.pdf> [hereinafter FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK].

46. Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, 61 Stat. 756, 767-78 (1947), T.I.A.S. No. 1676, *available at* [http://avalon.law.yale.edu/20th\\_century/decad036.asp#b2](http://avalon.law.yale.edu/20th_century/decad036.asp#b2).

47. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 382, n. 32. (1972).

48. *Id.* at 382-83, n. 32. *See also* W. Michael Reisman, *The Arafat Visa Affair: Exceeding the Bounds of Host-State Discretion*, 83 AM. J. INT’L L. 519, 523-24 (1989).

49. HENKIN, *supra* note 48, at 383 n. 32.

50. *Id.*

Nations because he had participated in the Iranian Hostage Crisis in 1979.<sup>51</sup> This example illustrates conditions that are not labelled “reservations” may affect the United States’ legal obligations. However, the exact legal effect of such conditions has not been finally resolved.

### 3. *Declarations*

In international practice, the term “declaration” can have multiple meanings.<sup>52</sup> Declarations may be stand-alone instruments, such as the 1948 Universal Declaration of Human Rights (UDHR),<sup>53</sup> or they may be attached to a treaty, such as a declaration under article 41 of the International Covenant on Civil and Political Rights (ICCPR) accepting the competence of the Human Rights Committee to hear inter-State complaints.<sup>54</sup> Declarations may or may not be legally binding, depending on their usage.<sup>55</sup> In fact, States sometimes use the term “declaration” specifically to avoid creating a legally binding obligation.<sup>56</sup> An example of a legally binding declaration is the Joint Declaration between the United Kingdom and China on the Question of Hong Kong of 1984.<sup>57</sup> An example of a declaration that was not meant to be legally binding is the 1992 Rio Declaration on Environment and Development, largely considered to be “soft law.”<sup>58</sup> Whether a declaration is intended to be legally binding often depends on the language of the declaration itself and the expressions of intent of the parties.<sup>59</sup>

Some declarations that start out as non-legally binding may come to reflect

- 
51. See Mark Hosenball, *U.S. may test influence at U.N. by denying visa to Iran envoy*, REUTERS (Apr. 9, 2014), <http://news.yahoo.com/u-may-test-influence-u-n-denying-visa-230729169.html>; Scott Neuman, *U.S. Denies Visa to Iran’s Controversial U.N. Envoy*, NPR (Apr. 11, 2014, 1:45 PM), <http://www.npr.org/blogs/thetwo-way/2014/04/11/301793898/congress-votes-to-bar-entry-to-irans-u-n-ambassador>. Lacking agreement on the legal effect of the condition, the parties usually reach a political compromise instead.
  52. Definition of Key Terms Used in UN Treaty Collection, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1\\_en.xml#exchange](https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#exchange) (last visited Feb. 20, 2016).
  53. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), *available at* <http://www.un.org/en/documents/udhr/> [hereinafter Universal Declaration of Human Rights].
  54. International Covenant on Civil and Political Rights, art. 41, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter ICCPR].
  55. Definition of Key Terms Used in UN Treaty Collection, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1\\_en.xml#exchange](https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#exchange) (last visited Feb. 20, 2016).
  56. *Id.*
  57. *Id.*
  58. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992); *see also* Magnus Jesko Langer, *Principle 21: The Role of Youth*, in THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 519 (ed. Jorge E. Viñuales, 2014).
  59. Guide to Practice on Reservations to Treaties, *supra* note 43, § 1.3.

customary international law. For example, the 1948 UDHR began as a non-binding United Nations General Assembly resolution, but later came to be viewed as an authoritative statement of basic human rights and, thus, evolved into binding customary international law.<sup>60</sup>

Under international law, “[a]n interpretive declaration is an instrument that is annexed to a treaty with the goal of interpreting or explaining the provisions of the latter.”<sup>61</sup> The United Nations International Law Commission (ILC) has also recognized a “conditional interpretive declaration” which it defines as “a unilateral declaration formulated by a State when [joining a treaty], whereby the State . . . subjects its consent to be bound by the treaty to a specific interpretation of the treaty or certain provisions thereof.”<sup>62</sup> Because a “declaration,” like an “understanding,” may also interpret a treaty, there is overlap between the meaning of a “declaration” and an “understanding.”<sup>63</sup>

According to the ILC, an interpretive declaration is not supposed to modify treaty obligations.<sup>64</sup> It may only clarify the meaning which its author attributes to a treaty provision.<sup>65</sup> However, as discussed in more detail below, it may constitute an element to be taken into account in treaty interpretation in accordance with the general rules for treaty interpretation under international law.<sup>66</sup>

With respect to U.S. practice, the CRS states that the U.S. Senate may use declarations as “statements of purpose, policy, or position related to matters raised in a treaty in question but not altering or limiting any of its provisions.”<sup>67</sup> Because this type of declaration is not intended to modify the legal effect of the treaty, the President does not always include them in the instrument of ratification provided to the other treaty parties.<sup>68</sup> The Senate has taken the position that all conditions

---

60. Universal Declaration of Human Rights, *supra* note 54; *see also* THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 41-42 (4 ed. 2009). Customary international law is defined as the general practice of states accepted as law. *See* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

61. Definition of Key Terms Used in UN Treaty Collection, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1\\_en.xml#exchange](https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#exchange) (last visited Feb. 20, 2016). The International Law Commission offers a similar definition: “Interpretive declaration’ means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization, purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.” Guide to Practice on Reservations to Treaties, *supra* note 43, § 1.2. The ILC takes the position, “A State . . . is free to formulate an interpretive declaration unless the interpretive declaration is prohibited by the treaty.” *Id.* § 3.5.

62. Guide to Practice on Reservations to Treaties, *supra* note 43, § 1.4.

63. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 313, cmt. g (AM. LAW INST. 1987).

64. Guide to Practice on Reservations to Treaties, *supra* note 43, § 4.7.1.

65. *Id.*

66. *Id.*

67. CONGRESSIONAL RESEARCH SERVICE, *supra* note 9, at 126.

68. *See id.* at 124-27. One example of a decision not to include a condition in the resolution of ratification comes from the ratification of the Convention Against Torture (CAT). U.S. Senator Helms

should be notified to other treaty parties unless the Senate instructs the President otherwise. The Senate favors notification because it clarifies the rights and obligations undertaken by the United States in ratifying a treaty.<sup>69</sup> The general rule in favor of notification is laudable because it increases transparency. However, in those exceptional cases where the Senate instructs the President not to give notice of some conditions, it may put the President in a difficult position because the executive branch must evaluate the Senate's action to determine whether in fact the Senate's additional language does or does not modify the legal effect of the treaty.<sup>70</sup> If the President believed that a "declaration" has the legal effect of a reservation, he should include that "declaration" in his instrument of ratification so that other treaty parties are put on notice and given the opportunity to object. But if the President simply follows the Senate's advice and does not notify other treaty parties, a treaty party or an international tribunal may later determine that the "declaration" really functions as a reservation, thus altering the United States' legal obligations under the relevant treaty and potentially putting the United States in breach.

The CRS also notes that the term "declaration" is sometimes used interchangeably with the term "proviso."<sup>71</sup> Provisos often include conditions relating to the process for domestic implementation of the treaty.<sup>72</sup> Provisos have also been defined as relating "to issues of U.S. law or procedure [that] are not intended to be included in the instruments of ratification to be deposited or exchanged with other countries."<sup>73</sup> Thus, provisos overlap with both "understandings" and "declarations" because they address issues relating to the domestic implementation of a treaty.<sup>74</sup> Perhaps because provisos are intended to operate domestically, they are not mentioned in international law sources, such as the VCLT or the U.N. Treaty Database.

---

"wanted to attach a sovereignty proviso to the torture treaty as had been done in the case of the genocide pact. But he agreed with [Senator] Pell that the reservation would be attached to the resolution of ratification, not to the instrument of ratification itself — the legal document notifying the United Nations of U.S. assent to the treaty. Although several senators, including Daniel Patrick Moynihan, D-N.Y., argued the proviso was unnecessary and harmful in the eyes of other countries, the Senate adopted Helms' amendment along with three other reservations as an en bloc amendment by division vote." CQ Almanac, *Senate Oks Ratification of Torture Treaty*, QC PRESS (1990), <http://library.cqpress.com/cqalmanac/document.php?id=cqal90-1118781>.

69. CONGRESSIONAL RESEARCH SERVICE, *supra* note 9, at 127.

70. The ILC *Guide to Reservations in Treaty Practice* states that interpretive declarations should be in writing and communicated to the other treaty parties in the same way that reservations are. *Guide to Practice on Reservations to Treaties*, *supra* note 43, §§ 2.1.5, 2.4.5.

71. CONGRESSIONAL RESEARCH SERVICE, *supra* note 9, at 126.

72. *Id.*

73. FRANK ET AL., *supra* note 6, at 288.

74. See discussion of "federalism understandings" and "non-self-executing declarations" *infra* p. 381-382.

There are a few other types of conditions the Senate has used over time, such as “exceptions,” “exclusions,” and “explanations.”<sup>75</sup> However, like provisos, their use is so infrequent, they have not been included in this study.

### **III. U.S. Senate Treaty Ratification Practice over the Last Fifty Years**

#### ***A. The Use of Conditions in Multilateral Treaties to Which the Senate Gave Its Advice and Consent***

To understand the potential scope of the use of conditions in U.S. treaty practice, the author compiled a database of multilateral treaties to which the United States has become a party between 1960 and 2009.<sup>76</sup> The list of multinational treaties the United States joined during this time period was initially drawn from the U.S. State Department’s *Treaties in Force* database.<sup>77</sup> Through the constitutional advice and consent process described above, the United States joined a total of 380 multilateral treaties between 1960 and 2009.<sup>78</sup>

The author initially classified the treaties as to subject matter using the U.S. State Department’s nomenclature (which contained 96 categories), e.g., atomic energy, postal arrangements, trade and commerce, etc. The author then grouped related treaties into 30 subject matter categories. For example, all treaties dealing with human rights were combined in one human rights category that includes the

---

75. Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT’L & COMP. L.J. 89, 108-09 (1996).

76. This time period was chosen because it represents five decades of U.S. treaty practice during the post-World War II period following the creation of the United Nations - a time period during which there has been tremendous growth in the number of states in the international community and in multilateral international agreements. See Gamble, *supra* note 42, at 377.

77. *Treaties in Force*, U.S. DEPT. OF STATE, <http://www.state.gov/s/l/treaty/tiff/index.htm> (last visited Feb. 21, 2016).

78. *Id.* Despite extensive research efforts, including utilization of staff at the SIU School of Law, the Law Library of Congress, and the U.S. State Department, the author was unable to locate the text of the following eight multilateral treaties, which are therefore excluded from the database: Agreement Regarding the Establishment, Construction and Operation of a Uranium Enrichment Installation in the United States, with Annex and Agreed Minute (02/01/1995); Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project (10/24/2007); Implementing Agreement for a Program of Research and Development on Energy Conservation in Heat Transfer and Heat Exchangers (06/28/1977); Implementing Agreement for Cooperation in the Development of Large Scale Wind Energy Conversion Systems (10/06/1977); Implementing Agreement for a Program of Research, Development and Demonstration on Enhanced Recovery of Oil (05/22/1979); Agreement Regarding the Status of Foreign Forces in the Former Territory of the German Democratic Republic (10/03/1990); Agreement On Technological Safeguards Associated With The Launch Of The INMARSAT-3 Satellite (08/19/1994); Relating To Mobile Services (10/3/1989).

State Department categories of Child Rights, Genocide, Human Rights, Labor, Migration, Racial Discrimination, Refugees, Slavery, Torture and Women-Political Rights.<sup>79</sup>

The author added information regarding whether the treaty allows or prohibits reservations, whether the United States has added any conditions to its participation in the treaty and, if so, what type of condition. Initially, the conditions were classified into five common categories as proposed by Professors Bradley and Goldsmith:<sup>80</sup>

a. Substantive reservations pursuant to which the United States declines to be bound by one or more provisions of the treaty (other than dispute settlement provisions)

b. Interpretive conditions which set forth the U.S. interpretation of a vague treaty term

c. Non-self-executing declarations, which provide that the treaty will not be effective in U.S. law until Congress passes implementing legislation

d. Federalism understandings which provide that the federal government will implement the treaty provisions where it has jurisdiction to do so and otherwise implementation will be done by state and local governments

e. Reservations to the use of the International Court of Justice (ICJ) and other international dispute settlement bodies to resolve disputes arising under the treaty

However, a few conditions did not fall in these categories and are included in a catch-all “other” category.

### ***1. How often does the United States add conditions to multilateral treaties?***

Scholars in law and political science have done work in the past examining the use of reservations in treaty practice, but little work has been done on other types of conditions. For example, in 1980, Professor John Gamble examined the use of reservations (not understandings and declarations) in international practice. He asserted there are no reservations at all to 85% of multilateral treaties.<sup>81</sup> He also examined the types of reservations added by States to multilateral treaties and concluded that reservations “are not too serious a problem; most are of a fairly minor nature.”<sup>82</sup> Another study by Auerswald and Maltzman published in 2003 containing

---

79. The treaty subject groupings can be found in Annex A. *infra* pp. 412-414.

80. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 416-23 (2000).

81. Gamble, *supra* note 42, at 379.

82. *Id.* at 391.

data on 796 bilateral and multilateral U.S. treaties from 1947 to 2000 concluded the U.S. Senate added reservations to treaties 20% of the time (once again the data did not consider understandings and declarations).<sup>83</sup>

Professor Kevin Kennedy conducted the most comprehensive examination of Senate practice with respect to reservations, understandings and declarations from 1795-1990, and concluded the Senate added conditions to 15% of bilateral and multilateral treaties.<sup>84</sup> He also concluded “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.”<sup>85</sup> This article builds on and refines this previous work by focusing exclusively on U.S. multilateral treaties and adding an examination of multilateral treaty practice from 1990-2009, a period when changes in these patterns appear.

Professor Kennedy’s U.S. treaty database shows a relatively steady trend in the use of conditions over time.<sup>86</sup> However, Professor Kennedy’s data does not include the post-Cold War period, and especially in the period following the terrorist attacks of 9/11/2001. Auerswald and Maltzman’s data extending through the year 2000 show the use of treaty reservations became more common after the breakdown of the Cold War consensus.<sup>87</sup> However, Auerswald and Maltzman only had one decade of post-Cold War data and were only focused on reservations.

The data collected for this study demonstrates that the United States’ additions of conditions to multilateral treaties has increased over time, with a particularly sharp increase in the last decade. As demonstrated by Graph A, in the 1960s and 1970s, the United States only added conditions to its multilateral treaties 11-12% of the time.<sup>88</sup> That percentage rose to 21-26% during the 1980s and 1990s. More recently, the United States has added conditions to its treaties at an even higher rate. By the 2000s, the United States added conditions to the multilateral treaties it ratified 34% of the time.<sup>89</sup>

---

83. David Auerswald & Forrest Maltzman, *Policymaking through Advice and Consent: Treaty Consideration by the United States Senate*, 65 J. POLITICS 1097, 1102 (2003).

84. Kennedy, *supra* note 76, at 91.

85. *Id.* at 92.

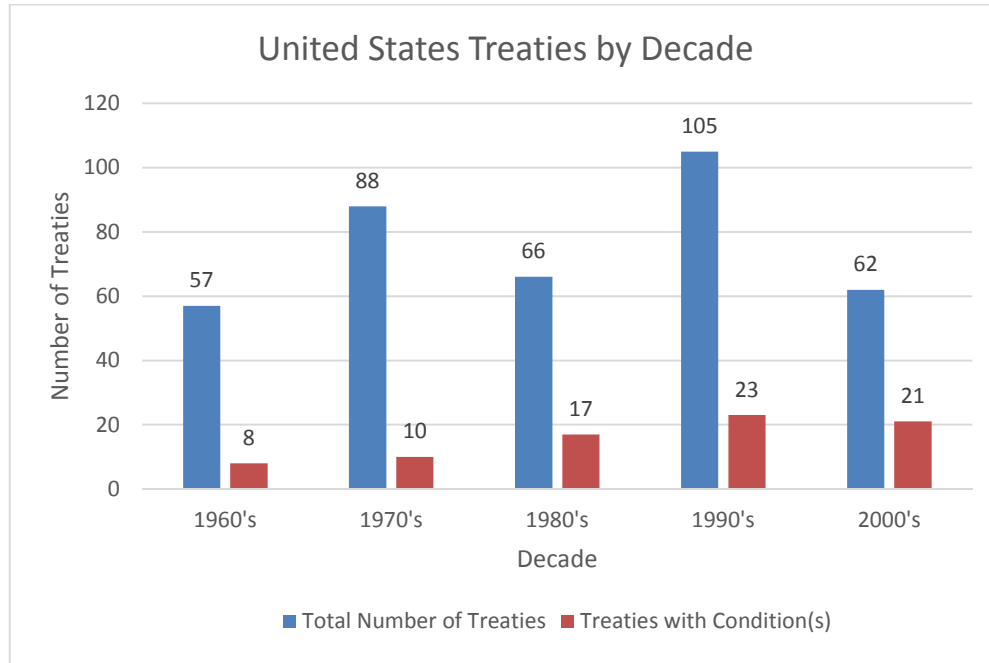
86. Professor Kennedy broke down treaties from 1795-1990 into fifty-year time periods and found that the United States added conditions from 9%-18.8% of the time. Kennedy, *supra* note 76, at 97.

87. Auerswald & Maltzman, *supra* note 83, at 1105.

88. Unlike Professor Gamble’s data set which focused solely on reservations, the data set used for this graph includes reservations, understandings and declarations, so comparisons with respect to usage are not exact. When reservations are broken out, there is no consistent pattern with respect to their use as is shown in Graph B *infra* p. 380.

89. The overall rate for the United States’ use of conditions is 29% from the 1960s through the 2000s.



**Graph A: U.S. Treaties by Decade**

The increasing use of conditions raises several questions, including why the Senate has seen fit to attach more conditions to treaties,<sup>90</sup> how that change in practice has impacted issues of separation of powers between the branches of the federal government and federalism issues between the federal government and the states, whether that practice is consistent with international treaty practice, and, ultimately, whether it is good policy.

## 2. *What types of conditions are most often added?*

In trying to understand Senate practice, it is useful to examine whether certain types of conditions are more common than others. Table 1 below demonstrates that declarations are the most common (43), with reservations being the second most

90. In previous work on this subject, the author suggested the changes in the numbers and types of treaties the United States is joining may be attributable to the newer post-Cold War world order and the rise of terrorism as global threat. See Cindy Buys, *An Empirical Look at U.S. Treaty Practice: Some Preliminary Conclusions [Agora: The End of Treaties?]*, AM. SOC'Y. OF INT'L L., May 7, 2014, <http://www.asil.org/blogs/empirical-look-us-treaty-practice-some-preliminary-conclusions-agera-end-treaties>. The author intends to publish additional data on the relationship between politics and U.S. treaty practice in the future, but that topic is beyond the scope of this paper. *Id.*

common (36) and understandings being the least common (30). Out of 380 multilateral treaties in the database, 109 have at least one condition attached, for a total percentage of 29% from 1960-2009.

**Table 1**

<b>Type of condition</b>	<b>Number of treaties containing each type of condition</b>
Reservations	36
Understandings	30
Declarations	43
<b>Total</b>	109

The 2003 UN Treaty Handbook states that, internationally, “[t]he contemporary practice shows a proliferation of declarations in relation to treaties.”<sup>91</sup> This statement is consistent with U.S. practice, where declarations are added more frequently than reservations or understandings. The more frequent occurrence of declarations may result, in part, from the multiple types of declarations that exist – everything from stand-alone legally binding documents to statements that seek to clarify the meaning of a particular treaty term. It may also be the result of States trying to fit international treaty obligations into their different legal systems and cultures.

Graph B below answers the question of whether the use of a particular kind of condition - reservations, understandings, or declarations - has increased over time. This graph demonstrates that the use of all three types of conditions has increased over time. Reservations started off with relatively infrequent usage in the 1960s and 1970s (5-9% of treaties had a reservation), climbing to 18-20% of treaties having reservations in the 1980s and 1990s, and plateauing then remaining at 21% in the 2000s.

Likewise, the use of understandings also increased over time, leveling off a bit in the last decade. Understandings were added to only 5% of treaties in the 1960s; their use increased to 23% in the 1980s; 29% in the 1990s; and then fell slightly to 27% in the 2000s.

The clearest upward trend exists with respect to the addition of declarations to treaties. The frequency in which the Senate attached declarations began in the single digits in the 1960s and 1970s (8-9%), and continued to increase over time to 14% in the 1980s, 20% in the 1990s and 32% in the 2000s.

---

91. CONGRESSIONAL RESEARCH SERVICE, *supra* note 9, at 50.

**Graph B: Percentage of Treaty Conditions by Decade<sup>92</sup>**

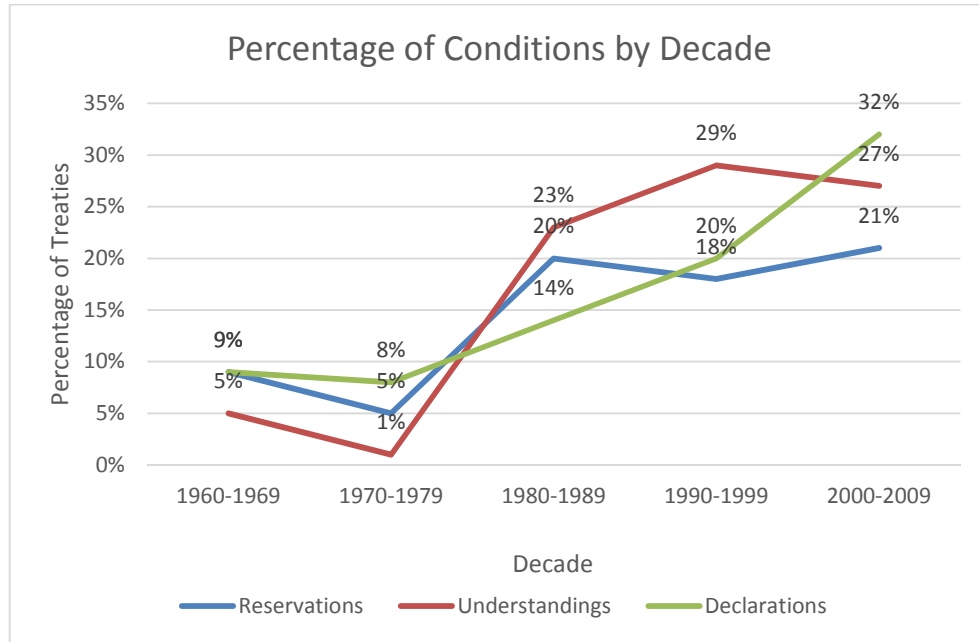


Table 2 below further breaks down the conditions attached by the U.S. Senate to multilateral treaties by frequency of type.

**Table 2**

Classification of Condition	Number of each type of Condition <sup>93</sup>
Interpretive	47
Substantive	41
Federalism	10
Dispute Settlement	10
Non-Self Executing	9
Other	6

92. See Graph B *supra* p. 380 which measures the total number of conditions added to treaties over the relevant time period. In some cases, a treaty may contain multiple conditions. Accordingly, the total number of conditions is greater than the number of treaties containing at least one condition.

93. The total number of conditions in Table 2 *supra* p. 380 is 123. It is greater than the number in Table 1 *supra* p. 15 because some treaties have more than one condition attached.

As Table 2 shows, the most frequent type of condition (47) is an interpretive understanding or declaration that purports to clarify, elaborate or explain a treaty provision. The Senate normally takes the position that this type of condition is different from a reservation because it does not limit or modify the United States' treaty obligations. In fact, this type of condition can affect the United States' treaty obligations if other treaty partners interpret the vague treaty term differently. An example of differing interpretations of a treaty term is illustrated by the case of Sean Goldman, a 4-year-old boy who was taken to Brazil by his mother, who refused to return Sean to his father in the United States.<sup>94</sup> The father pursued legal remedies under the Hague Convention on the Civil Aspects of International Child Abduction in both U.S. and Brazilian courts.<sup>95</sup> Article 12 of the Hague Convention provides a defense to the return of an abducted child if more than a year has passed between the time of the wrongful removal and "the date of commencement of" judicial or administrative proceedings for the child's return.<sup>96</sup> During the legal proceedings, the United States and Brazil interpreted the commencement of the one-year period differently.<sup>97</sup> Thus, differing interpretations can lead to a lack of uniformity of treaty obligations and to different legal rights and responsibilities in different states.

The second most common type of condition (41) is a substantive one, i.e., a reservation that actually alters legal rights and obligations with respect to particular portions of the treaty. For example, when the United States ratified the ICCPR, it entered a reservation preserving the right to impose capital punishment on persons below the age of 18.<sup>98</sup>

The third most common condition, but significantly less so (10), is a federalism understanding, which states that if the federal government has jurisdiction over the subject matter of the treaty, it will implement the treaty, but if the treaty touches

---

94. Daniel B. Wood, *Sean Goldman case highlights rising international child abduction*, CHRISTIAN SCI. MONITOR (Dec. 23, 2009), <http://www.csmonitor.com/USA/2009/1223/Sean-Goldman-case-highlights-rising-international-child-abduction>.

95. *See id.*

96. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89.

97. Amanda M. Waide, *To Comply or Not to Comply? Brazil's Relationship with the Hague Convention on the Civil Aspects of International Child Abduction*, 39 GA. J. INT'L & COMP. L. 271, 291 (2010).

98. The text of the United States' reservations to the ICCPR may be found in the UN Treaty Database, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en). Of course, the juvenile death penalty is now considered unconstitutional as a result of the U.S. Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005). Thus, the United States no longer relies on this reservation. *Id.*

on areas of state regulation, states will implement those provisions.<sup>99</sup> While this type of understanding does not change the meaning of any particular treaty provisions, it does have the potential to affect the implementation of the United States' legal obligations and, thus, the effectiveness of the treaty.

For example, child pornography is defined somewhat differently under U.S. federal law, state law, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, to which the United States is a party (despite not joining the underlying Convention on the Rights of the Child (CRC)). Upon joining the Optional Protocol to the CRC, the United States attached a federalism understanding to its instrument of ratification asserting the federal government and state governments may each have jurisdiction over different aspects of matters covered by the Optional Protocol.<sup>100</sup> The differences in legal jurisdiction and definitions may be a problem with respect to the applicability of the Optional Protocol throughout the United States. In this regard, Article 1 of the CRC defines a child as anyone under the age of 18.<sup>101</sup> Article 2 of the Optional Protocol provides: "Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes."<sup>102</sup> U.S. federal law defines child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture . . . of sexually explicit conduct" involving a person under the age of 18.<sup>103</sup> Thus, U.S. law requires depiction of sexually explicit conduct, while the OP only requires depiction of sexual parts of a child. Additionally, in federal court, the child pornography or the apparatus used to create it must have crossed state lines for

---

99. Six of these ten treaties relate to international criminal law. The use of a federalism understanding with respect to this type of treaty is not surprising given the states' traditional role in regulating crime. The remaining treaties all deal with human rights issues – the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention for the Protection of Children and Cooperation in Respect of Intercountry Adoption.

100. The understanding reads as follows: "IMPLEMENTATION OF THE PROTOCOL IN THE FEDERAL SYSTEM OF THE UNITED STATES. -The United States understands that the Protocol shall be implemented by the Federal Government to the extent that it 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 as necessary, take appropriate measures to ensure the fulfillment of the Protocol." Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=en#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en#EndDec).

101. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

102. *Id.*

103. 18 U.S.C. §§ 2251, 2256 (2008).

federal courts to have jurisdiction. Otherwise, individual states will have jurisdiction. In this regard, some states have a different definition of child pornography. For example, Maryland law makes it illegal to "knowingly promote, advertise, solicit, distribute, or possess with the intent to distribute [an image] . . . that depicts a minor engaged in . . . sexual conduct . . . [or] in a manner that reflects the belief, or that is intended to cause another to believe, that the [image] depicts a minor engaged [in] ... sexual conduct." In Maryland, for a person to be convicted of possessing child pornography, the image needs to depict a minor under the age or 16, rather than 18, as required by U.S. law and the Optional Protocol.<sup>104</sup>

Another example of a federalism issue relates to the United States' implementation of the Vienna Convention on Consular Relations (VCCR). Article 36 of the VCCR provides for a right of consular notification and access for foreign nationals arrested or detained in the United States.<sup>105</sup> Because most persons in the United States are arrested or detained by state or local police, the federal government relies on these sub-federal officers to carry out U.S. treaty obligations in this regard. However, many local and state police did not comply with this treaty obligation, leading to hundreds of lawsuits in U.S. courts,<sup>106</sup> as well as three cases against the United States at the ICJ.<sup>107</sup> These failures to provide consular notification and access also negatively impacted U.S. foreign relations with States like Mexico.<sup>108</sup> While the Senate did not attach a federalism understanding to the VCCR, this example demonstrates the potential for federalism issues that may result in uneven implementation of treaty obligations throughout the United States.

Tied with federalism conditions in terms of frequency are conditions that disallow the use of a particular dispute settlement body to resolve treaty disputes, most commonly, the ICJ. The United States has on seven occasions entered a reservation excluding or conditioning the use of the International Court of Justice (ICJ) as the proper dispute settlement body to resolve disputes that arise out of a multilateral

---

104. MD. CODE ANN. CRIM. LAW §§ 11-201, 11-207, 11-208 (West 2009).

105. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

106. Cindy Galway Buys et al., *Do Unto Others: The Importance of Better Compliance with Consular Notification Rights*, 21 DUKE J. COMP. & INT'L L. 461 (2011).

107. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

108. See *Violations of the Vienna Convention in U.S. Death Penalty Cases*, Statement of Secretary of State Hillary Rodham Clinton, submitted to the U.S. Senate Committee on the Judiciary, July 27, 2011, available at <http://users.xplornet.com/~mwarren/editorials.htm>. See also Letter of Arturo Sarukhan, Mexican Ambassador to the United States, *Why enforcing the Vienna Convention Makes Sense* (May 7, 2008), available at <http://elobservadorarizonamexico.com/noticias/1661-why-enforcing-the-vienna-convention-makes-sense>.

treaty.<sup>109</sup> The United States' reservation to the Genocide Convention stating that the United States must give its explicit consent on a case-by-case basis before the ICJ may take jurisdiction over any disputes relating to the United States' obligations under the Convention illustrates this type of reservation. In addition to opting out of ICJ jurisdiction, the United States has excluded the use of a particular type of arbitral tribunal in three multilateral treaties.

The next most common type of condition is a non-self-executing declaration by the Senate, which states that some or all of the provisions of treaty will not become effective in U.S. law until the Congress passes implementing legislation. This type of declaration can affect the United States' treaty obligations because the treaty is not legally enforceable in U.S. courts until such implementing legislation is passed. For example, when the United States joined the ICCPR, it added a declaration that articles 1-27 of the Covenant are not self-executing.<sup>110</sup> Congress has never enacted legislation specifically to implement the ICCPR. As a result, it is not possible for private litigants in U.S. courts to rely on the rights set forth in the ICCPR. If the treaty obligations are not enforceable, the United States' treaty partners may wonder what legal obligations the United States has actually undertaken. The United States may take the position that implementing legislation is not necessary because other U.S. laws already protect many of the rights set forth in the ICCPR. However, the U.N. Human Rights Committee has identified areas in which the United States is not in compliance with its obligations under the ICCPR.<sup>111</sup> Moreover, it may be argued based on the principle of *pacta sunt servanda* that the United States has a good faith obligation to ensure that when it ratifies a non-self-executing treaty those treaty obligations are fully enforceable in domestic law.

This section demonstrates that the varied nature and usage of declarations, along with the overlap between understandings and declarations, can lead to confusion and uncertainty. More clarity and simplicity is needed in this area of law. One possible solution would be to amend the VCLT to add a definition of a declaration

---

109. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (U.S. reservations, understandings and declarations are available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec)). Professor Galbraith's recent work suggests that whether a State agrees to dispute settlement before the ICJ has more to do with the way the dispute settlement clause is framed within the treaty (i.e., as an opt in or opt out clause) rather than with rational choice theory. Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT'L L. 309, 314-15 (2013).

110. ICCPR, *supra* note 55 (U.S. reservations, understandings and declarations are available as part of ICCPR Status, UN Treaty Collection, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en)).

111. See, e.g., *Human Rights Committee considers report of the United States*, U.N. HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER (March, 14 2014), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383&LangID=E>.

and to specify the legal effect of declarations. Another possibility would be for the United Nations General Assembly to more formally adopt the International Law Commission's *Guide to Practice on Reservations to Treaties*, perhaps giving it more persuasive legal authority, and charging it with addressing the issue of understandings more specifically. Either of these actions would bring more clarity to this area of the law.

The ILC's work on treaty conditions continues as of this writing. The author urges the ILC to expand its work to identify and define other types of conditions beyond simply reservations and interpretive declarations. For example, the United Nations Treaty Collection Definitions recognizes several other types of declarations besides just interpretive declarations, as follows:

Declarations that are intended to have binding effects could be classified as follows:

- (a) A declaration can be a treaty in the proper sense. [Example omitted.]
- (b) An interpretative declaration is an instrument that is annexed to a treaty with the goal of interpreting or explaining the provisions of the latter.
- (c) A declaration can also be an informal agreement with respect to a matter of minor importance.
- (d) A series of unilateral declarations can constitute binding agreements.<sup>112</sup>

Clarifying and defining the legal effect of different types of declarations will help treaty parties understand what their legal obligations are, as well as those of their treaty partners. It would also help courts and other tribunals tasked with interpreting a treaty to better understand and apply the parties' treaty obligations.

In addition, the ILC could examine the use of "understandings" in state practice and make recommendations as to whether such conditions should be given recognition under international law. If the ILC were to conclude that "understandings" should be given recognition, it could also opine as to the weight or effect of such conditions on States' treaty obligations.

### ***3. Are conditions more frequently added to certain types of treaties?***

Having examined the types of conditions and their frequency of use in the aggregate, this next section considers whether there is a correlation between the addition of conditions and the treaty's subject matter. In this regard, the data demonstrates clear differences in the occurrence of conditions depending in the subject matter of the treaty. The United States is most likely to add conditions to

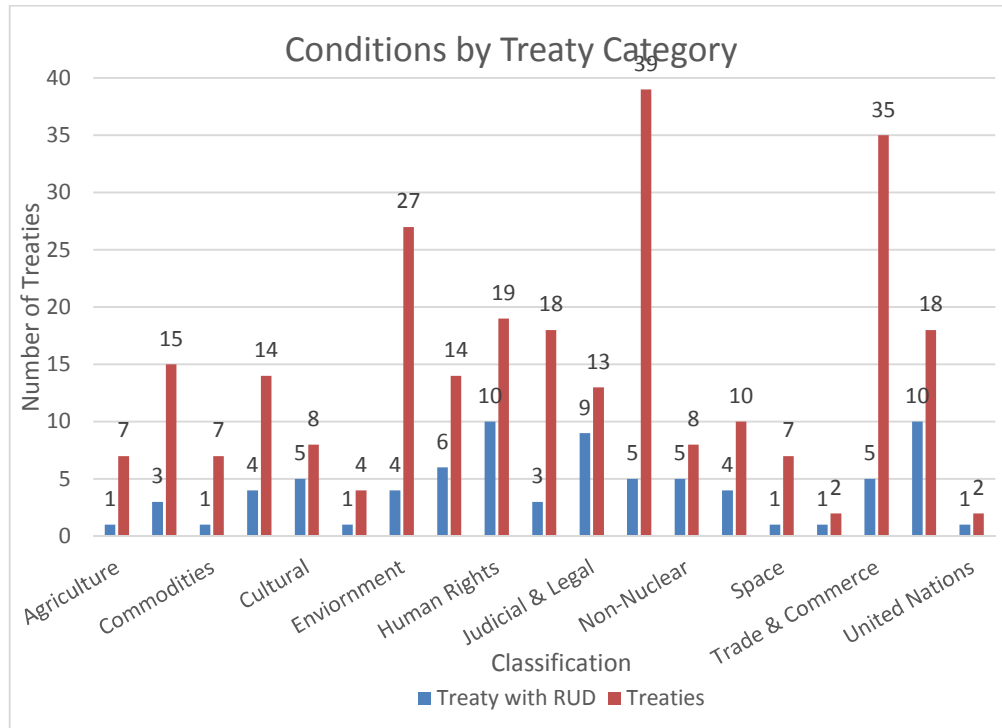
---

112. *Definition of key terms used in the UN Treaty Collection*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1\\_en.xml#declarations](https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#declarations) (last visited Feb 21, 2016).



multilateral treaties relating to judicial and legal matters (9 of 13 or 69%); cultural matters (5 out of 8 or 62%); non-nuclear weapons (5 of 8 or 62%); transnational crime (10 of 18 or 55%) and human rights (10 of 19 or 53%).<sup>113</sup> The remainder of the data is set forth in Graph C below.

**Graph C: Conditions by Treaty Category**



Of note, the following 11 categories of treaties (out of 30) have no conditions at all:

Subject Matter (number of treaties)

Antarctica (2)

Country-specific treaties (12)

Diplomatic and consular relations (3)

Energy (44)

Harmonization (12)

113. The United States also added conditions to one of two multilateral tax treaties and one of two treaties relating to the United Nations (50% each), but because the sample size is so small, it is difficult to draw any general conclusions from this data.

Health (6)  
NATO (24)  
Peace (1)  
Publications (4)  
Red Cross Conventions (1)  
Transportation (2)

The reasons States enter into treaties vary and may affect their interest in conditioning their treaty obligations. Most States enter into human rights treaties for expressive purposes, i.e., “to signal their adherence to global cultural norms.”<sup>114</sup> Many human rights treaties also codify customary international law norms such as the right to a fair trial or even *jus cogens* norms like the prohibition on genocide and, thus, States may not excuse themselves from compliance with these norms by way of treaty conditions. By contrast, trade treaties are based on reciprocity.<sup>115</sup> Each State agrees to abide by certain trade rules that open up domestic markets to foreign competitors so as to have equal access to foreign markets. For example, the United States may agree to reduce tariffs on computers from Japan if Japan agrees to reduce tariffs on U.S. beef. Thus, one might expect fewer conditions being attached to trade treaties because such conditions would upset the delicate bargain struck. The data tends to support this hypothesis in that the United States has added conditions to human rights treaties 53% of the time, while it has added conditions to trade treaties only 14% of the time.

Professor Kirgis has suggested States are less likely to add reservations to treaties that govern private conduct, citing the Convention on the International Sale of Goods (CISG) and the Hague Convention on International Child Abduction, as examples.<sup>116</sup> The CISG falls in the category of trade and commerce which, as noted above, has a low number of conditions, perhaps supporting Professor Kirgis’s statement. In fact, Article 98 of the CISG limits the ability of States parties to make reservations to only those expressly allowed by the CISG.<sup>117</sup> On the other hand, the Convention on International Child Abduction falls in the category of Judicial and Legal Matters, which is the subject matter category with the highest percentage of conditions. There are 13 treaties in this category; 9 of which contain conditions

---

114. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1, 12 (2012).

115. *Id.* at 30.

116. Frederic L. Kirgis, *Reservations to Treaties and United States Practice*, ASIL INSIGHT (May 4, 2003), available at <http://www.asil.org/insights/volume/8/issue/11/reservations-treaties-and-united-states-practice>. Professor Kirgis does not reference any empirical data in support of this statement.

117. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

(including 4 having reservations). Included in this category are four State Department sub-categories: judicial procedure (8), arbitration (2), and private international law (2), and investment disputes (1). There are no conditions attached to the treaties on private international law or investment disputes. Both arbitration treaties have conditions and 7 out of 8 treaties dealing with judicial procedure have conditions, including the Convention on International Child Abduction, to which the United States made two reservations. Many of these treaties actually regulate both public and private conduct; thus, it is difficult to support Professor Kirgis's assertion that treaties governing private conduct are less likely to have reservations or other conditions attached.

Professor Kennedy's data showed the Senate was most likely to add conditions to tax treaties (24%)<sup>118</sup> and least likely to add conditions to intellectual property and environmental treaties (7%).<sup>119</sup> The data singling out multilateral treaties is consistent with Professor Kennedy's conclusion that tax treaties are more likely to have conditions (1 out of 2 or 50%), as compared to intellectual property (16.6%) or environmental treaties (14.8%). However, tax treaties are much more likely to be bilateral than multilateral, so this particular sample size involving multilateral tax treaties is too small to allow definitive conclusions.

Professors Auerswald and Maltzman also examined both bilateral and multilateral treaties of the United States from 1947 to 2000 to determine whether the subject matter of the treaty affected the addition of reservations.<sup>120</sup> They divided the treaties into two groups: high politics and low politics.<sup>121</sup> "High politics" treaties are those involving security matters, such as peace agreements and nonproliferation treaties, as well as sovereignty issues, such as establishing borders or diplomatic relations between States.<sup>122</sup> "Low politics" treaties fall into three subcategories: (1) economic, dealing with trade coordination, double taxation and international labor standards, (2) legal treaties dealing with extradition and other legal standards of behavior, and (3) other treaties that establish behavioral norms such as human rights or environmental treaties.<sup>123</sup> They theorized U.S. Senators pay more attention to treaties dealing with matters of high politics than those dealing with low politics and, hence, Senators are more likely to attach reservations to high politics treaties

---

118. It is important to remember in comparing data that Professor Kennedy's data includes bilateral tax treaties, whereas the database for this article only includes multilateral tax treaties. Kennedy, *supra* note 76, at 124. His data set also ends in 1990, whereas the current data set includes an additional decade of data.

119. *See id.*

120. Auerswald & Maltzman, *supra* note 84, at 1103-04. Their data focused only on reservations, not other types of conditions.

121. *Id.* at 1103.

122. *Id.*

123. *Id.*

to clarify U.S. obligations.<sup>124</sup> Their theory was supported by their data, which demonstrated that Senators were more likely to add reservations to high politics treaties.<sup>125</sup>

When reservations are separated out from other types of conditions, the current data set confirms that reservations are more likely to be added to “high politics” treaties (23% of the time) as compared to “low politics” treaties (13% of the time). However, when all types of conditions are considered, the opposite pattern emerges. The current data set shows that Senators are more likely to add conditions to “low politics” treaties (20% of the time) than “high politics” treaties (11% of the time). One possible explanation for this difference may be that less cost is perceived in adding conditions other than reservations to treaties because they do not require a formal acceptance or objection from the other treaty parties and, therefore, do not pose as much risk to the treaty relationship. However, exactly why this difference appears will require more exploration by scholars in the future.

When considering why the Senate uses conditions for different types of treaties, in addition to issues of “high” politics versus “low” politics, prior scholarship suggests that the U.S. constitutional and electoral system make it necessary for the federal government to use flexible treaty arrangements for at least two reasons: (1) politicians must deliver on any promises made or they will face negative consequences at the ballot box,<sup>126</sup> and (2) the courts are predisposed to align domestic law with international commitments.<sup>127</sup> The ability to add conditions to treaties provides some flexibility in adapting those treaties to the U.S. legal and political system.

The data suggests another reason for the Senate’s use of conditions is respect for the structure of the U.S. government. Several of the more common types of conditions, including the federalism understanding, the non-self-executing declaration, and the dispute settlement reservations, attempt to preserve power for the state government or co-equal branches of the federal government. For example, the federalism understanding is clearly designed to allow states to continue to

---

124. *Id.* at 1100.

125. *Id.* at 1104. They also concluded bilateral treaties were more likely to have reservations than multilateral treaties because the stakes were lower with bilateral treaties.

126. B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT’L ORG. 829, 831 (2001).

127. Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT’L STUD. Q. 149, 151-52 (2009). Professor Helfer points out many treaties that prohibit reservations have adopted differential treatment regimes for less developed countries to encourage their participation in lieu of a system of unilateral reservations. Lawrence R. Helfer, *Not Fully Committed? Reservations, Risk and Treaty Design*, 31 YALE J. INT’L L. 367, 377 (2006). Politicians may also use foreign or international models to influence the making of domestic policy. See KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION* 18-19, 21-22, 175 (Oxford University Press, 1st ed. 2013).

exercise regulatory authority in areas of traditional state regulation, such as criminal law.<sup>128</sup> As international law reaches more and more into areas that used to be governed primarily or exclusively by domestic law, and the number of States in the international community has grown, more States may believe it necessary to modify treaty obligations to fit their various domestic legal systems.

In the United States' constitutional structure, the non-self-executing treaty doctrine gives both houses of Congress – not just the Senate – the ability to have a voice in how a treaty is implemented in the domestic legal system by requiring the passage of implementing legislation. The requirement of implementing legislation may lead to more “buy in” to the treaty obligations because the state representatives in the House as well as the Senate are educated about the treaty obligations and have a role in shaping how they will be implemented in domestic law. For example, when the United States joined the Convention Against Torture, the Senate added a declaration stating that Articles 1-16 of CAT are non-self-executing and included an “understanding” of the meaning of “lawful sanctions” that incorporated both domestic and international law.<sup>129</sup> The United States then passed legislation to implement CAT through the Torture Victims Protection Act.<sup>130</sup>

In addition to preserving U.S. sovereignty, reservations opting out of international dispute settlement mechanisms may act to preserve a role for the federal courts in interpreting and applying treaty obligations of the United States. For example, the United States entered reservations opting out of dispute settlement at the International Court of Justice under the United Nations Convention Against Illicit Traffic of Narcotic Drugs and Psychotropic Substances;<sup>131</sup> the Inter-American Convention Against Corruption;<sup>132</sup> the Convention on Early Notification of a Nuclear Accident;<sup>133</sup> the International Convention on the

---

128. See, e.g., Convention on Cybercrime, Nov. 23, 2001, 2296 U.N.T.S. 167.

129. United Nations Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

130. Torture Victim Protection Act, 28 U.S.C. § 1350 (1992). When considering ratification of the CAT, concern was expressed regarding the meaning of “lawful sanctions” in Article 1’s definition of torture. “A majority of the committee agrees with the Administration’s position that the term should be defined with reference to both domestic and international law and therefore has included the administration’s proposed understanding on this matter in the resolution of ratification.” CLAIBORNE PELL, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30 (1990), available at [http://detaineeataskforce.org/wp-content/uploads/2013/04/S.-Comm.-on-Foreign-Relations-Report-on-Convention-Against-Torture-and-Other-Cruel-Inhuman-or-Degrading-Treatment-or-Punishment-S.-Exec.-Rep.-No\\_.pdf](http://detaineeataskforce.org/wp-content/uploads/2013/04/S.-Comm.-on-Foreign-Relations-Report-on-Convention-Against-Torture-and-Other-Cruel-Inhuman-or-Degrading-Treatment-or-Punishment-S.-Exec.-Rep.-No_.pdf).

131. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95.

132. Inter-American Convention Against Corruption, S. EXEC. REP. NO. 106-15, 35 I.L.M. 724 (1996).

133. Convention on Early Notification of a Nuclear Accident, Sept. 26, 1986, S. EXEC. REP. NO. 100-20, 1439 U.N.T.S. 276.

Elimination of All Forms of Racial Discrimination;<sup>134</sup> the Genocide Convention;<sup>135</sup> and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.<sup>136</sup> The United States also added an “understanding” to its ratification of the Protocol on Restrictions on the Use of Mines, Booby-Traps and Other Devices in which it states, “The United States shall not recognize the jurisdiction of any international tribunal to prosecute a United States citizen for a violation of the Protocol or the Convention on Conventional Weapons.”<sup>137</sup> Similarly, with respect to the United Nations Convention to Combat Desertification, the United States added an “understanding” stating that it “declines to recognize as compulsory either of the dispute settlement means set out in Article . . . For any dispute arising from this Convention, the United States does not recognize or accept the jurisdiction of the International Court of Justice.”<sup>138</sup> Whether U.S. courts can hear cases involving treaty disputes will depend on jurisdictional issues and justiciability doctrines, such as political question and Act of State doctrines.

Respect for the structure of the U.S. government also helps to explain why the United States is more likely to add conditions to certain types of treaties. As noted above, the United States is most likely to add conditions to treaties dealing with judicial and legal matters, cultural matters, non-nuclear weapons, crime, and human rights. With the possible exception of some of the weapons treaties,<sup>139</sup> all of these areas are areas where the federal government shares much of its power with the state governments. Thus, it is understandable the Senate may wish to preserve a role for the states or for other branches of the federal government when consenting to a treaty that touches on these matters. In fact, Senators have made statements that support this theory.<sup>140</sup> The comments of other Senators, however, suggest that

---

134. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 110.

135. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 38.

136. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, T.I.A.S. 13094, 2173 U.N.T.S. 222.

137. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II), Oct. 10, 1980, S. EXEC. REP. NO. 106-2, 2048 U.N.T.S. 93.

138. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994, S. EXEC. REP. NO. 106-25, 1954 U.N.T.S. 3 [hereinafter Convention to Combat Desertification].

139. For example, the federal government generally controls issues relating to chemical and biological weapons.

140. For example, in explaining their opposition to U.S. ratification of U.N. Convention on the Law of the Sea, Senators Rob Portman and Kelly Ayotte made the following statement: “Unlike many international agreements, key provisions of the Law of the Sea treaty are drafted to be “self-executing,” meaning that certain tribunal judgments would automatically constitute enforceable federal law, without congressional legislation or meaningful review by our nation’s judiciary. . . . In other words, the treaty equates tribunal decisions with decisions of the U.S. Supreme Court. This means that private litigants will likely be able to invoke tribunal judgments as enforceable in U.S. courts —

they are opposed to any international agreement that would limit U.S. sovereignty regardless of the subject matter of the treaty.<sup>141</sup>

While respect for the U.S. Constitutional structure is appropriate, it can be taken too far, preventing the United States from entering into treaties that would be beneficial to the United States and the international community by securing reciprocal benefits and promoting the rule of law. Alternatively, differences in state and federal law may cause the United States to violate treaty obligations it does undertake.<sup>142</sup> As demonstrated by the examples of the CRC OP and the VCCR above, if the federal government does not sufficiently educate and monitor state implementation of treaty obligations, some states may not implement those obligations at all or may do so in inconsistent or conflicting ways. Accordingly, the United States will have to weigh in each case the value of joining the treaty against the possible encroachment on the traditional functions of state governments and the three branches of the federal government.

### ***B. Does a Prohibition on Reservations Hinder United States' Entry into a Treaty?***

Some treaties prohibit the making of any reservations to the treaty's text at all, or prohibit reservations except to specific treaty provision(s). Often, this prohibition results from the belief that the multilateral treaty is a "package deal."<sup>143</sup> The compromises reached during the negotiation process are hard won and to pick and choose among treaty provisions after the fact would upset the balance struck.<sup>144</sup> Other times, a prohibition on reservations is included because the treaty is legislative in nature, requiring uniform application.<sup>145</sup>

---

against the government and possibly against U.S. businesses. The United States will have no lawful choice but to acquiesce to tribunal judgments, however burdensome or unfair . . . [W]e are deeply concerned about the treaty's breadth and ambiguity, the inadequate U.S. input in the treaty's adjudicative bodies, and the automatic enforcement of tribunal judgments in the United States . . . The real issue is not *whether* the United States will defend its maritime rights, but rather *who* will have the final say on the scope of those rights. We simply are not persuaded that decisions by the International Seabed Authority and international tribunals empowered by this treaty will be more favorable to U.S. interests than bilateral negotiations, voluntary arbitration, and other traditional means of resolving maritime issues." Press Release, *Senators Portman and Ayotte Sink Law of the Sea Treaty* (July 16, 2012), available at <http://www.portman.senate.gov/public/index.cfm/press-releases?ID=a886f01e-1b08-4c51-bf7e-4bad33194c0b>.

141. See discussion *infra* Part III. B.

142. For example, some U.S. Senators have refused to give their advice to the CEDAW because of concerns regarding domestic legal conflicts.

143. See Kirgis, *supra* note 117.

144. See, e.g., Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154; *infra* Annexes at 412.

145. See Kirgis, *supra* note 117.

This section examines some well-known multilateral treaties the United States has not joined, as well as those it has, to determine how a prohibition on treaty reservations may affect U.S. foreign policy. It also considers whether certain types of treaties are more likely to contain a prohibition on reservations.

In this latter regard, the U.N. Final Clauses of Multilateral Treaties Handbook states, “Treaties in the environmental field often prohibit reservations.”<sup>146</sup> The data does not seem to support this conclusion, at least for the environmental treaties to which the United States is a party because only 4 of these 27 multilateral treaties relating to the environment prohibit reservations.

In fact, the most common type of treaty with a prohibition on reservations are treaties dealing with trade and commerce (15). This is consistent with the idea that reservations should not be permitted where the treaty is considered a “package deal.” The second most common type of treaty with a prohibition on reservations are treaties dealing with marine and maritime matters (10), with intellectual property treaties taking a close third (8). 16 out of 30 different subject matter categories have at least one treaty that prohibits reservations.<sup>147</sup> Thus, it is difficult to conclude there is a correlation between a treaty’s subject matter and whether the treaty will allow reservations.

The UN Handbook also observes that, “other treaties implicitly prohibit reservations,” giving the example of international labor conventions that prohibit reservations to bring uniformity to labor conditions worldwide.<sup>148</sup> While none of the labor treaties in the database expressly prohibit reservations, the obligation to unconditionally accept the obligations of the ILO Convention has been interpreted to mean that reservations to ILO conventions are prohibited.<sup>149</sup>

Over the years, the Senate Foreign Relations Committee has expressed concern regarding treaties that prohibit reservations, stating, “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.”<sup>150</sup> This statement raises the question as to whether a prohibition on reservations is in fact a hindrance to treaty ratification or whether there are other factors at play that cause a treaty not to receive a favorable recommendation of the Senate Foreign Relations Committee.

In addition to the treaties in the database to which the United States is a party,

---

146. FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK, *supra* note 46, at 47.

147. *See infra* Annex B at 416 (displaying a list of treaties by subject matter that prohibit reservations).

148. *See* FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK, *supra* note 46, at 47-48. The labor treaties are an example of legislative treaties where uniformity is desired.

149. *See* EBERE OSIEKE, CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOUR ORGANIZATION 20 (1985); *cf.* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 122 (3d ed. 2013). Interpretive declarations may be allowed, however.

150. CONGRESSIONAL RESEARCH SERVICE, *supra* note 9, at 125.



over the last five decades, U.S. presidents have recommended adoption of an additional 22 multilateral treaties that are still pending in the Senate.<sup>151</sup> There are several well-known recent examples where the Senate thus far has failed to give its advice and consent to major multilateral treaties, despite urging from the executive branch. For example, several presidents from both the political parties have urged ratification of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>152</sup> but the Senate has not complied.<sup>153</sup> Likewise, President Obama's Administration has urged ratification of the Convention on the Elimination of Discrimination against Women (CEDAW)<sup>154</sup> and the United Nations Convention on the Rights of Persons with Disabilities<sup>155</sup> and yet the Senate again has not given its advice and consent.

Often, these treaties have stalled in the Senate Foreign Relations Committee, where powerful Committee Chairmen or other influential Senators on the Committee have opposed adoption of these treaties. For example, when Senator Jesse Helms was Chairman of the Senate Foreign Relations Committee from 1995-2001, he was famous for using his position and the Senate's rules to stall or block adoption of a number of multilateral treaties, such as the Comprehensive Test Ban Treaty,<sup>156</sup> the Kyoto Protocol,<sup>157</sup> CEDAW,<sup>158</sup> the U.N. Convention on the Rights of the Child,<sup>159</sup> and the International Criminal Court.<sup>160</sup>

- 
151. *Treaties Pending in the Senate*, U.S. DEPT. OF STATE (Apr. 27, 2015), <http://www.state.gov/s/treaty/pending/>.
152. President George W. Bush, *President's Statement on Advancing U.S. Interests in the World's Oceans*, THE WHITE HOUSE (May 15, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070515-2.html>; Andrew Burt, *Why U.S. Senate should ratify Law of the Sea Treaty*, THE HILL (May 25, 2012, 4:20 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/229559-why-us-senate-should-ratify-law-of-the-sea-treaty>.
153. Zach Colman, *Republican Senator says sea treaty might pass after election*, THE HILL (Aug. 17, 2012, 2:32 PM), <http://thehill.com/policy/energy-environment/244101-murkowski-sea-treaty-might-pass-in-lame-duck>.
154. *Thirtieth Anniversary of the United Nations' Adoption of CEDAW*, U.S. DEPT. OF STATE (Dec. 18, 2009), <http://www.state.gov/r/pa/prs/ps/2009/dec/133893.htm>.
155. *Disabilities*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/disabilities> (last visited Feb 24, 2016).
156. WILLIAM A. LINK, *RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM* 462 (2008).
157. *Implications of the Kyoto Protocol on Climate Change, Hearings before the S. Comm. on Foreign Relations*, 105th Cong., 2d Sess. (1998) (statement of Sen. Helms).
158. S. EXEC. REP. NO. 107-9, at 14 (2002).
159. S. RES. 133, 104th Cong. (1995).
160. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations of the S. Comm. on Foreign Relations*, 105th Cong. (1998) (statement of Sen. Helms). Some research suggests the likelihood of a reservation being attached to a treaty does not increase when the Chair of the Senate Foreign Relations Committee is from a different political party than the President. Auerswald and Maltzman, *supra* note 84, at 1106 (Further examination of the connection between political parties and treaty ratification will likely be the subject of a later article).

In explaining their opposition to certain treaties, some Senators have argued U.S. law is already sufficient and these new legal norms are not needed; or to adopt the treaty would be to give up a measure of sovereignty and to subject the United States to unwanted international scrutiny and criticism.<sup>161</sup> These Senators suggest the only types of treaties the United States should sign are those that advance “a specific U.S. security or economic interest.”<sup>162</sup> Some Senators also argued the treaty might infringe on U.S. law.<sup>163</sup> In particular, some Senators suggested they must add conditions “to protect the Constitution” and objected to subjecting the United States to review by the ICJ.<sup>164</sup>

Adding one or more conditions to a treaty during the Senate ratification process could ameliorate some of these concerns. For example, both CEDAW and the Disabilities Convention allow reservations. If the United States wanted to ratify these treaties to demonstrate its commitment to these human rights issues, it could do so subject to certain conditions that modify objectionable treaty obligations, so long as the conditions are not contrary to the object and purpose of the treaty.

Research suggests imprecision or ambiguity in treaty language can lead to greater cooperation.<sup>165</sup> It allows States that join to interpret the treaty to fit each domestic legal system. The use of treaty conditions may operate in the same way. In other words, the United States could join more treaties because of the ability to adapt the treaty to its own needs through the addition of conditions. Use of conditions is not an objectionable practice per se, so long as the practice is transparent and the conditions are not contrary to the basic object and purpose of the treaty or international law more generally. Of course, the downside of adding conditions is less uniformity in international legal obligations. Persons affected by the treaty may not have the exactly same rights under the same treaty in different

---

161. S. EXEC. REP. NO. 112-6, at 17-19 (2012), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112erpt6/html/CRPT-112erpt6.htm>; See also Press Release, *Senators Portman and Ayotte Sink Law of the Sea Treaty*, *supra* note 141.

162. S. EXEC. REP. NO. 112-6, at 19.

163. *Id.* These Senators incorrectly assert that ratification of the Disabilities Convention would lead to that Convention having the same legal authority as the U.S. Constitution. Of course, the U.S. Supreme Court in *Reid v. Covert*, 354 U.S. 1 (1957), long ago established the U.S. Constitution trumps any inconsistent treaty obligations; S. EXEC. REP. NO. 101-30, at 4 (1990), available at [http://detaineeetaskforce.org/wp-content/uploads/2013/04/S.-Comm.-on-Foreign-Relations-Report-on-Convention-Against-Torture-and-Other-Cruel-Inhuman-or-Degrading-Treatment-or-Punishment-S.-Exec.-Rep.-No\\_.pdf](http://detaineeetaskforce.org/wp-content/uploads/2013/04/S.-Comm.-on-Foreign-Relations-Report-on-Convention-Against-Torture-and-Other-Cruel-Inhuman-or-Degrading-Treatment-or-Punishment-S.-Exec.-Rep.-No_.pdf). Similar concerns were also raised and addressed during the ratification process for the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

164. *Convention Against Torture: Hearing before the S. Comm. on Foreign Relations*, 101st Cong. (1990) (statements of Sen. Helms and Pressler), available at <http://babel.hathitrust.org/cgi/pt?id=pst.000016129474;view=1up;seq=1>.

165. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000).

States. In addition, such practice may also hinder the ability of the international community to raise the lowest common denominator. Thus, use of conditions to modify treaty obligations must be done with care.

Adding conditions is not possible with respect to all of these pending treaties, however. Some, such as UNCLOS and the Comprehensive Nuclear Test Ban Treaty, do not allow any reservations.<sup>166</sup> As noted above, the Senate Foreign Relations Committee has expressed concern regarding treaties that prohibit reservations.<sup>167</sup> Despite that sentiment, the United States has joined 59 treaties that prohibit reservations. Thus, a prohibition on reservations does not appear to be a bar to U.S. joinder where the U.S. Senate determines the overall benefits of the treaty outweigh its concern for the lack of reservations. Additionally, the use of declarations to clarify matters rather than reservations may assist in overcoming such concerns. Once again, however, care must be exercised to insure that these “declarations” are not reservations in disguise.

There are also occasions when a treaty prohibits reservations, yet the United States attached conditions that may attempt to circumvent the prohibition.<sup>168</sup> For example, Article 37 of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, prohibits reservations.<sup>169</sup> Yet the United States entered conditions to clarify that the United States does not have financial obligations in certain cases; it does not need to implement any plans pursuant to the treaty; and it does not accept the dispute resolution means outlined in the treaty.<sup>170</sup> Similarly, Article 27 of the Additional Protocol II to the Treaty of February 14, 1967 for the Prohibition of Nuclear Weapons in Latin America also prohibits reservations.<sup>171</sup> Upon signing the treaty, the United States made a statement regarding several matters under the treaty, including the effect of the treaty on the status of its claims to certain

---

166. Several States have, however, entered interpretive declarations to various articles of UNCLOS, some of which may actually be considered improper reservations. See Michael Wood, *Institutional Aspects of the Guide to Practice on Reservations*, 24 *EURO. J. INT'L L.* 1099 (2013).

167. CONGRESSIONAL RESEARCH SERVICE, *supra* note 9, at 125.

168. See, e.g., Convention for the Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, SEN. EXEC. REP. 106-14, 1870 U.N.T.S. 167.

169. Convention to Combat Desertification, *supra* note 139.

170. See Status of Treaties, Chapter XXVII: Environment, 10. United Nations Convention to Combat Desertification In Those Countries Experiencing Serious Drought and/or Desertification, Particularly In Africa, U. N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-10&chapter=27&lang=en#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-10&chapter=27&lang=en#EndDec).

171. Additional Protocol II to the Treaty of February 14, 1967 for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, T.I.A.S. 10147, 634 U.N.T.S. 362, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20634/volume-634-I-9068-English.pdf>.

territories, as well as regarding the interpretation of certain treaty provisions.<sup>172</sup> If any of these conditions operate to modify the United States' treaty obligations, they may actually be reservations and thus prohibited by the express terms of the respective treaties.

No clear patterns emerge from the data on treaties that prohibit reservations. The data does not conclusively show a clear relationship between a prohibition on reservations and U.S. ratification or non-ratification of the treaty. Nor does the data clearly support a relationship between the subject matter of the treaty and the likelihood the treaty will prohibit reservations.

#### **IV. Is U.S. treaty practice consistent with international law and foreign practice?**

The Vienna Convention on the Law of Treaties expressly permits reservations to treaties under certain circumstances.<sup>173</sup> And, increasingly, customary international law recognizes the use of certain kinds of declarations.<sup>174</sup> International law does not, however, formally recognize “understandings,” as demonstrated by the lack of mention of understandings in the VCLT, the UN Treaty Collection definitions, or the ILC Guide.

Despite a lack of formal recognition for some of these conditions, all three types of these conditions are used in international treaty practice to a varying extent. The use of reservations is a common practice as is demonstrated by the reservations attached to many of the treaties in the UN Treaty Collection.<sup>175</sup> Declarations of various types also appear to be quite common.<sup>176</sup> By contrast, conditions labelled “understandings” are quite rare in international treaty practice.

##### ***A. The Use of “Understandings” in International Treaty Practice***

On the assumption that the more parties to the treaty, the more likely it is parties will attach conditions, the author surveyed every treaty in the database with more than 150 parties, a total of 91 treaties.<sup>177</sup> The majority of treaties have no

---

172. *See id.*

173. VCLT, *supra* note 25, art. 19.

174. *See* Definition of Key Terms Used in UN Treaty Collection, *supra* note 53; Guide to Practice on Reservations to Treaties, *supra* note 43.

175. *See* Multilateral Treaties Deposited with the Secretary-General, U. N. TREATY COLLECTION, <https://treaties.un.org/pages/ParticipationStatus.aspx> (last visited Feb. 24, 2016).

176. *See id.*

177. The author made this assumption because the large number of treaty parties means greater opportunities to add conditions and a greater variety of domestic legal systems into which the treaty must

“understandings” at all. In fact, only 18 out of the 91 treaties surveyed contain a condition labelled “understanding.”

The United States was by far the most frequent user of conditions labelled “understanding,” accounting for the addition of “understandings” to 10 of those 18 treaties.<sup>178</sup> Only six States other than the United States added a condition to one of these 91 treaties labelled “understanding” and five of those States only added an understanding a single time. Besides the United States, Kuwait was the only other State to add “understandings” to more than one treaty. It added the same understanding relating to its non-recognition of Israel to six different treaties. Thus, the United States and Kuwait combined account for 16 out of 18 “understandings.” Similar to Kuwait, Sudan was the only State out of 190 parties that added an “understanding” to the Vienna Convention on Diplomatic Relations (VCDR), to the effect that its ratification of the VCDR does not imply its recognition of Israel.<sup>179</sup> Out of 174 parties to the 1979 International Convention Against the Taking of Hostages, Dominica was the only State to add an “understanding” seeking to clarify that “the Convention prohibits the taking of hostages in any circumstances, even those referred to in article 12.”<sup>180</sup> There were three treaties where another State joined the United States in adding a condition labelled “understanding” – Argentina added an “understanding” to the 1966 International Covenant on Civil and Political Rights; Bangladesh added an “understanding” to the 1999 International Convention for the Suppression of Terrorist Bombings; and the Netherlands added an “understanding” to the 1998 United Nations Convention Against Illicit Trafficking in Narcotic Drugs.

In light of the fact that a few other States have occasionally attached “understandings” to their treaty ratification documents, it cannot be said the United

---

be accommodated, thus necessitating an increased need to use conditions to tailor treaty obligations to fit the variety of domestic legal systems.

178. These treaties are: The Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography; the International Convention for the Suppression of Financing of Terrorism; the International Convention for the Suppression of Terrorist Bombing; the International Plant Protection Convention; the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly Africa; the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 1984 Convention Against Torture; the 1966 International Covenant on Civil and Political Rights; and the 1998 United Nations Convention Against the Illicit Trafficking in Narcotic Drugs and Psychotropic Substances; and the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships.
179. Status of Treaties, Chapter III: Privileges and Immunities, Diplomatic and Consular Relations, etc., 3. Vienna Convention on Diplomatic Relations, U. N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-3&chapter=3&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en) (last visited Feb. 24, 2016). In fact, non-recognition of Israel was the most common understanding added by other states, accounting for 10 of the understandings.
180. International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205, *available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-5&chapter=18&lang=en#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-5&chapter=18&lang=en#EndDec).

States' use of "understandings" in treaty practice is completely inconsistent with international practice. However, it may certainly be said the United States is a more frequent user of understandings than other States.<sup>181</sup> It is also true that even taking into account U.S. practice, the use of "understandings" as such is quite rare in international treaty practice.

### ***B. The Use of "Declarations" in International Treaty Practice***

The use of "declarations" to explain a State's "understanding" of the meaning of a treaty provision is much more common. Using the same 91 treaties, there were 80 States that entered "declarations" explaining their "understanding" of a particular treaty provision.<sup>182</sup> For example, there are no conditions labelled "understandings" for the Vienna Convention on Consular Relations, a treaty with 177 parties, although Egypt added a statement in which it explains its "understanding" of who is entitled to immunity under the Convention.<sup>183</sup> Other examples demonstrating the confusion between declarations and understandings may be found in conditions attached to the International Convention for the Suppression of Terrorist Bombing. At least seven parties to that treaty made "declarations" stating their "understanding" of how particular treaty terms should be interpreted or applied.<sup>184</sup> Thus, as in U.S. treaty practice, there is much overlap between declarations and understandings in international treaty practice. The lack of international uniformity

---

181. One of the explanations as to why the United States is a more frequent user of conditions may be its constitutional system for treaty ratification, which gives the U.S. Senate the opportunity to add new conditions during the advice and consent process after the U.S. President has negotiated the terms of the treaty. In this regard, the U.S. system is unlike some other Westminster-style democracies (e.g., the United Kingdom, Canada, and Australia), which provide for little role for parliamentary participation in the treaty ratification process, although that may be changing. See Joanna Harrington, *Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making*, 55 INT'L & COMP. L.Q. 121, 122-23 (2006). Interestingly, despite Ireland's historical ties to Britain, Ireland follows the U.S. model, with a constitutional provision requiring parliamentary approval of treaties. Constitution of Ireland of 1937, art. 29.6. Likewise, South Africa has amended its constitution to provide a role for parliament in the treaty-making process. See S. AFR. CONST., art. 231, 1996.

182. See *infra* Annex C.

183. Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-6&chapter=3&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en).

184. For example, the Republic of Moldova added the following "Declaration": "The Republic of Moldova declares its understanding that the provisions of article 12 of the International Convention for the Suppression of Terrorist Bombings should be implemented in such a way as to ensure the inevitability of responsibility for the commission of offenses falling within the scope of the Convention, without prejudice to the effectiveness of the international cooperation on the questions of extradition and legal assistance." Status of Treaties, Chapter XVIII: Penal Matters, 9. International Convention for the Suppression of Terrorist Bombings, U. N. TREATY COLLECTION, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-9&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&lang=en).

in adding “understandings” and “declarations” to treaties further underscores the need for greater clarity and simplicity in this area.

Unlike understandings, the United Nations’ publications do recognize and define “declarations” but also recognize different types of declarations.<sup>185</sup> In particular, the 2011 ILC *Guide to Practice on Reservations to Treaties* gives explicit recognition to “interpretive declarations.”<sup>186</sup> As a result, the U.S. Senate is on more solid legal ground when it attaches a declaration to a treaty. That said, U.S. treaty practice may not always be completely consistent with international law. If the United States attaches a declaration affecting the United States’ legal obligations under the treaty, that declaration may need to be treated as a reservation.<sup>187</sup> Thus, the most important factor is the legal effect of a particular condition.

### ***C. Other Types of Conditions Used in International Treaty Practice***

In addition to conditions labelled as “reservations,” “understandings,” or “declarations,” there are a few other behaviors observed in international treaty practice regarding the use of conditions that add to the confusion in this field. There are some occasions when States have not used any of the more common labels discussed above. Instead, states attached a “statement” or an unlabeled sentence to their acceptance of treaty obligations which sets forth their “understanding” or “interpretation” of a particular treaty term. In this regard, out of the 91 treaties surveyed, 35 States attached some form of a statement purporting to interpret an aspect of a particular treaty. The actual intent and effect of these statements is unclear. Depending on the substance of the statement, they may be intended to operate only domestically or they may be intended to have effect internationally. Once again, if these statements actually modify the State’s legal obligations, they should be treated as reservations.

### ***D. Suggestions for Reforms***

Given the rarity of “understandings” in international treaty practice, the

---

185. See Definition of Key Terms Used in UN Treaty Collection, *supra* note 53; Guide to Practice on Reservations to Treaties, *supra* note 43. The ILC Guide to Practice is not binding international law in itself, but some of its provisions do reflect binding treaty provisions or customary international law rules. See also Alain Pellet, *The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur*, 24 EURO. J. INT’L L. 1061, 1073 (2013). Its purpose, however, is to assist States in formulating and responding to reservations and interpretive declarations. See Michael Wood, *Institutional Aspects of the Guide to Practice on Reservations*, 24 EURO. J. INT’L L. 1099 (2013).

186. Guide to Practice on Reservations to Treaties, *supra* note 43, § 1.2.

187. VCLT, *supra* note 25, art. 2.1.

inconsistent usage of the term, and the overlap with the use of “declarations,” it would be prudent for the United States and the international community to simplify treaty practice by discontinuing the use of “understandings” and other “statements” in the treaty ratification process and rely solely on reservations and declarations to condition their treaty obligations. If a State uses a different label in its instrument of ratification, the treaty depository body could return the instrument of ratification for clarification.

The international community should also more formally adopt agreed upon definitions of “declarations” to clarify how they may be used and the legal effect of such declarations. One helpful change would be to change the label “declaration” to something else like “opt in/opt out clause” when a State is accepting or declining the jurisdiction of an international court or a treaty body, such as the ICJ or the ICCPR’s Human Rights Committee to help separate out and clarify the types of conditions being added.

In addition, all conditions, regardless of their labels, should be notified to other treaty parties so they may assess for themselves whether the conditions actually affect a party’s legal obligations under the treaty. If there is a legal effect, notification allows the other treaty parties an opportunity to determine whether and how to respond.

## **V. Legal Effect of Senate Conditions on Other Branches of the Federal Government**

Another concern related to the use of conditions in U.S. treaty practice is their legal effect domestically. When the U.S. Senate attaches one or more conditions to a treaty undergoing the ratification process, is the President bound to include that condition when depositing the instrument of ratification? Must the President abide by the condition when implementing the treaty? Does the form of the condition matter? Are those conditions binding on U.S. courts involved in treaty interpretation at a later date? If not, what weight should the courts give those conditions? All of these questions are addressed in this next section.

### ***A. Is the Executive bound by Senate Conditions?***

The Restatement (Third) of U.S. Foreign Relations Law § 314 takes the position that because the President can only make a treaty with the advice and consent of the Senate, the President is bound by any reservations or understandings of a treaty’s meaning expressed by the Senate in the advice and consent process. In this regard, the Restatement provides:



(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.

While the Restatement is not binding law, it has long been considered persuasive authority.<sup>188</sup> On the other hand, the Third Restatement has not been updated in many years. The American Law Institute has begun a project to draft a fourth Restatement of Foreign Relations Law taking into account substantial changes in international law and foreign relations practice since 1987.<sup>189</sup> It may be time to reconsider U.S. foreign relations practice with respect to the use of conditions as part of this process.

Professor Glennon argues the President is bound by at least certain conditions imposed by the Senate. In his view, the Senate has the power to determine how a treaty will be implemented in U.S. law, thus giving it the power to enter binding conditions upon its consent, at least with respect to the self-executing or non-self-executing nature of the treaty.<sup>190</sup> Professor Henkin likewise has opined that if the Senate proviso is a condition of its consent to a treaty, the treaty can only take effect subject to that condition.<sup>191</sup>

Other scholars take a different view. Professors Riesenfeld and Abbott believe the Senate lacks the constitutional authority to attach certain kinds of legally binding conditions.<sup>192</sup> In their view, the Senate only has the unicameral power to consent to the ratification of treaties, not to pass domestic legislation.<sup>193</sup> A Senate declaration is not part of the treaty itself; rather, it is an expression of a U.S. policy or position; thus it is akin to a stand-alone piece of domestic legislation. The President implements the treaty as part of his Article II powers as Chief Executive Officer.<sup>194</sup> According to Riesenfeld and Abbott, U.S. courts are not bound by Senate conditions, because pursuant to Article VI of the U.S. Constitution, only the treaty

---

188. WINER ET AL., INTERNATIONAL LAW LEGAL RESEARCH 242-43 (2013).

189. Publications, AM. L. INST., <https://www.ali.org/publications/> (last visited Feb 24, 2016).

190. Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition its Consent to Treaties*, 67 CHI.-KENT L. REV. 533 (1991).

191. HENKIN, *supra* note 48, at 135.

192. PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES 3 (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994).

193. *See id.*

194. U.S. CONST. art. II, § 2, cl. 2.

itself is part of the Supreme Law of the Land.

The U.S. Constitution expressly gives the Senate a role in the treaty ratification process, phrased as giving its “advice and consent” to the treaty.<sup>195</sup> Having the Senate participate in the treaty-making process gives some representative and democratic legitimacy to a process increasingly handled by the Executive Branch.<sup>196</sup> Accordingly, it is both appropriate and desirable for the Senate to express its consent or lack thereof by voting on the treaty. It is also appropriate and desirable for the Senate to give the President its “advice” regarding the treaty. However, common meanings of the word “advice” include “view,” “opinion,” “counsel” or “recommendation,”<sup>197</sup> words which generally do not connote a legally binding obligation. Thus, the position of scholars such as Professors Glennon and Henkin may be too absolute in this regard and there may be room for Presidents to treat at least some of the Senate’s conditions as persuasive, but not legally binding. It may make more sense to treat reservations added by the Senate through the advice and consent process as legally binding because they are intended to alter the United States’ legal obligations under the treaty. However, conditions with less clear legal implications, such as declarations and understandings, may be entitled to less deference and treated with less authority.

In fact, there is precedent for a President failing to include a Senate condition during the ratification process and the court not enforcing that condition.<sup>198</sup> In the *New York Indians* case, the Senate gave its advice and consent subject to a condition that, *inter alia*, the treaty would have no force or effect until it was submitted to and freely accepted by certain Indian bands or tribes.<sup>199</sup> The President did not include the condition in his proclamation of ratification or in the published copy of the treaty.<sup>200</sup> The U.S. Supreme Court held the condition was not part of the treaty because the other treaty parties did not have notice of it. Hence, the U.S. government could not rely on that condition in subsequent litigation over the treaty’s meaning and effect.<sup>201</sup> This case suggests the President has the final say as to whether to include certain kinds of condition proposed by the Senate.

It is generally agreed that once a treaty is concluded, the Senate’s role is largely

---

195. *Id.*

196. THE FLUID STATE: INTERNATIONAL LAW AND NATIONAL LEGAL SYSTEMS 57-58 (Hilary Charlesworth et al. eds., 2005) (discussing concerns regarding democratic deficits in treaty-making).

197. Advice, OXFORD ENGLISH DICTIONARY, *available at*: <http://www.oxforddictionaries.com/definition/english/advice>

198. *See New York Indians v. United States*, 170 U.S. 1 (1898).

199. *See id.* at 21-22.

200. *See id.* at 22-23.

201. *See id.*

over.<sup>202</sup> For example, the Restatement (Third) of Foreign Relations acknowledges the President responds to conditions added by other States parties to the treaty without consultation with the Senate.<sup>203</sup> The Senate also has no ongoing role in treaty interpretation.<sup>204</sup> Professor Glennon takes the position that the President interprets treaties, not the Senate, as long as executive interpretation does not contradict Senate condition(s).<sup>205</sup> According to Professor Glennon, if the President disagrees with the Senate's "understanding," the time to make that objection is before completion of the ratification process.<sup>206</sup>

Professor Glennon's approach in this regard does seem to be a practical one even if not completely consistent with the *New York Indians* case. If the President has doubts about the legal effect of a particular condition attached by the Senate, it would make sense for the President to attempt to resolve those doubts prior to completing the ratification process to avoid uncertainty about the United States' legal obligations, both domestically and internationally.

However, one can envision a situation where the executive branch does not anticipate a particular legal issue arising and the executive is called upon to implement the treaty in a way that causes it to question the condition originally imposed by the Senate. In such a case, it may be that the president, as the Chief Executive Officer and the person charged with making treaties, believes the condition is not consistent with the United States' legal obligations under the treaty because of the treaty's interpretation and application by the treaty parties over time. If the executive branch chooses to adopt a different interpretation of the treaty and the Senate disagrees with the actions of the executive branch, the Senate could seek judicial review to resolve the matter.<sup>207</sup>

In sum, there is strong support for the idea that the President is bound by reservations attached by the Senate. There is also support for the idea that the President should, at a minimum, take other types of conditions proposed by the Senate seriously and should even follow them most of the time out of respect for the Senate's role in the treaty-making process. However, there should also be room for the President to disagree with the Senate and, in the case of conflict, it may be argued that the President's view with respect to conditions other than reservations

---

202. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 326 cmt. a (AM. LAW INST. 1987); see *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

203. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 314 cmt. c (AM. LAW INST. 1987).

204. HENKIN, *supra* note 48, at 136.

205. Glennon, *supra* note 4, at 534; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 326(1) (AM. LAW INST. 1987) ("The President has the authority to determine the interpretation of an international agreement asserted by the United States in its relation with other states.").

206. Glennon, *supra* note 4, at 535.

207. That is, assuming such a lawsuit could survive any justiciability challenges such as the political question doctrine. See *Goldwater v. Carter*, 100 S. Ct. 533 (1979).

should prevail because he is the one charged with making and implementing treaties and acts as the “sole organ” of the United States in foreign affairs.<sup>208</sup>

***B. Are U.S. Courts bound by Conditions Added by the Senate?***

In the U.S. constitutional system of checks and balances, it has long been established that the Supreme Court’s role is to say what the law is.<sup>209</sup> Because treaties are part of the supreme law of the land, the Supreme Court should also be the final arbiter of the meaning of a treaty in U.S. law.<sup>210</sup> Thus, it is appropriate for the Supreme Court to have the final say regarding the meaning of a treaty in U.S. domestic law.

Despite this well-established principle of judicial review, U.S. courts have often been reluctant to seriously examine the validity of conditions added by the Senate to a treaty. Commonly, the courts defer to the political branches on the ground that the executive and legislative branches are the ones charged with making and carrying out U.S. foreign policy.<sup>211</sup> For example, there are multiple cases challenging the U.S. interpretation and application of the Convention Against Torture (CAT). In those cases, the courts refused to adopt an interpretation different from the “shared understanding” of the executive and legislative branches as set forth in an understanding proposed by the President and adopted by Senate in the ratification process.<sup>212</sup> The President and Senate’s understanding alters the definition of torture under the CAT to, *inter alia*, add a requirement of specific intent to inflict severe physical or mental pain or suffering and to require “prolonged mental harm.”<sup>213</sup> Neither of these requirements are found in the definition of torture

---

208. See *United States v. Curtiss-Wright*, 299 U.S. 304 (1936).

209. *Marbury v. Madison*, 5 U.S. 137 (1803).

210. U.S. CONST. art. VI, cl. 2.

211. See, e.g., SLOSS ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 253 (2011) (discussing U.S. Supreme Court’s deference to Executive Branch post-World War II to project U.S. power).

212. See, e.g., *Auguste v. Ridge*, 395 F.3d 123, 131 (3d Cir. 2005) (applying a “specific intent” requirement under CAT and its implementing legislation); see also, *U.S. v. Belfast*, 611 F.3d 783, 806 (11th Cir. 2010); *Reyes Sanchez v. Ashcroft*, 261 F. Supp. 2d 276, 291-92 (S.D.N.Y. 2003).

213. The particular understanding reads as follows:

II. The Senate’s advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another

in CAT.<sup>214</sup> The Committee Against Torture specifically requested the United States withdraw its understanding and modify its “restrictive interpretation” of CAT in favor of one consistent with the treaty, suggesting that the U.S. interpretation may even be contrary to the object and purpose of the treaty and therefore invalid.<sup>215</sup> Despite this admonition, thus far, no U.S. court has been willing to examine the validity of the understanding.<sup>216</sup> Likewise, U.S. courts were reluctant to consider the validity of the U.S. reservation to the ICCPR preserving the right to impose the death sentence on juveniles,<sup>217</sup> prior to the U.S. Supreme Court’s decision that such practice was unconstitutional.

A few courts have been more willing to examine conditions added to other treaties by the Senate. In these cases, courts have stated that although the Senate has declared that particular treaty provisions are not self-executing, that is a determination to be made by the courts.<sup>218</sup> This practice raises the question of what sources the courts should take into account when performing treaty interpretation as well as the question of the relevant weight to be given to potentially competing sources that may be used in the process. Because reservations actually modify the legal effect of a treaty provision and must be communicated to and either accepted or rejected by the other treaty parties, there is no question that a valid reservation must be implemented by a U.S. court.<sup>219</sup> Understandings and declarations are more complicated, however. Each may profess to interpret one or more treaty provisions in a particular way. What weight should a court give to such interpretations? Should

---

person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Status of Treaties, Chapter IV: Human Rights, 9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=IV-9&chapter=4&lang=en#EndDec](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=IV-9&chapter=4&lang=en#EndDec).

214. CAT requires instead that the act be intentional (not that it is intended to inflict severe physical or mental harm) and does not require “prolonged” mental harm. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 130, art. (1)(a).
215. Comm. against Torture, *Concluding observations on the third to fifth periodic reports of the United States of America*, U.N. Doc. CAT/C/USA/CO/3-5, at 2 (Nov. 20, 2014), available at <http://www.state.gov/documents/organization/234772.pdf>.
216. *See, e.g.*, cases listed *infra* note 219.
217. *See, e.g.*, *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002).
218. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Ahmed v. Goldberg*, 2001 WL 1842398 (N. Mar. I. 2001) (interpreting CAT); *see also* *Igartua de la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (colloquy regarding proper role of courts with respect to treaty interpretation between Boudin, C.J., for majority, and Howard, J., in dissent).
219. A reservation that is contrary to the object and purpose of the treaty would not be valid and should not be enforced by a court. VCLT, *supra* note 25, art. 19. This argument was made with respect to the reservation preserving the use of the juvenile death penalty under the ICCPR, but U.S. courts refused to question the validity of the reservation. *See Domingues v. Nevada*, 114 Nev. 783, 785 (Nev. 1998).

it matter whether the interpretation was proposed by the Executive branch or the Senate? To what extent should U.S. courts take into account differing interpretations by other treaty parties?

Both the VCLT<sup>220</sup> and domestic U.S. law adopt the principle that courts should begin treaty interpretation by considering the ordinary or plain meaning of the text of the treaty in the context in which the words are used.<sup>221</sup> However, both international and domestic law allow resorting to other sources to aid in treaty interpretation, recognizing that the words of the treaty reasonably may be susceptible to multiple meanings.<sup>222</sup> In U.S. law, aids to treaty interpretation include the history of the treaty, the negotiations, and the practical construction adopted by the parties.<sup>223</sup> The VCLT includes in its general rules of interpretation, “(a) any subsequent agreement between the parties regarding 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.”<sup>224</sup> The VCLT also permits as a supplementary means of interpretation recourse to the preparatory work of the treaty and the circumstances surrounding its conclusion.<sup>225</sup>

There are thus many possible aids in treaty interpretation that are accepted both domestically and internationally. An interpreting court must therefore make choices regarding which aids to rely upon and how much weight to give to each one. It is noteworthy that neither the Supreme Court’s jurisprudence nor the VCLT expressly mentions ratification debates by a domestic legislature as a permissible aid to construction, suggesting that U.S. Senate interpretations of a treaty provision not codified into a formally notified and accepted condition are entitled to little weight.<sup>226</sup>

Historically, U.S. Supreme Court justices sometimes rely on materials produced during the Senate advice and consent process, such as presidential transmittal documents and hearing testimony before the Senate Foreign Relations Committee,

---

220. VCLT, *supra* note 25, art. 31.

221. *See, e.g.*, *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325(1) (AM. LAW INST. 1987).

222. VCLT, *supra* note 25, art. 31-32; *Eastern Airlines*, 499 U.S. at 535.

223. *Eastern Airlines*, 499 U.S. at 542-44.

224. VCLT, *supra* note 25, art. 31(3); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325(2) (AM. LAW INST. 1987).

225. VCLT, *supra* note 25, art. 32.

226. It could be argued these ratification debates are part of the “practical construction” of the treaty; however, the phrase “practical construction” is probably better read as referring to post-ratification practice, not pre-ratification debates over the treaty’s meaning.

when interpreting treaties to which the United States is a party.<sup>227</sup> However, these references are generally to statements by Executive Branch officials describing the understandings reached during the negotiation process with foreign parties. The Justices have not referred to statements by one or more U.S. Senators regarding their understanding of the treaty's meaning.<sup>228</sup>

In *United States v. Stuart*, the Supreme Court's majority opinion relied on the absence of any discussion of a different meaning of a treaty provision in the Senate record to support its interpretation of the words in a bilateral tax treaty with Canada.<sup>229</sup> Justice Scalia objected to the Court's reference to the Senate record, pointing out the dangers of doing so.<sup>230</sup> In particular, he pointed out the illegitimacy of relying on a unilateral U.S. position rather than the understanding of the treaty parties as reflected in its text.<sup>231</sup> Statements made by individual Senators may not reflect the understanding of the Senate as a whole and certainly cannot be said to reflect the views of the Executive Branch or of the other treaty partners.<sup>232</sup>

Justice Scalia's position in his concurring opinion in *Stuart* is the better one and is supported by legal opinion. The Office of Legal Counsel (OLC) of the U.S. Department of Justice authored an opinion in 1987 on the "Relevance of Senate Ratification History to Treaty Interpretation".<sup>233</sup> In that opinion, OLC opined, "the most relevant extrinsic evidence of a treaty's meaning are the exchanges between the parties negotiating it, i.e., the President and the foreign power."<sup>234</sup> It further opined that while the Senate's deliberations during the ratification process should not be ignored, "the ratification record is not the determinative source of evidence as to the treaty's meaning under domestic law."<sup>235</sup>

This opinion has further support in § 326(2) of the Restatement (Third) of Foreign Relations Law, which takes the position that: "[c]ourts in the United States have the final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by

---

227. David J. Bederman, *Medellin's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529, 534-35 (2008). See, e.g., *Volkswagenwerk*, 486 U.S. 713-14 (1988) (Brennan, J., concurring); *Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 530-38 (1987).

228. See *Volkswagenwerk*, 486 U.S. at 713-14; *Industrielle Aerospatiale*, 482 U.S. at 530-38; *Medellin v. Texas*, 552 U.S. 491, 510 (2008).

229. *United States v. Stuart*, 489 U.S. 353, 366-68 (1989).

230. *Id.* at 371, 373-74 (Scalia, J., concurring).

231. *Id.* at 374.

232. Of course, statements by individual Senators do not carry legal authority in the way that a formal condition voted on favorably by the Senate and included in a resolution of ratification would.

233. *Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28 (1987).

234. *Id.*

235. *Id.*

the Executive Branch.”<sup>236</sup> This section of the Restatement does not refer to Senate understandings of the meaning of a treaty.

All of the above suggests the Executive branch’s interpretation of a treaty is due deference because of its role in the treaty’s negotiation. Conversely, the Senate’s interpretation of the treaty does not carry the same weight unless it is expressed by way of a formal “understanding” or “declaration” that is accepted by the President during the ratification process and incorporated into the instrument of ratification, thus alerting the other treaty parties. It is only through a formally expressed, written “understanding” or “declaration” that courts can be certain the proffered interpretation reflects the view of the majority of the Senate. And, if that condition is accepted by the President, it may reflect a shared understanding of both political branches. If the Senate’s interpretation affects the United States’ legal obligations vis-à-vis its treaty partners, it must also be communicated to and accepted by those treaty partners to become effective. In fact, the better practice is to notify all conditions to all treaty parties to allow for independent assessment of the legal effect and an opportunity to respond.

Because the U.S. Constitution charges the political branches with conducting foreign relations,<sup>237</sup> their opinions as to the nature of the treaty obligations undertaken by the United States are worthy of deference. And, as expressed above, the President’s view is due more deference than the Senate’s in light of his constitutional role in making and implementing treaties. Thus, if the Senate’s interpretation appears patently wrong, perhaps based on a plain reading of the text or in light of contrary interpretations by other treaty partners, there may be good reason for the courts to adopt a different interpretation. Not only would such a rule respect the Supreme Court’s role in the U.S. Constitutional system, it would also allow the Court to ensure the United States’ interpretation is in accord with other foreign or international interpretations of that same treaty language, bringing uniformity to international law, as well as ensuring the United States is not in breach of its international obligations.

---

236. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 326(2) (AM. LAW INST. 1987); *see also* *El Al Israel Airlines Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) (“Respect is ordinarily due to reasonable views of the Executive Branch concerning the meaning of an international treaty.”); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) (“the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight.”).

237. U.S. CONST. art. II, § 2, cl. 2.



**C. Are treaty partners or international tribunals bound by conditions added by the United States?**

If the United States' treaty partners have notice of a condition at the time the United States joins the treaty, it would seem they have an opportunity to accept or object to that condition and decide whether to be in a treaty relationship with the United States.<sup>238</sup> In this regard, the *ILC Guide to Practice on Reservations to Treaties* contains provisions regarding the acceptance of or objections to declarations similar to treaty reservation practices under Article 20 of the VCLT. If the States belonging to the treaty fail to object to a condition in a timely manner, they should not be able to object to that condition at a later date. This position would be consistent with Article 20 of the VCLT with respect to reservations.<sup>239</sup>

One problem, however, is that some declarations and understandings are never notified to the United States' treaty partners. This non-disclosure is premised on the theory that it is not necessary because these conditions only affect the domestic implementation of the treaty. However, if those conditions affect the United States' legal obligations arising from the treaty in a way that is objectionable to its treaty partners, it seems reasonable that the treaty partners would not be bound by those conditions if not given previous notice and opportunity to object.<sup>240</sup> If the United States (or any treaty party) wishes to rely on a treaty condition, it should be required to notify that condition to all States party to the treaty. In that way, each State has an opportunity to assess the potential legal effect of the condition and respond thereto.

## VI. Conclusions and Recommendations

The data utilized for this article demonstrates that the United States Senate regularly attaches a variety of conditions to U.S. participation in multilateral treaties. The Senate's use of conditions has risen dramatically over time, from 11-12% in the 1960s and 1970s, to 34% in the 2000s. The data also demonstrates that there are fairly significant differences in the use of conditions depending on the issue area or type of treaty, with treaties relating to judicial and legal matters, cultural matters, non-nuclear weapons, criminal behavior and human rights issues attracting some of the highest numbers of conditions. Furthermore, the data shows U.S. treaty practice with respect to the use of conditions is not entirely consistent

---

238. See *Guide to Practice on Reservations to Treaties*, *supra* note 43, at §§ 2.9.1, 2.9.2.

239. VCLT, *supra* note 25, art. 20.

240. See *Coplin v. U.S.*, 6 Cl. Ct. 115, 139-40 (1984); see also discussion of *New York Indians*, *supra* pp. 403-405.

with international practice, especially the United States' use of understandings.

The use of conditions in current U.S. treaty practice creates many legal uncertainties. As a result, treaty partners may be unsure what international legal obligations the United States has undertaken. Likewise, persons in the United States relying on U.S. treaty commitments may be unclear about their rights and obligations under certain treaty provisions. Accordingly, this article suggests reforms in the use of conditions in treaty practice. More specifically, the U.S. Senate should no longer use conditions other than reservations and declarations. Both reservations and declarations are better understood in international treaty practice than understandings or other types of conditions. Additionally, the international legal community should bring more clarity to the meaning and legal effect of "declarations" attached to treaties by adopting mutually agreed upon definitions and States should conform their practice to the newly agreed upon rules. And, like reservations, all declarations should be notified to treaty partners to allow them to decide whether the declaration actually alters the bargain struck under the treaty.

**Annex A**  
**Subject Matter Classifications of Treaties**

**Agriculture**

**Antarctica**

**Aviation**

Aviation  
International Civil Aviation Organization  
Open Skies

**Country Specific (CS)**

Cambodia  
Germany  
Laos  
Vietnam

**Diplomatic & Consular Relations (DC)**

Consuls  
Diplomatic Relation

**Communications**

Satellite Communication Systems  
Telecommunication

**Cultural**

World Heritage  
Cultural Property  
Cultural Relations

**Development & Assistance (DA)**

Economic and Technical Cooperation and Development  
Food Aid

**Energy**

Atomic Energy

Energy

**Environment and Conservation (EC)**

Conservation  
Desertification  
Environmental Modification  
Environment  
Forestry  
Marine Pollution  
Polar Bears  
Pollution

**Finance**

Finance  
Financial Institutions

**Harmonization**

Postal Arrangements  
Weights and Measurements

**Health**

**Human Rights (HR)**

Child Rights  
Genocide  
Human Rights  
Labor  
Migration  
Racial Discrimination  
Refugees  
Slavery  
Torture  
Women-Political Rights

**Individual Commodities**

Coffee  
Copper  
Grains  
Timber  
Wheat

Wine

**Intellectual Property (IP)**

Copyright  
Intellectual Property  
Industrial Property  
Patents  
Phonograms  
Publications  
Technology Transfer

**Judicial and Legal (JL)**

Arbitration  
Law, Private International  
Judicial Procedure  
Investment Disputes  
International Court of Justice

**Marine and Maritime Matters (MM)**

Containers  
Fisheries  
Hydrography  
Marine Science  
Maritime Matters  
Seabeds

**Peace**

Relations (Treaty of Amity and Cooperation in Southeast Asia)

**NATO**

**Non-Nuclear Weapons (NW)**

Arms Limitation  
Biological Weapons  
Chemical Weapons  
Gas Warfare  
Weapons

**Nuclear (N)**

Nuclear Weapons- Non-Proliferation  
Nuclear Waste  
Nuclear Test Ban  
Nuclear Safety  
Nuclear Materials  
Nuclear Free Zone- Latin America  
Nuclear Accidents

**Red Cross Conventions**

**Space**

Astronauts  
Space

**Taxation**

**Trade and Commerce (TC)**

Customs  
Trade and Commerce

**Transportation**

Automotive Traffic  
Transportation-Foodstuffs

**Transnational Crime**

Bribery  
Computer Crime  
Corruption  
Organized Crime  
Prisoner Transfer  
Narcotic Drugs  
Terrorism

**United Nations**

Peacekeeping  
United Nations

**Annex B**  
**Treaties that Prohibit Reservations**

<u>Subject matter category of treaty</u>	<u>Number of treaties</u>
Aviation	4
Communications	1
Environmental and Conservation	4
Finance	3
Harmonization	1
Health	1
Human Rights	1
Individual Commodities	2
Intellectual Property	8
Judicial and Legal	3
Marine and Maritime Matters	10
Non-nuclear weapons	1
Nuclear	1
Trade and Commerce	15
Transnational Crime	2
Transportation	1

**Annex C**  
**Number of Treaties Having Understandings by Country**

Country	Understandings	Declarations Clarifying an “understanding”	Other state- ment clarifying an “under- standing”
Algeria		II	
Antigua & Bar- buda		I	
Argentina	I		
Austria		III	II
Bahamas			I
Bangladesh	I		
Barbados		I	I
Belarus			I
Belgium		II	
Belize		I	
Brazil			I
Canada		II	
Chile			I
Colombia		I	
Costa Rica		I	
Denmark		I	
Dominica	I		
El Salvador		I	
Egypt			I
Fiji		I	I
France		II	II
Germany		III	U
Ghana			U
Grenada		I	
Holy See		III	
Hungary		I	
India			I
Iran		II	
Israel		II	I
Italy		I	I
Japan		I	
Kiribati			
Korea		I	
Kuwait	IIII	III	III
Lao Peoples Dem Rep.		II	



Lesotho			I
Libya			I
Liechtenstein		III	
Luxembourg		I	
Malaysia		III	I
Malta		I	
Mexico			II
Moldova		I	
Monaco		I	
Nauru		I	
Nepal			I
Netherlands	I	IIII	
Oman		I	II
Papua New Guinea		I	
Romania			I
Russia		I	
Samoa		I	
Saudi Arabia			I
Singapore		IIII	
Spain			I
Sudan	I	I	
Sweden		I	
Switzerland		II	
Syria			I
Thailand		IIII	
Tonga		I	
Turkey		II	
Tuvalu		I	
United Arab Emirates			I
UK		II	I
US	IIIIIIII		
Venezuela		I	
Yemen			I
<b>Totals</b>	<b>21</b>	<b>80</b>	<b>35</b>