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Chapter 6

National Treaty Law and Practice: United States

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I. INTRODUCTION

The Constitution of the United States was adopted at Philadelphia in 1787. A terse document, it consists of seven articles -- four of which pertain to the treaty power. Article I vests all legislative powers in a Congress; section 10 of that Article prohibits any state from entering into a "treaty, alliance, or confederation." Article II vests the executive power in a President. Sections 2 and 3 assign certain powers to the President, including the "power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Article III vests the judicial power of the United States in the courts; section 2 provides "[t]he judicial power shall extend to all cases. . . arising under. . . treaties made, or which shall be made" under the authority of the United States. Article VI, paragraph 2, known as the supremacy clause, provides "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby. . . ."

The members of the Federal Convention designed the Constitution to include checks and balances to enable each of the branches to protect itself against encroachments by one or both of the other branches. Indeed, the very purpose of adopting the Constitution was to replace a failed governmental structure under the 1777 Articles of Confederation. This ineffectual document created no executive power. All legislative and treaty-related power were vested in the Continental Congress and the states.

Given the concise nature of the relevant Constitutional provisions and the absence of any experience in dealing with the respective roles of the executive and the Congress under the old system, the treaty-making provisions of the Constitution constituted a *tabularasa* in a number of respects.¹ Over the years, the United States has developed a variety of means for the making of international agreements. Knowledge of this evolving practice in the realm of treaty-making over the past two centuries is necessary fully to understand the current treaty law of the United States. Many of the sections that follow set out that practice to illuminate the Constitutional provisions and to demonstrate how the law is being applied as we approach the twenty-first century.

II. DISCUSSION ITEMS

A. What is an International Agreement?

For international law purposes, a treaty is an international agreement between two or more states

or international organizations that is intended to be legally binding and is governed by international law.² It does not matter whether a treaty is embodied in a single instrument or in two or more related instruments or whatever its particular designation may be.

From a Constitutional law perspective, a treaty is an international agreement (regardless of title, designation, or form) whose entry into force with respect to the United States takes place only after the Senate has given its advice and consent pursuant to Article II, section 2, clause 2, of the Constitution. A treaty must, of course, deal with matters of international concern and not contravene the Constitution of the United States.³

In addition to Government-to-Government agreements, Agency-to-Agency agreements, such as a mapping agreement between the Coast and Geodetic Service of the United States and the Hydrographic Office of the Navy Department of Sri Lanka, are generally considered to be international agreements for the purposes of reporting under the Case-Zablocki Act and printing in the *United States Treaties and Other International Acts Series*. The same rules will not necessarily apply to implementing agreements. A program agreement under an umbrella agreement, such as a science and technology agreement that established a series of weather research projects involving tracing of upper air currents with balloons, might be reported and published depending on the significance of the program and its duration. However, agreements with respect to individual "launches" would not be.

With respect to Government-to-Government agreements, like most other countries, the United States has a long-standing practice of agreeing to documents that are non-binding from a legal perspective. Two of the better known examples from United States practice during the first half of the century are the 1907-08 "Gentlemen's Agreement" between the United States and Japan relating to immigration⁴ and the Joint Declaration made on August 14, 1941 by President Franklin Roosevelt and Prime Minister Churchill, a document more commonly known as the Atlantic Charter.⁵

Over the last decade, the number of such documents has shown a marked increase. The lawyer to whom such instruments are brought for review needs to alert a client that even though the document does not give rise to legal obligations, it may give rise to political ones. In commenting on bilateral memoranda of agreement between the Governments of Israel and the United States, Secretary Kissinger noted: "The fact that many provisions are not by any standard international commitments does not mean, of course, that the United States is morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and they engage the good faith of the United States so long as the circumstances that gave rise to them continue. But they are not binding commitments of the United States."⁶

Although oral agreements are unusual and are not governed by the Vienna Convention on the Law of Treaties, such agreements are concluded from time to time. United States law requires that such agreements be reduced to writing and reported to the Congress in accordance with the Case-Zablocki Act.⁷ On the other hand, unilateral acts are not considered to be international agreements by the United States.

B. Executive Authorization and Approval Procedures

In 1955, the Department of State issued Department Circular No. 175 on the negotiation and signature of treaties and other international agreements. The circular, which has been amended on several occasions, currently appears as Chapter 700 in Volume XI of the Department of State's Foreign Affairs Manual.⁸ While several sections of the Circular 175 address the reporting requirements of the original Case-Zablocki Act, the role of the Department of State in coordinating the treaty function is not addressed in detail. Moreover, as some other agencies saw it, the Department's regulation rested solely on the Department's authority and had no binding force outside the Department of State.

When the Congress reviewed compliance with the original Case-Zablocki Act of 1972, it found that the State Department did not have at its disposal the necessary authorities to ensure better reporting. To remedy that problem, the Congress adopted the first in a series of amendments that strengthened the Department's coordination function. The most important changes were: (1) including a provision making clear that the Secretary of State had broad power to control the conclusion of an agreement by another department or agency even when that other department or agency had independent statutory authority to conclude agreements of a specific kind; (2) giving the Secretary of State power to determine for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of the Act; and (3) providing that the President, through the Secretary of State, would promulgate such rules and regulations as might be necessary to carry out the provisions of the Act.⁹ Those rules and regulations were issued on July 13, 1981.¹⁰

Section 181.4 provides that the Secretary of State is responsible, on behalf of the President, for ensuring that all proposed international agreements of the United States are fully consistent with U.S. foreign policy objectives. Any agency wishing to conclude an international agreement must transmit to the interested bureau or office in the Department of State, or to the Office of the Legal Adviser, for consultation pursuant to Section 181.4, a draft text or summary of the proposed agreement, a precise citation of the Constitutional, statutory, or treaty authority for such agreement, and other background information as requested by the Department of State. It continues: "If a proposed agreement embodies a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in an approved budget, the agency proposing the agreement shall state what arrangements have been planned or carried out concerning consultation with the Office of Management and Budget for such commitment. The Department of State should receive confirmation that the relevant budget approved by the President provides or requests funds adequate to fulfill the proposed commitment, or that the President has made a determination to seek the required funds."¹¹

In order to avoid duplication, an exception to the procedures set out above is provided in subsection (g): "The consultation requirement shall be deemed to be satisfied with respect to proposed international agreements of the United States about which the Secretary of State (or ... designee) has been consulted in his capacity as a member of an interagency committee or council established for the purpose of approving such proposed agreements. Designees of the Secretary of State serving on any such inter-agency committee or council are to provide as soon as possible to the interested office or bureaus of the Department of State and to the Office of the Legal Adviser copies of draft texts or summaries of such proposed agreements and other background information as requested."¹²

C. Legislative Approval

Most agreements entered into by the United States do not require approval of the legislature prior to ratification or other form of acceptance. A relatively small number of these agreements are sole executive agreements entered into by the President under certain of his independent powers -- for example, the commander in chief power under the Constitution. On the other hand, if the agreements relate to matters solely within the power of the legislature, he will need approval unless the Congress has delegated the power to make agreements in those fields or is considered to have acquiesced over a long period of time in the President's concluding certain agreements without the necessity of seeking specific approval.¹³

Preauthorization

Even though the practice of delegating authority to conclude agreements dates back to 1792, the

extent to which the Congress has provided that the President, the Executive Departments, or agencies may or should conclude international agreements is not widely recognized. Some evidence of the scope of delegations may be gleaned from a review of the entries in the 1997 general index to the *United States Code Annotated* under the heading "international agreements", which extend for more than 22 column inches. A more comprehensive search would likely demonstrate that there are literally hundreds of such authorizations. They include agreements limiting importation of agricultural commodities into the United States, agricultural research and extension programs, air commerce and safety, agreements by the Coast Guard establishing ice-breaking facilities in waters other than those subject to jurisdiction of the United States, and negotiations between the President of the United States and the Government of Canada on the Trans-Canadian pipeline. Agreements concluded under these delegations are sometimes referred to as Congressional-Executive Agreements.

Preauthorization, Subject to Review or Possible Further Action

Statutes authorizing negotiation of certain types of agreements require the transmittal of those agreements to the Congress prior to their entry into force; others require specific approval of the texts. For example, the Atomic Energy Act of 1954, *as amended*, requires the transmittal of Nuclear Cooperation Agreements to Congress for 90 continuous session days to afford it an opportunity to disapprove by joint resolution. The first 30-day period is for consultation with the foreign affairs committees "concerning the consistency of the proposed agreement" with the requirements of the Atomic Energy Act; the next 60-day period is for the Congress to consider whether to adopt a joint resolution disapproving the agreement.¹⁴ The Fishery Conservation and Management Act of 1978, *as amended*, requires a 60-day waiting period for Governing International Fisheries Agreements, but no specific approval.¹⁵ (However, in the application of that statute, the Congress has frequently approved agreements in lieu of waiting for the running of the prescribed period.) The Social Security Amendments of 1977 establish a similar procedure for social security agreements between the Social Security Administration and foreign social security systems.¹⁶ Under the International Development and Food Assistance Act of 1978, *as amended*,¹⁷ and the Enterprise for the Americas Initiative Act of 1992,¹⁸ international agreements concerning or resulting in debt relief must lie before the Congress for 30 days before entry into force. A more limited provision of this character appears in the National Aeronautics and Space Administration Authorization Act of 1988 which required "the Intergovernmental Agreement currently being negotiated between the United States Government" and other governments, as well as any "memoranda of understanding being negotiated between counterpart agencies in Canada, Japan, and Europe concerning the detailed design, development, construction, operation, or utilization of the space station," to be submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Science, Space, and Technology of the House of Representatives 30 days prior to their entry into force.¹⁹

Statutory Approval of Agreements That Have Not Previously Been Authorized

The Congress in the exercise of its legislative function may authorize approval of other agreements negotiated by the President where he cannot rely on his independent Constitutional powers. A significant example is Public Law 92-448, a Joint Resolution approving and authorizing the President to accept an Interim Agreement Between the United States and the U.S.S.R. on Certain Measures with Respect to Limitation of Strategic Offensive Arms.²⁰ Section 2 of the law embodies the standard model: "The President is hereby authorized to approve on behalf of the United States the interim agreement between the United States of America and the Union of Soviet Socialist Republics on certain measures with respect to the limitation of strategic offensive arms, and the

protocol related thereto, signed at Moscow on May 26, 1972"21

A more recent example dates from 1992, when a number of international organizations based in Washington approached the State Department about concluding an agreement on state and local taxation of foreign employees of international organizations. The initiative was a result of an amendment by the State of Maryland of its income tax laws with retroactive effect. The organizations pointed out that foreign employees of the World Bank were exempt by treaty and that their non-citizen employees had exemption from U.S. Federal tax on income earned from the organizations which employ them but that the International Organizations Immunities Act, on which the Federal tax exemption was based, does not extend to state taxation.

The President has no independent Constitutional authority to exempt non-citizen employees working for international organizations from state income taxes. However, the Congress has such power; and the President and the Senate acting pursuant to the treaty power have such power.²² As a first step, an agreement between the United States and the interested international organizations was negotiated. It was then decided to seek authorization from the Congress for the President to conclude such an agreement (rather than to send the text to the Senate for advice and consent to ratification). In April 1994, the Congress authorized the President "to bring into force for the United States the Agreement on State and Local Taxation of Foreign Employees of Public International Organizations, which was signed by the United States on April 21, 1992"23 On May 14, 1994, he did so.

"Fast Track" -- Special Procedures for Trade Agreements

The Omnibus Trade and Competitiveness Act of 1988 and the Trade Act of 1974, *as amended*, contain special provisions relating to Congressional approval of agreements on the elimination of non-tariff barriers and bilateral agreements regarding tariff and non-tariff barriers. Those procedures, known informally as "fast track" procedures, require that the President notify the Congress concerning the initiation of negotiations and submit the text of the agreement for legislative approval.²⁴

Under the Constitution, the Congress has power over foreign commerce. During the 1930's, the Congress passed reciprocal trade agreements acts that gave the President authority to negotiate tariff reductions with our trading partners. The special procedure known as "fast track" was put in place during the Ford Administration to strengthen the partnership between the President and the Congress by streamlining the approval process for trade agreements. Under those procedures, the President notifies the Congress that he is opening negotiations. He submits the text of an agreement to the Congress, each House of which must vote to accept or reject the proposal within sixty legislative days. No amendments are permitted.²⁵ The most searching examination of whether fast track procedures could be used in lieu of Senate advice and consent to approve a trade agreement occurred in connection with approval of the Uruguay Round Agreements in 1994. The literature includes memoranda from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Ambassador Michael Kantor, United States Trade Representative, advising that the Uruguay Round Agreements did not require approval by the Senate as a treaty, but could constitutionally be executed by the President and approved and implemented by Act of Congress;²⁶ a letter to the President from Professor Lawrence H. Tribe dated September 12, 1994; a memorandum to Mr. Dellinger and the Senate majority and minority leaders, dated October 5, 1994, from Professor Tribe; and the Prepared Statement of Professor Tribe before the Senate Committee on Commerce, Science, and Transportation on October 18, 1994 -- all asserting that Senate advice and consent was constitutionally necessary.²⁷ Following the hearings, the Senate passed the Uruguay Round legislation. The legislation was approved December 8, 1994.²⁸

Fast track authority subsequently lapsed. On September 16, 1997, the President transmitted to

the Congress the Export Expansion and Reciprocal Trade Agreements Act of 1997 to renew fast track procedures for trade agreements requiring congressional approval and implementation.²⁹ As of the date this chapter was forwarded to the publisher, however, neither house had passed the Act.

D. Reservations

While the Congress in approving an international agreement by statute may include reservations, most reservations are made by the Senate when it is sharing the treaty-making power with the President under Article II, section 2, clause 2 of the Constitution.

The treaty power clause of the Constitution does not mention reservations. However, the Senate has exercised the power of attaching conditions to its resolutions of advice and consent to treaties since 1795.³⁰ The conditions included by the Senate in its resolutions of advice and consent to ratification fall into four general categories: reservations, understandings, declarations, and provisos. A reservation is defined in the Vienna Convention on the Law of Treaties as "a unilateral statement, however phrased or named, made by a State when . . . signing [or] ratifying . . . a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."³¹ Clearly, an amendment of a treaty is a reservation under that definition. Other conditions -- such as declining to accept the obligations in a given article -- also constitute reservations if they modify the legal effect of the treaty. An understanding differs from a reservation in that it is a statement or other declaration relevant to the application or interpretation of the treaty that is not intended to exclude or modify the provisions of a treaty.³² Declarations are usually statements of the Senate's position, opinion or intentions on matters relating to issues raised by a particular treaty, but not to its specific provisions. However, in practice, the distinction between an understanding and a declaration is frequently blurred. A proviso is a condition that is intended to operate solely in the domestic sphere. Provisos often specify that the President should not deposit an instrument of ratification of a treaty until the necessary implementing legislation has been enacted. If the Senate includes in its resolution of ratification a reservation or a statement of understanding or a declaration ascribing a particular meaning to a treaty, and the President ratifies the treaty subject to those conditions, the treaty becomes effective in domestic law subject to those conditions. Of course, whether or not the Senate has attached reservations to its advice and consent, the President is free to change his mind and decide not to ratify a treaty.

Recent examples of Senate amendments that materially changed the texts agreed to by the parties include those made to the 1977 Panama Canal Treaty³³ and the Supplementary Treaty to the Extradition Treaty of July 8, 1972 between the United States and the United Kingdom.³⁴ More limited and finely-tuned conditions, some in the form of understandings, appear in the Senate's resolutions of advice and consent to other bilateral treaties, such as the 1991 Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income between the United States and Barbados.³⁵ Although it is frequently said that reservations are not made to bilateral treaties, a recent study shows that the Senate made reservations to 13 bilateral treaties over the period 1975 to 1985.³⁶ A reservation to a bilateral treaty requires acceptance by the other party.³⁷

Reservations in respect of multilateral treaties raise different issues. Since it is much more difficult to get all the parties to a multilateral treaty to agree to an amendment, it is not practicable for the Senate to try to amend multilateral treaties in connection with the advice and consent process. On the other hand, the Senate frequently makes reservations to multilateral treaties and has on several occasions in recent years emphasized its opposition to the conclusion of multilateral treaties that prohibit reservations. For example, Article XXII of the Chemical Weapons Convention³⁸ prohibits reservations to the Convention. The first of twenty-eight conditions that the Senate incorporated in its resolution of advice and consent to ratification read as follows: "(1) EFFECT OF

ARTICLE XXII. -- Upon the deposit of the United States instrument of ratification, the President shall certify to the Congress that the United States has informed all other States Parties to the Convention that the Senate reserves the right, pursuant to the Constitution of the United States, to give its advice and consent to ratification of the Convention subject to reservations, notwithstanding Article XXII of the Convention."³⁹ Condition 17, entitled "Constitutional Prerogatives," included findings and a Sense of the Senate resolution on its Constitutional right to make reservations to treaties.⁴⁰

Reservations to multilateral treaties may be made at the time of signature or ratification. However, the United States generally makes reservations only at the latter stage. Reservations of other countries to multilateral treaties are not sent to the Senate for its advice and consent. Under the regime of reservations established by the Vienna Convention on the Law of Treaties, a contracting State can accept or object to reservations made by another Party. If a State has not expressly accepted a reservation, it will be presumed, under article 20 of the Vienna Convention, to have done so if it shall have made no objection within a period of twelve months after it was notified by the depository of the reservation or by the date on which it expressed its consent to be bound, whichever is later.⁴¹ If the other party objects, it may oppose the entry into force of the treaty between itself and the reserving State.

E. Consultation with the Legislature

The Founding Fathers clearly intended the "advice and consent" language in Article II, section 2, clause 2 of the Constitution to require that the President consult with the Senate prior to the opening of treaty negotiations. In August, 1789, President Washington met twice with the Senate to consider the terms of a treaty to be negotiated with the Southern Indians. The meetings were regarded as unsatisfactory by both sides, and the President decided never to repeat the process. For some time thereafter, the President sought advice by message, but the general practice of consulting the Senate prior to the opening of negotiations was abandoned by the end of Washington's second Administration. The "advice and consent" language in the Constitution's treaty clause is generally understood today to describe the process of Senate approval of a treaty following its signature on behalf of the United States and the President's transmittal of the text to the Senate for consideration prior to its ratification.

The abandonment of the earlier practice does not mean that there is an absence of communications between the Executive Branch and the Senate or between the Executive Branch and both Houses of the Congress prior to the conclusion of an international agreement on behalf of the United States. In connection with its consideration of a particular treaty, the Senate may advise the Executive of provisions that it would like to see included in similar or "follow-on" treaties. It may also adopt resolutions specifying provisions that it believes should be included or not be included in treaties under negotiation, appoint groups of Senators to monitor the status of specific negotiations and to make reports to the Senate, and require Executive Branch reports on matters relevant to application of treaties or their implementation. The House of Representatives may also pass resolutions, hold hearings, require reports and otherwise communicate its views in respect of international agreements to the Executive Branch.

F. Consultation with the Public

The Department of State's regulations on treaties provide that "where, in the opinion of the Secretary of State or his designee the circumstances permit, the public be given an opportunity to comment on treaties and other international agreements."⁴² Model tax treaties, model extradition treaties, and a number of draft treaties in the private international law area have been published in the *Federal Register* for comment.⁴³

One of the most extensive areas of public participation is in the field of private international law treaties.⁴⁴ The Secretary of State's Advisory Committee on Private International Law was established in 1964 in order to serve as a forum for obtaining expert advice and guidance from national legal organizations in the United States with expertise in the development of law; other private sector interests that were likely to be affected by international unification or harmonization in areas of the law in which they had a particular interest; and legal experts from the academic world who were abreast of needs and trends in the law and thus able to assist in identifying possible changes in the law and assessing proposals designed to improve the law in those areas. In order to participate effectively in work at the international level, the Committee established a series of study groups to evaluate agreements being developed.⁴⁵

The meetings of the Advisory Committee and of the Study Groups are subject to the provisions of the Federal Advisory Committee Act, open to the public, and announced in advance in the *Federal Register*. The objective is to ensure that no interest is denied an opportunity to be heard during the negotiating process.

In other contexts, industry representatives or members of the public serve as members of U.S. delegations to international meetings at which treaties are being negotiated.⁴⁶ Often participation is coordinated through federally chartered committees of Executive Branch Departments or agencies similar to the Advisory Committee on Private International Law. For example, the Department of State's Advisory Committee on International Communications and Information Policy arranges for expert study groups to prepare recommendations for positions that the United States will take in upcoming International Telecommunication Plenipotentiary Conferences and in World Radio Conferences. Some members of the study groups serve as members of U.S. delegations. In aviation negotiations and in negotiations in the international labor field,⁴⁷ there is a long-standing practice of private sector participation. Similarly, the negotiation of the Law of the Sea Convention involved extensive use of an advisory committee consisting of members from the private sector.

G. Legal Bases for Agreements Not Formally Approved By the Legislature

Agreements Under the President's Constitutional Power

Article II of the Constitution deals with the powers of the Executive. Four of the provisions of that article have been held to give the President the power to make international agreements other than "treaties" under Article II, section 2, clause 2. They are: the Executive Power clause in Section 1; the Commander-in-Chief Power in Section 2; the power to receive Ambassadors and other public Ministers in Section 3; and the duty to take Care that the laws be "faithfully executed" with which Section 3 concludes. Where the powers granted to the President are exclusive -- as the Commander in Chief power -- the President may make an international agreement solely on his own. Such agreements are often called sole executive agreements. The classic illustration is the armistice agreement.

A leading case on the power of the President to conclude international agreements on his independent Constitutional powers is *United States v. Belmont*,⁴⁸ the basis of which involved a lawsuit by private parties to recover from executors a sum of money deposited with their decedent and subsequently assigned to the United States by the Soviet Government. The Court took judicial notice of the fact that "coincident with the assignment" the President recognized the Soviet Government. In its view the "recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments."⁴⁹ Noting that this agreement did not receive Senate advice and consent, the Supreme Court stated: "[A]n international compact, as this was, is not always a treaty which requires the participation of the Senate."⁵⁰

Turning to the supremacy clause issue, the Court said: "[W]hile this rule in respect of treaties

is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements . . . In respect of all international negotiations and compacts and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."⁵¹

Notwithstanding cases such as *Belmont* and other cases from that era, Congress attempted during the 1970's to limit the President's Constitutional power to negotiate and conclude executive agreements on the basis of the Article II powers set out above. The hearings on those efforts, which are listed in the bibliography at the end of this chapter, contain a comprehensive review of the authorities. The October 31, 1975 memorandum entitled "Authority of the President to Enter Into Executive Agreements Pursuant to His Independent Authority" is a particularly convincing presentation of that authority.⁵² The 1970's legislative efforts to limit the President's executive agreement authority ultimately failed.

United States courts are generally reluctant to decide disputes between members of Congress and the President concerning the treaty-making power. Such cases are usually dismissed on the ground that the issue is a nonjusticiable political question or that the plaintiff lacks standing to bring the case. In *Dole v. Carter*,⁵³ a case that was ultimately decided to be nonjusticiable, the unusually broad discussion of the merits at the District Court level seem to reinforce the President's authority to make executive agreements. Senator Dole sought an injunction to prevent President Carter from returning the crown of Saint Stephen, of which the United States had custody, to the People's Republic of Hungary pursuant to an executive agreement in the form of an exchange of letters between the two governments. Senator Dole argued that owing to a "tacit agreement" between Hungary and the United States relating to the Treaty of Peace with Hungary of February 10, 1947,⁵⁴ the President lacked the authority to deal with the matter by an exchange of letters and that the crown could be returned only pursuant to a bilateral treaty subject to Senate advice and consent. The court found there was no such "tacit agreement." Citing with approval, *United States v. Belmont*,⁵⁵ *United States v. Pink*,⁵⁶ and *United States v. Curtiss-Wright Export Corp.*,⁵⁷ the court went out of its way to conclude "[a]s a matter of law . . . that the President's agreement to return the Hungarian coronation regalia is not a commitment requiring the advice and consent of the Senate under Article II, Section 2, of the Constitution."⁵⁸ Having specifically declined to consider matters relating to standing or jurisdiction, the court denied the injunction on the ground that Senator Dole was unlikely to prevail on the merits.

The next day, the Court of Appeals denied a motion for an injunction pending appeal. In reaching its decision, the court relied on the traditional approach of United States courts when asked to take jurisdiction of cases between the Executive and legislative branches that arise in the field of foreign relations. It found that the action of the President to return to the people of Hungary property which belongs to them "uniquely demand[s] single voiced statement of the Government's views." It continued: "We are aware of no 'judicially discoverable and manageable standards for resolving [the issue].' . . . The President has decided that our foreign relations are best served by the return of the crown. We decline to enter into any controversy relating to distinctions which may be drawn between executive agreements and treaties. We say only that on the facts before us we find no justiciable controversy."⁵⁹

It is clear that a sole executive agreement made by the President on his independent constitutional authority is the law of the land and supersedes state law under Article VI of the Constitution. However, if he concludes an agreement in an area in which he lacks both independent authority and Congressional approval, he will in most cases fail. In the *United States v. Guy W. Capps, Inc.*,⁶⁰ the United States sued an importer for breach of a contract that was based on an executive agreement. The court held that the executive agreement was void: "[W]hile the President has certain inherent powers under the Constitution . . . the power to regulate interstate and foreign

commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress."⁶¹ It continued: "Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The Executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports."⁶²

Treaties and the Senate

Article II, section 2, clause 2, establishes a special mechanism by which the President has power, "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. . . ." This provision enables the President and the upper house of the U.S. Congress to make treaties in a special way.⁶³ The advice and consent procedure is used to conclude approximately 5% of U.S. international agreements. Although there are no prescribed subjects, a review of practice shows that international agreements dealing with defense, extradition, tax, disarmament, the environment, and private international law tend to be dealt with by treaties.

If the President decides a particular international agreement should be handled as a treaty under the Constitution, he will transmit it to the Senate for advice and consent to ratification, acceptance, or approval. Criteria in the Department's regulations may help in clarifying how a particular instrument will be treated, but it is not possible to be too categorical about what agreements must be handled as treaties. In almost all cases, it will be possible to seek legislative approval of an agreement by both houses of the Congress. Indeed, in some cases it is politically easier for the President to obtain the support of a majority in both houses than two thirds of the Senate. In the nineteenth century the President failed to secure the advice and consent of the Senate to a treaty of annexation with Texas. The treaty was approved by joint legislation on March 1, 1845. When the treaty for the annexation of Hawaii was delayed in the 1890's, President McKinley obtained the annexation by joint resolution approved July 7, 1898.⁶⁴

In 1996 the President sought legislative authorization to confirm U.S. approval of a Document Agreed Among the States Parties to the Convention on Conventional Armed Forces in Europe. The Senate, which had given advice and consent to ratification of the Conventional Armed Forces Convention, informed the Department of State that it believed that the Document should be handled as a treaty and sent to it for advice and consent to ratification. In light of the Senate's concern on this issue, the Administration refrained from reintroducing the draft legislation it had submitted to an earlier Congress and transmitted the Document to the Senate for its advice and consent to ratification. The Senate gave its advice and consent on May 14, 1997.

There are cases in which the Administration consults with the Senate as to whether or not the Senate wishes a particular treaty to be sent to it for advice and consent prior to ratification or acceptance. For example, after consultations with the Senate Foreign Relations Committee staff with respect to the Budapest Treaty on the International Recognition of Deposit of Microorganisms for Purposes of Patent Procedure, the Legal Adviser recommended to Secretary of State Cyrus R. Vance that the treaty be concluded as an executive agreement. On August 31, 1979, Secretary Vance signed an instrument of acceptance of this treaty, which was subsequently deposited with the Director General of the World Intellectual Property Organization.⁶⁵

Agreements Authorized by Treaty

Some treaties provide authority to conclude related or implementing agreements. If the President and the Senate have concluded a treaty under Article II, section 2, clause 2 of the Constitution that authorizes related international agreements, no other approval is required.⁶⁶

Acquiescence

In addition to legislative delegations of authority to conclude international agreements, in some cases the Congress will be held to have acquiesced in a long-standing practice of the Executive in concluding a class of sole executive agreements where it has known of the practice and has not objected.⁶⁷

H. Publication and Transmittal Requirements

Treaties and other international agreements must be published unless they are exempted from publication pursuant to law. The basic publication requirements are set out in the Act of September 23, 1950,⁶⁸ which provides: "The Secretary of State shall cause to be compiled, edited, indexed, and published . . . a compilation entitled 'United States Treaties and Other International Agreements,' . . . that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party . . ., or with reference to which any final formality has been executed, during each calendar year."⁶⁹ An amendment to the 1950 act provides that the "Treaties and Other International Agreements" publication shall be legal evidence of the texts contained therein in all the courts of the United States, the several States, and the Territories and insular possessions of the United States. Due to resource constraints, the Department of State has been unable to publish agreements as promptly as it once did. However, as indicated below, texts that have not yet been published may be available from several commercial providers.

In 1994, the Congress amended the publication statute⁷⁰ by authorizing the Secretary of State to determine that publication of certain categories of agreements is not required, if the following criteria are met:

- "(1) such agreements are not treaties which have been brought into force for the United States after having received Senate advice and consent pursuant to section 2 (2) of Article II of the Constitution of the United States;
- (2) the public interest in such agreements is insufficient to justify their publication . . . [on one of 4 specified grounds]; and
- (3) copies of such agreements . . ., including certified copies where necessary for litigation or similar purposes, will be made available by the Department of State upon request."

Any determination under one of the categories specified above must be published in the *Federal Register*.

The first determination under the statute appeared in the *Federal Register* on October 23, 1995.⁷¹ Nine categories of agreements are listed in the proposed amendment to 22 C.F.R. Pt. 181. They include: bilateral agreements for the rescheduling of intergovernmental debt payments, bilateral textile agreements concerning the importation of products containing specified textile fibers, bilateral agreements that apply to specified military exercises, bilateral military personnel exchange agreements, bilateral judicial assistance agreements that apply only to specified civil or criminal investigations or prosecutions, bilateral mapping agreements, and tariff and other schedules under the General Agreement on Tariffs and Trade and the World Trade Organization Agreement.

The status of U.S. treaties is reflected in *Treaties in Force*, a Department of State publication that lists treaties in force on January first of each year. The information in the annual volume is supplemented by a list of treaty actions that appears bimonthly in the Current Treaty Actions section of *Dispatch*, a Department of State publication. Both resources can be accessed at <http://www.state.gov>.

The Case-Zablocki Act requires that the texts of international agreements other than treaties, entered into by the United States subsequent to August 22, 1972, be transmitted to the Congress as soon as practicable after such agreement has entered into force with respect to the United States but

in no event later than sixty days thereafter.⁷² The same timing applies to any agreement "the immediate public disclosure of which would in the opinion of the President, be prejudicial to the national security of the United States." However, the latter group of agreements are transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.

In order to implement the Case-Zablocki Act the Department of State sends texts to the Congress on a biweekly schedule. Although the legislation does not require additional information, at the request of the Congress the Department of State has included in the regulations implementing the Case-Zablocki Act a requirement that a background statement accompany each agreement. Each background statement describes the agreement to which it relates and contains a statement of the legal authority for the agreement. Pursuant to the Freedom of Information Act, arrangements have been made by seven publishers to pick up copies of these packages. While some of the publishers specialize in certain subjects, such as tax, intellectual property, maritime, or law enforcement matters, others disseminate the texts of all reported agreements, as well as the texts of treaties sent to the Senate that are not covered by the Case-Zablocki Act.

The United States recognizes its obligation to submit treaties and other international agreements for registration and publication in accordance with Article 102 of the United Nations Charter.

I. Incorporation Into National Law

Article VI of the Constitution provides that "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;. . . ." Under this provision treaties and other international agreements may be self-executing. The phrase "may be self-executing" is used to indicate that in some circumstances treaties and other international agreements will not be directly incorporated into national law; in those circumstances additional action will be taken at the national level. While the precise nature of the distinction between self-executing and non-self-executing treaties is a matter of some confusion, for the purposes of this section a treaty will be considered self-executing if it becomes directly and immediately applicable -- i.e., if it requires no implementing legislation or regulations in order to become fully effective.

If the text of a particular agreement is given legislative approval, that legislation will generally include any necessary implementing provisions. Examples of self-executing treaties include Friendship, Commerce, and Navigation Treaties, as well as the more recent bilateral investment treaties, their lineal descendants.

There are several circumstances in which a treaty will not be self-executing. The first of these is where the treaty or other international agreement specifically requires that parties enact certain provisions into domestic law. One example under this rubric is the Genocide Convention, Article V of which requires the Contracting Parties to enact "necessary legislation to give effect to the provisions of the Convention and, in particular, to provide effective penalties for persons guilty of genocide."

The second is where a treaty requires a Party to punish a certain crime, *e.g.*, hijacking, and there is no statute criminalizing that behavior. Under the Constitution of the United States, the Congress has exclusive power to define crimes. Thus, there is authority for the proposition that an individual could not be prosecuted for a crime set out in a treaty unless the Congress had made that crime a part of the criminal law of the United States.

Examples of implementing legislation includes the U.N. Participation Act,⁷³ which gives the President authority to carry out certain of the obligations of the United States under the United Nations Charter and a number of United States statutes, such as the one defining genocide, by which

the United States makes genocide a crime under its domestic law and provides penalties for those who engage in prohibited activity. Where implementing legislation is necessary with respect to a treaty that has received Senate advice and consent to ratification, it is the practice of the United States to delay deposit of its instrument of ratification until enactment of the legislation.

In some cases, a combination of legislation and exercise of additional authority under existing law -- even though it was not enacted to address the particular obligations established by the treaty -- may provide a basis for carrying out the new treaty obligations. For example, the United States recently became a party to the Environmental Protocol to the Antarctic Treaty. The obligations were not self-executing and no existing legislation directly addressed certain of the obligations contained in the protocol. In order to meet those obligations, the Administration proposed implementing legislation. In the course of drafting the new legislation, the Administration found existing legislation that permitted the executive branch to implement other obligations of the Convention. Drawing on such authority, the National Science Foundation issued new regulations that enabled the executive branch to discharge those obligations.

Status of Treaties in U.S. Law

As indicated in the extract from Article VI of the Constitution with which this section begins, under the law of the United States there is no hierarchy between treaties and other international agreements and laws made pursuant to the Constitution; they are of equal authority as the supreme law of the land. In this respect, the law of the United States differs from that of many other countries, where the Constitution or national jurisprudence gives effect to the international agreement notwithstanding the subsequent enactment of inconsistent legislation.⁷⁴

In order to resolve inconsistencies between treaties and other international agreements and domestic law, two rules of interpretation have been developed: (1) When an Act of Congress and an international agreement relate to the same subject, the Executive Branch and the courts will endeavor to construe them so as to give effect to both;⁷⁵ reconcile the international agreement and an Act of Congress, the later in time generally prevails as domestic law.⁷⁶ If application of these rules results in supersession of treaty provisions as domestic law, that result does not relieve the United States of its international obligations.

The classic example of the subsequent, inconsistent statute is the Seamen's Act of March 4, 1915 which contravened one or more articles in bilateral treaties between the United States and 17 other countries. Agreements to abrogate the treaties in their entirety were reached with a number of countries. Others agreed that the treaties should continue in force subject to abrogation of the inconsistent articles.⁷⁷

J. Legally Binding Decisions of International Organizations

The United States is a member of the United Nations. Under its Charter, the United Nations can make decisions that are legally binding on its members. Article 25 of the Charter provides that the Security Council may make such decisions when acting under Chapter VII. The Senate having given its advice and consent to ratification of the Charter containing those powers, and the President, having ratified it, have bound the United States to carry out those obligations. An obligation made binding on the United States pursuant to one of those provisions is not viewed as a new treaty commitment that requires new authorization. On the other hand, implementation of the new obligation may require legislation, issuance of executive orders, or a new proclamation laying out the legal or factual predicate.

On May 25, 1993, the United Nations Security Council decided to establish an international tribunal for the purpose of prosecuting persons responsible for serious violations of international

humanitarian law in the former Yugoslavia. The Security Council also decided to adopt a Statute creating the basic framework of the Tribunal. Article 29 of the Statute obligates States to comply with Tribunal requests for assistance, including Tribunal requests for the transfer of persons indicted by the Tribunal from the territory of a State to Tribunal custody in The Hague. Since the creation of the Tribunal and the adoption of its Statute were pursuant to Chapter VII of the U.N. Charter, this Article 29 obligation is binding under international law.

Under the domestic law of the United States in force in 1993, extradition was allowed only pursuant to specific authorization by statute or treaty. In order to comply with the obligations with respect to the Yugoslavia Tribunal, the Administration drafted a bilateral agreement with the Tribunal and sought the necessary statutory authority to carry out the surrender obligations for which it provided. Prior to enactment of the legislation, the Security Council adopted a resolution establishing a similar Rwanda Tribunal. In January 1996, Congress enacted Public Law 104-106 authorizing the transfer of persons to the Tribunals pursuant to the agreements. It also authorized the other judicial assistance provided for the Tribunals in the Security Council Resolutions. The United States brought the agreements on surrender of persons to the two tribunals into force on February 14, 1996.

K. Implementation of Multilateral Conventions

It is necessary to divide examination of this question into two phases. Since most multilateral conventions are sent to the Senate for advice and consent and ratified by the President, the first phase will normally be the pre-ratification phase. With respect to multilateral conventions that are not subject to ratification, the first phase ends when the United States expresses its consent to be bound.

During the first phase the Treaty Office coordinates planning for implementation of the convention in order to ensure that the United States will be in a position to fulfill its international obligations. If a treaty requires implementing legislation, the Secretary of State's report on the treaty will usually note that fact. If it is to be implemented under existing authority, the Treaty office will coordinate with the Departments or agencies that will have responsibility for implementation to ensure that they will have completed action that may be necessary, such as issuance of regulations, establishment of procedures, assignment of responsibilities, printing of forms, or publication of notices prior to the date on which the treaty will enter into force for the United States.

After the treaty enters into force for the United States, the Departments or agencies primarily responsible for the subject matter of the treaty are charged with its implementation. If the Department of State receives complaints from other parties concerning U.S. application of a treaty, it will meet with those Departments or agencies in order to address and resolve the complaints.

Some international agreements -- particularly those dealing with human rights and international trade -- establish bodies that review performance by the parties of their treaty obligations. In addition, a number of international organizations -- such as The Hague Conference on Private International Law and the Council of Europe -- have regularly scheduled meetings at which the national authorities having responsibility for implementation of certain treaties review problems that have arisen in applying the treaties and make recommendations for resolving those problems either by changes in the texts of the conventions or changes by certain states of the procedures under which they are implementing their obligations. U.S. delegations to both types of meetings generally include representatives of the State Department and of the lead departments or agencies.

L. Termination

The Constitution does not address the power to terminate treaties or other international agreements. No serious question exists as to the President's authority to terminate executive agreements. However, practice has varied with respect to treaties. The President has: (a) acted on

his own authority, (b) acted pursuant to a Senate resolution of advice and consent passed by the special majority required for advice and consent to ratification, and (c) acted pursuant to a joint resolution of the Congress. In 1979, President Carter gave notice of termination of the 1954 Mutual Defense Treaty with the Republic of China. A number of Senators and members of the House of Representatives brought suit to enjoin the termination. The District Court held that authorization by either the Senate or a majority of both Houses of the Congress was required. That decision was reversed by the Court of Appeals. The Supreme Court vacated the judgment of the Court of Appeals and remanded the case with instructions to dismiss the complaint.⁷⁸

On May 1, 1985, President Reagan gave notice of termination of the Treaty of Friendship, Commerce, and Navigation with Nicaragua. In accordance with Article XXV of the treaty, it terminated on May 1, 1986. No serious issue was raised that the Senate or the Congress was not involved.

Both the treaties mentioned in the preceding paragraphs included provisions for termination one year after notification of intent to terminate. Given the customary international law on termination of treaties that contain no provision regarding termination -- Article 56 of the Vienna Convention on the Law of Treaties, it would seem that the absence of a termination provision in a treaty receiving Senate advice and consent would not preclude a President from terminating on his own authority. For example, most treaties do not have a provision with respect to termination for breach, but there is practice in the United States of the President having terminated or suspended operation of a treaty in response to breach. The most recent example is the suspension as between the United States and New Zealand, as of September 17, 1986, of the Security Treaty (ANZUS Pact) signed at San Francisco September 1, 1951.⁷⁹

M. Depositary Problems

The United States is a depositary for over 200 multilateral treaties. In addition to the United Nations Charter, these include many of the treaties setting up the specialized agencies, the International Monetary Fund, and the International Bank for Reconstruction and Development. In carrying out its depositary responsibilities, the United States follows the rules established under the relevant treaty. With respect to depositary matters not addressed in a given treaty, it generally conducts itself in accordance with the rules in Article 77 of the Vienna Convention on the Law of Treaties.

In connection with its depositary duties under the Statute of the International Atomic Energy Agency, for example, the United States informed the Board of Governors of the Organization that it had received for deposit an instrument of accession from an entity that was not a State and that the final clauses of the Statute specified that the Statute was open only to States. In accordance with Article 77, it subsequently circulated a statement of the facts in the case to the Parties and asked for their views. While the United States and one other State supported the ineligibility of the entity under the final clauses, a majority of the parties clearly favored acceptance of the instrument. Accordingly, the United States in its depositary capacity accepted the instrument.⁸⁰

In the wake of the breakup of the USSR, Edwin D. Williamson, Legal Adviser of the Department of State, addressed the status of agreements between the United States and the USSR at the time of the dissolution of the Union. He stated: "we have decided that the better legal position is to presume continuity in treaty relations between the United States and the former Republics. As a general principle, agreements in force between the United States and the former Soviet Union at the time of the dissolution will be presumed to continue in force with the newly independent republics."⁸¹

The continuity presumption on which Mr. Williamson relied is contained in Article 34 of the Vienna Convention on the Succession of States to Treaties.⁸² In respect of multilateral treaties, it is the practice of depositaries to refrain from listing a successor State as a party in the absence of

receipt of a notice of succession or accession by that State. In some cases, however, one or more depositaries -- there are eleven treaties from the cold war era for which the United States, the United Kingdom, and the USSR are named as depositaries -- have urged successor states to resolve any ambiguity by filing either of those documents.

The Russian Federation has generally given depositaries notices that it would continue to be bound by treaties of the USSR. Inasmuch as Ukraine and Belarus had been members of the United Nations and recognized as having treaty-making capacity for many years, the treaty status of those countries is generally clear. With respect to other former republics at the time of the dissolution problems remain.

The subsequent breakups of Czechoslovakia and Yugoslavia have caused the United States to take a more active role in discharging its depositary responsibilities with respect to succession to multilateral treaties. For example, it reviewed with Slovenian authorities multilaterals for which the United States is depositary in order that those authorities might determine to which of the multilateral treaties to which Yugoslavia had been a party Slovenia wished to succeed or accede. All of the treaties discussed except one were multilateral treaties that were generally open to States. The exception was the Agreement regarding Financial Support of the North Atlantic Ice Patrol of January 4, 1956. In its depositary capacity the United States informed the Slovenians that in order to become a party to that agreement it was necessary for a State to be benefiting to an appreciable degree from the services of the Ice Patrol and that its proposed membership be acceptable to all existing parties. The Slovenian authorities decided not to pursue succession to the Ice Patrol Agreement.

Modern multilateral treaties frequently call for the designation of competent authorities or other entities to cooperate in activities under those treaties. In its capacity as depositary the United States has called the attention of such provisions to succeeding or acceding States that have not done so and asked that they do so.⁸³

N. International Agreements Concluded By Sub-National Entities

As indicated in the Introduction, the Constitution prohibits the conclusion of international agreements by sub-national entities.

III. DOCUMENTATION

A. National Constitution

See texts attached as Annex A.

B. National Legislation

Statutory Provisions

Case-Zablocki Act of 1972

Fast Track

See texts attached as Annex B.

C. Examples of Internal Procedural Documents

1. Full Power

See Full Power, investing the Deputy Secretary of State to sign a Treaty with the Republic of Latvia on Mutual Legal Assistance in Criminal Matters, attached as Annex C-1.

2. Instrument of Ratification

See Instrument of Ratification, signed by President William J. Clinton, ratifying the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, attached as Annex C-2.

3. Registration Certificate

See Registration Certificate, signed by Secretary of State Warren Christopher on August 24, 1995, attached as Annex C-3.

4. Depository Circular Note

See Depository Note, signed by Secretary of State Madeline Albright on July 3, 1997, attached as Annex C-4.

5. Message to Legislature

See Message from the President, transmitting to Congress a Convention of Establishment between the United States of America and France, attached as Annex C-5.

6. Official Proclamation

See Presidential Proclamation, regarding a Consular Convention between the United States of America and the Republic of Tunisia, attached as Annex C-6.

7. Protocol of Exchange of Instruments of Ratification

See Protocol of Exchange of Instruments, between the United States of America and the Kingdom of Thailand, attached as Annex C-7.

8. Notification of Completion of

Constitutional and Statutory Requirements.

See letter from the Secretary of State to the Ambassador of France, providing notice of the completion of the constitutional and statutory requirements for the entry into force of a Convention on taxation, attached as Annex C-8.

D. Statistical Data

Annex A

The Constitution of the United States

Article I, 8: The Congress shall have Power . . .

Clause 3: To regulate Commerce with foreign Nations, and among the several states, ...;

Clause 10: To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Clause 18: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, 10:

Clause 1: No State shall enter into any Treaty, Alliance, or Confederation . . .

Clause 3: No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power. . .

Article II, 2:

Clause 1: The President shall be Commander in Chief of the Army and Navy of the United States, . . .

Clause 2: He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; . . .

Article II, 3:

. . . he [the President] shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article VI, 2:

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

Annex B

1 U.S.C. 112b (the Case-Zablocki Act of 1972)

112b. United States international agreements; transmission to Congress

- (a) The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President. Any department or agency of the United States Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than twenty days after such agreement has been signed.
- (b) Not later than March 1, 1979, and at yearly intervals thereafter, the President shall, under his own signature, transmit to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate a report with respect to each international agreement which, during the preceding year, was transmitted to the Congress after the expiration of the 60-day period referred to in the first sentence of subsection (a), describing fully and completely the reasons for the late transmittal.
- (c) Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State. Such consultation may encompass a class of agreements rather than a particular agreement.
- (d) The Secretary of State shall determine for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of this section.
- (e) The President shall, through the Secretary of State, promulgate such rules and regulations as may be necessary to carry out his section.

Selected Statutory Provisions with respect to Fast Track Approval of Trade Agreements (Trade Act of 1974, as amended, through March 1993)

19 U.S.C. 2112

§ 2112. Nontariff barriers to and other distortions of trade

(a) Congressional findings: directives; disavowal of prior approval of legislation . . . The President is further urged to utilize the authority granted by subsection (b) to negotiate trade agreements with other countries and instrumentalities providing on a basis of mutuality for the harmonization, reduction, or elimination of such barriers to (and other distortions of) international trade. Nothing in this subsection shall be construed as prior approval of any legislation which may be necessary to implement an agreement concerning barriers to (or other distortions of) international trade.

(b) Presidential determinations prerequisite to entry into trade agreements. . . .

(1) Whenever the President determines that any barriers to (or other distortions of) international trade of any foreign country or the United States unduly burden and restrict the foreign trade of the United State or adversely affect the United States economy, or that the imposition of such barriers is likely to result in such a burden, restriction, or effect, and that the purposes of this chapter will be promoted thereby, the President [so long as this authority remains in force], may enter into trade agreements with foreign countries or instrumentalities providing for the harmonization, reduction, or elimination of such barriers (or other distortions) or providing for the prohibition of or limitation on the imposition of such barriers (or other distortions).

(2) . . .

(3) . . .

(4)(A) . . . a trade agreement that provides for the elimination or reduction of any duty imposed by the United States may be entered into under paragraph (1) . . . if --

(i) such country requested the negotiation of such an agreement, and

(ii) the President, at least 60 days prior to the date notice is provided under subsection (e)(1) of this section --

(I) provides written notice of such negotiations to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives, and

(II) consults with such committees regarding the negotiation of such agreement.

(4)(C) . . .

(c) Presidential consultation with Congress prior to entry [into] trade agreements. Before the President enters into any trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall consult with the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, and with each committee of the House and the Senate and each joint committee of the Congress which has jurisdiction over legislation involving subject matters which would be affected by such trade agreement. Such consultation shall include all matters relating to the implementation of such trade agreement as provided in subsections (d) and (e). If it is proposed to implement such trade agreement, together with one or more other trade agreements entered into under this section, in a single implementing bill, such consultation shall include the desirability and feasibility of such proposed implementation.

(d) Submission to Congress of agreements, drafts of implementing bills, and statements of proposed administrative action. Whenever the President enters into a trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall submit such agreement, together with a draft of an implementing bill (described in section 2191(b) of this title) and a statement of any administrative action proposed to implement such agreement, to the Congress as provided in subsection (e) and such agreement shall enter into force with respect to the United States only if the provisions of subsection (e) are complied with and the implementing bill submitted by the President is enacted into law.

(e) Steps prerequisite to entry into force of trade agreements. Each trade agreement submitted to the Congress under this subsection shall enter into force with respect to the United States if (and only if) --

(1) the President, not less than 90 days before the day on which he enters into such trade agreement, notifies the House of Representatives and the Senate of his intention to enter into such an agreement, and promptly thereafter publishes notice of such intention in the Federal Register;

- (2) after entering into the agreement, the President transmits a document to the House of Representatives and to the Senate containing a copy of the final legal text of such agreement together with --
 - (A) a draft of an implementing bill and a statement of any administrative action proposed to implement such agreement, and an explanation as to how the implementing bill and proposed administrative action change or affect existing law, and
 - (B) a statement of his reasons as to how the agreement serves the interests of United States commerce and as to why the implementing bill and proposed administrative action is required or appropriate to carry out the agreement; and
- (3) the implementing bill is enacted into law.
- (f) . . .
- (g) Definitions . . .

19 U.S.C. 2191

§ 2191. Bills implementing trade agreements on nontariff barriers and resolutions approving commercial agreements with Communist countries

(a) Rules of House of Representatives and Senate -- This section and sections 2192 and 2193 of this title are enacted by the Congress.

(1) . . .

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) Definitions, For the purposes of this section --

(1) The term "implementing bill" means only a bill of either House of Congress which is introduced as provided in subsection (c) of this section with respect to one or more trade agreements submitted to the House of Representatives and the Senate under section 2112 or section 2903(a)(1) of this title and which contains --

(A) a provision approving such trade agreement or agreements,

(B) a provision approving the statement of administrative action (if any) proposed to implement such trade agreement or agreements, and

(C) if changes in existing laws or new statutory authority is required to implement such trade agreement or agreements, provisions, necessary or appropriate to implement such trade agreement or agreements, either repealing or amending existing laws or providing new statutory authority. . . .

(d) Amendments prohibited -- No amendment to an implementing bill . . . shall be in order in either the House of Representatives or the Senate; and no motion to suspend the application of this subsection shall be in order in either House, nor shall it be in order in either House for the Presiding Officer to entertain a request to suspend the application of this subsection by unanimous consent.

(e) Period for committee and floor consideration --

(1) Except as provided in paragraph (2), if the committee or committees of either House to which an implementing bill . . . has been referred have not reported it at the close of the 45th day after its introduction, such committee or committees shall be automatically discharged from further consideration of the bill or resolution and it shall be placed on the appropriate calendar. A vote on final passage of the bill or resolution shall be taken in each House on or before the close of the 15th day after the bill or resolution is reported by the committee or committees of that House to which it was referred, or after such committee or committees have been discharged from further consideration of the bill or resolution. If prior to the passage by one House of an implementing bill . . . of that House, that House receives the same implementing bill . . . from the other House, then --

(A) the procedure in that House shall be the same as if no implementing bill . . . had been received from the other House; but

(B) the vote on final passage shall be on the implementing bill . . . of the other House.

(3) For purposes of paragraphs (1) and (2), in computing a number of days in either House, there shall be excluded any day on which that House is not in session.

(f) Floor consideration in the House --

(1) A motion in the House of Representatives to proceed to the consideration of an implementing bill . . . shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order

to move to reconsider the vote by which the motion is agreed to or disagreed to.

(g) Floor consideration in the Senate --

(1) A motion in the Senate to proceed to the consideration of an implementing bill . . . shall be privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

Annex C-1

FULL POWER

I invest Stobe Talbott, Deputy Secretary of State, or in his absence, John C. Kornblum, Assistant Secretary of State for European and Canadian Affairs, with full power and authority for and in the name of the Government of the United States of America to sign the Treaty Between the United States of America and the Republic of Latvia on Mutual Legal Assistance in Criminal Matters, together with any related documents, the said Treaty to be transmitted to the President of the United States of America for his ratification by and with the advice and consent of the Senate of the United States of America.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Department of State to be affixed at the city of Washington, in the District of Columbia, this tenth day of June, 1997.

[signature Madeline Albright]
Secretary of State

[SEAL]

Annex C-2

WILLIAM J. CLINTON

President of the United States of America

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

CONSIDERING THAT:

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the "Chemical Weapons Convention" or CWC), with Annexes, was done at Paris on January 13, 1993 and signed that date by the United States; and

The Senate of the United States of America by its resolution of April 24, 1997, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Convention, with Annexes, subject to the condition which relates to the Annex on Implementation and Verification, that no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States.

NOW, THEREFORE, I, William J. Clinton, President of the United States of America, ratify and confirm the said Convention, with Annexes, subject to the aforesaid condition.

IN TESTIMONY WHEREOF, I have signed this instrument of ratification and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington

[SEAL]

this twenty-fifth day of
April in the year of
our Lord one thousand
nine hundred ninety-seven
and of the Independence of the
United States of America the two
hundred twenty second.

By the President: [signature William J. Clinton]

[signature Madeline Albright]
Secretary of State

Annex C-3

[SAMPLE U.S. REGISTRATION DOCUMENT]

I CERTIFY THAT the documents attached hereto are true and complete copies of

- (1) TIAS 10632 -- Agreement between the United States of America and Italy amending the agreement of August 4, 1964 relating to the safeguarding of classified information. Effected by exchange of letters at Rome April 15 and September 2, 1982. Entered into force September 2, 1982, by present exchange of letters. Reservation: none.
- (2) TIAS 10633 -- Memorandum of understanding between the United States of America and Venezuela relating to interim agreement on maritime matters. Signed at Washington January 14, 1983. Entered into force January 14, 1983, upon signature. Reservation: none.
- (3) . . .

IN TESTIMONY WHEREOF, I,

Warren Christopher,

Secretary of State, have hereunto caused the Seal of the Department of State of the United States of America to be affixed and my name subscribed by the Treaty Registration Officer of the said Department, at the City of Washington, in the District of Columbia, this twenty-fourth day of August, 1995.

Secretary of State

By: _____
Treaty Registration Officer

[SEAL]

Annex C-4

The Secretary of State presents her compliments to Their Excellencies and Mesdames and Messieurs the Chiefs of Mission of the States Parties to the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation done at Montreal on February 24, 1988, and has the honor to inform them of the following:

The Department of State has received a note No. 99/97 of June 11, 1997, from the British Ambassador stating that following the restoration of Hong Kong to the People's Republic of China, on July 1, 1997, the Government of the United Kingdom will cease to be responsible for the international rights and obligations arising from the application of the Protocol to Hong Kong. There is enclosed a copy of the Ambassador's note.

The Secretary of State would be grateful if the Chiefs of Mission would forward this information to their respective Governments.

Enclosures: As stated.

[initials]

Department of State,

Washington, July 3, 1997.

Annex C-5

86th Congress
2d Session

SENATE

Executive
G

CONVENTION OF ESTABLISHMENT BETWEEN THE
UNITED STATES OF AMERICA AND FRANCE

—————
MESSAGE

from

THE PRESIDENT OF THE UNITED STATES

transmitting

A CONVENTION OF ESTABLISHMENT BETWEEN THE UNITED
STATES OF AMERICA AND FRANCE, TOGETHER WITH A PRO-
TOCOL AND A JOINT DECLARATION RELATING THERETO,
SIGNED AT PARIS ON NOVEMBER 25, 1959

—————
April 6, 1960 -- Convention was read the first time and the injunction of secrecy was removed therefrom. The convention, the President's message of transmittal, and all accompanying papers were referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate.

—————
THE WHITE HOUSE, *April 6, 1960.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a convention of establishment between the United States of America and France, together with a protocol and a joint declaration relating thereto, signed at Paris on November 25, 1959.

I transmit also, for the information of the Senate, the report by the Secretary of State with respect to the convention. (Enclosures: (1) Report of the Secretary of State; (2) convention of establishment, with protocol and joint declaration, signed at Paris, November 25, 1959.)

DEPARTMENT OF STATE,
Washington, April 1, 1960.
The President,
The White House:

I have the honor to submit to the President, with a view to its transmission to the Senate to receive the advice and consent of that body to ratification, if the President approve thereof, a convention of establishment between the United States of America and France, together with a protocol and a joint declaration relating thereto, signed at Paris, November 25, 1959.

The present treaty, although designated a convention of establishment because it is concerned principally with the establishment and conduct of business enterprises, belongs in the series of commercial treaties initiated by the United States in 1946, being the 19th in that series. In common with the others in the series, its object is the creation of a comprehensive agreed basis in reciprocal terms for the protection of American citizens, their property and other interests abroad. It establishes such a basis for relations with France for the first time, although it may be considered as a modern successor to the 1778 treaty of amity and commerce with France (8 Stat. 12; TS 83), the first treaty concluded by the United States.

The present treaty contains provisions relating to entry and sojourn, personal freedoms, property rights, rights with respect to business activities, taxation, exchange regulation, and other matters affecting the status and activities of citizens and enterprises of one country within the territories of the other. The provisions on these subjects are in most respects similar in substance to provisions in treaties in force between the United States and a number of other countries. They follow the same general pattern, for example, as that set forth by the provisions on establishment in the treaties of friendship, commerce, and navigation with the Federal Republic of Germany (7 UST 1839; TIAS 3593) and the Netherlands (8 UST 2043; TIAS 3942), which were concluded in 1954 and 1956, respectively. Principal points of difference are referred to below.

The most notable difference between the present treaty and other recent commercial treaties is the absence from the former of provisions dealing specifically with the exchange of goods and with navigation. As concerns the exchange of goods, France, like a number of other European countries, is reluctant to enter into new long-term commitments, in view of the new problems created and new approaches necessitated by the incidence of the various economic integration projects. Inasmuch as the commercial relations with France have been subject to the General Agreement on Tariffs and Trade since that agreement became effective on January 1, 1948; neither party considered an additional conventional arrangement on the subject essential. As regards navigation, France desired to retain without change certain regulations that favor French shipping over foreign shipping. While these regulations appear to have little or no adverse impact upon United States shipping interests, it was thought to be better, from the standpoint of U.S. policy, to exclude navigation from the treaty rather than agree to a reservation that might be interpreted as a substantial departure from the established position against discrimination. Furthermore, the treaty does not contain provisions on social security found in a number of recent commercial treaties, nor the usual clauses assuring rights to engage in nonprofit activities on a national-treatment basis. Other divergences from the texts of previous treaties, most of which resulted from minor negotiation requirements or from restatements for stylistic reasons are not regarded as of substantial importance.

The protocol, considered an integral part of the treaty, contains clauses clarifying or construing certain provisions of the treaty proper. The attached joint declaration affirms the intent of the parties to facilitate to the greatest possible extent on a basis of true reciprocity the admission of personnel indispensable to the operation of enterprises established by the nationals or companies of one country within the other. In the United States this declared purpose is to be attained for nationals of France by virtue of the normal immigration quota and the provisions for treaty-trader and treaty-investor privileges. In France it would be attained by means of a liberal administration of the work-permit system.

Provision is made in the treaty for its entry into force 1 month after the day of exchange of ratifications and for its continuance in force for a period of 10 years from that day and indefinitely thereafter, subject to termination on 1 year's written notice by either party to the other. Its provisions are to extend initially only to metropolitan France and the overseas department, but provision is made for possible future extension to the overseas territories and member states of the French Community.

Respectfully submitted.
CHRISTIAN A. HERTER.

(Enclosure: Convention of establishment, with protocol and joint declaration, signed at Paris, November 25, 1959).

Annex C-6

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Consular Convention between the United States of America and the Republic of Tunisia was signed at Tunis on May 12, 1988, a copy of which in the English, Arabic, and French languages is hereto annexed;

The Senate of the United States of America by its resolution of May 13, 1992, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Convention;

The Protocol was ratified by the President of the United States of America on August 12, 1992, in pursuance of the advice and consent of the Senate, and was ratified by the Republic of Tunisia on January 31, 1989;

It is provided in Article 46(1) of the convention that the Convention shall enter into force 30 days following the date of the exchange of instruments of ratification; and

The instruments of ratification of the Convention were exchanged at Washington December 16, 1993, and accordingly the Convention entered into force on January 15, 1994.

NOW, THEREFORE, I, William J. Clinton, President of the United States of America, proclaim and make public the Convention, to the end that it be observed and fulfilled with good faith on and after January 15, 1994, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

Done at the city of Washington

this second of August

in the year of

our Lord one thousand

nine hundred ninety-four

and of the Independence

of the United States of

America the two hundred

nineteenth.

By the President: [signature William J. Clinton]

[signature Warren Christopher]
Secretary of State

Annex C-7

PROTOCOL OF EXCHANGE OF INSTRUMENTS OF RATIFICATION

The undersigned, Winston Lord, Assistant Secretary of State for East Asian and Pacific Affairs, and M.L. Birabhongse Kasemsri, Ambassador Extraordinary and Plenipotentiary of Thailand to the United States of America, being duly authorized by their respective Government, have met for the purpose of exchanging instruments of ratification of the Treaty between the Government of the United States of America and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986.

The United States ratification is subject to two understandings which are contained in the United States instrument of ratification.

The Thai ratification is subject to a declaration which is appended to the Thai instrument of ratification.

The respective instruments of ratification of the Treaty having been examined and found to be in due form, the exchange took place this day.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed the present Protocol of Exchange of Instruments of Ratification.

DONE in duplicate, in English, at Washington, this tenth day of June, 1993.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:

[signature]

FOR THE GOVERNMENT OF THE
KINGDOM OF THAILAND:

[signature]

Annex C-8

DEPARTMENT OF STATE
WASHINGTON

December 5, 1995

Excellency:

I have the honor to refer to the Convention between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Paris on August 31, 1994, together with two related exchanges of notes.

The Government of the United States of America has completed its constitutional and statutory requirements for the entry into force of the Convention. Therefore, I have the honor to transmit herewith the United States instrument of ratification. In accordance with Article 33, paragraph 1, the Convention shall enter into force upon written notification that the Government of the French Republic has complied with its constitutional and statutory requirements.

Accept, Excellency the renewed assurances of my highest consideration.

For the Secretary of State

[signature]

Enclosure:

United States Instrument of Ratification.

His Excellency

Francois Bujon de l'Estang,

Ambassador of France.

Annex D

D. Statistical Data

1. The latest edition of *Treaties in Force* lists approximately 9,400 treaties and other international agreements of the United States on record in the Department of State on January 1, 1997 which had not expired by their terms or which had not been denounced by the parties, replaced or superseded by other agreements or otherwise definitively terminated. During the first nine months of 1997 an additional 150 agreements entered into force, bringing the total to more than 9500 treaties and other international agreements as of October 1.

2. The following statistics pertain to the period 1986-1996:

Treaties and Other International Agreements Concluded

1986	417
1987	446
1988	408
1989	378
1990	418
1991	297
1992	324
1993	273
1994	362
1995	317
1996	282

Treaties that Received Senate Advice and Consent

1986	13
1987	3
1988	19
1989	9
1990	14
1991	15
1992	31
1993	20
1994	7
1995	10
1996	28

3. Based upon statistics for the years 1986-1996, the United States concludes an average of 356 international agreements a year.

4. The average number of international agreements that were treaties that received Senate advice and consent during that period was 15. In addition, several other international agreements, such as the North American Free Trade Agreement and the Uruguay Round Agreements, received legislative approval during that period by Act of Congress.

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ENDNOTES

¹ The longtime editor of *The Constitution of the United States: Analysis and Interpretation*, Edwin S. Corwin, observed: "[T]he Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy." Edwin S. Corwin, *The President: Office and Powers, 1787-1984* 209 (1984).

² The Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, para. 1(a), 1155 U.N.T.S. 331. Although not a party, the United States accepts that the Convention, in most respects, is declaratory of customary international law. *See, e.g.*, S. Exec. Doc. L, at 1 (1971) (Letter of Submittal from the Secretary of State to the President) ("Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice").

³ The classic formulation of this principle may be found in the remarks of Charles Evans Hughes before the American Society of International Law:

"I think it is perfectly idle to consider that the Supreme Court would even hold that any treaty made in a constitutional manner in relation to the external concerns of the nation is beyond the power or the sovereignty of the United States or invalid under the Constitution of the United States where no express prohibition of the Constitution has been violated . . . The [treaty-making] power is to deal with foreign nations with regard to matters of international concern."

1929 Proc. Am. Soc'y Int'l L. 194 (1929).

One has only to look at *Treaties in Force* or the *United Nations Treaty Series* to appreciate that the scope of such matters has expanded over the nearly seven decades since the statement was made.

On the Constitutional point, *see Reid v. Covert*, 354 U.S. 1 (1957).

⁴ [1924] 2 *Foreign Relations of the United States* 339-74.

⁵ 55 Stat. 1603; *Executive Agreement Series* 236.

⁶ *Dep't St. Bull.*, Oct. 27, 1975, at 609, 612-13. For a recent treatment of the issues, see Marian Nash (Leich), *International Acts Not Constituting Agreements: International Documents of a Non-Legally Binding Character*, 88 *Am. J. Int'l L.* 515, 516-19 (1994).

⁷ 1 U.S.C. § 112(b). The language concerning oral agreements was added after the original enactment of the Act.

⁸ The 1974 revision may be found in A.W. Rovine, *Digest of United States Practice in International Law 1974*, at 199-215 (1975).

⁹ Foreign Relations Authorization Act, Fiscal Year 1979, § 708, Pub. L. No. 95-426, 92 Stat. 993 (1978).

¹⁰ 22 C.F.R. pt. 181 (1997).

¹¹ *Id.* § 181.4(e).

12 *Id.* § 181.4(g).

13 *See* discussion of *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

14 42 U.S.C.A. §§ 2153 & 2159 (g), (h), & (i) (1994 & Supp. 1997).

15 16 U.S.C.A. § 1823 (Supp. 1997).

16 42 U.S.C. § 433 (1994).

17 22 U.S.C. § 2395a (2) (1994).

18 Enterprise for the Americas Initiative Act of 1992, § 2, Pub. L. No. 102-532, 106 Stat. 3509 (1992).

19 National Aeronautics and Space Administration Authorization Act, Pub. L. No. 100-147 § 112, 101
Stat. 860 (1987) (codified at 42 U.S.C. § 2451 note (1994)).

20 Pub. L. No. 92-448, 86 Stat. 746 (1972).

21 Pub. L. No. 92-448, § 2, 86 Stat. at 747.

22 *See, e.g.*, Articles of Agreement of the International Monetary Fund, December 27, 1945, art. IX,
§ 9(b), 60 Stat. 1401, 1414, 2 U.N.T.S. 40, 76 and Articles of Agreement of the International Bank
for Reconstruction and Development, December 27, 1945, art. VII, § 9(b), 60 Stat. 1440, 1458, 2
U.N.T.S. 134, 182.

23 Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, § 421, Pub. L. No. 103-236, 108
Stat. 382, 456 (1994).

24 19 U.S.C. § 2112.

25 19 U.S.C. § 2191.

26 The Memorandum of November 22, 1994, "Whether Uruguay Round Agreements Required
Ratification as a Treaty", appears in United States Department of Justice, *Selected Opinions of the
Office of Legal Counsel: August 1993-March 1995*.

27 Laurence H. Tribe, *The World Trade Organization and the Treaty Clause: The Constitutional Requirement
of Submitting the Uruguay Round of GATT as a Treaty*, Prepared Statement before Senate Committee
on Commerce, Science, and Transportation (Oct. 18, 1994).

28 Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

29 Message to Congress Transmitting the Proposed "Export Expansion and Reciprocal Trade
Agreements Act of 1997," 33 Weekly Comp. Pres. Doc. 1344 (Sept. 16, 1997). The bills, which
differ slightly, were introduced in the House of Representatives on October 7, 1997 and in the
Senate on October 8, 1997. They bear the numbers 1997 H.R. 2621 and 1997 S. 1269.

30 In 1795 the Senate considered the Jay Treaty with Great Britain. A number of senators insisted
that part of one article be suspended. By a vote of 20-10, the Senate advised and consented subject
to that condition. Great Britain accepted suspension of the article, and the President thereafter
ratified it. Samuel B. Crandall, *Treaties: Their Making and Enforcement* 81, 82 (2d ed. 1916).

31 Vienna Convention on the Law of Treaties, art. 2, para 1(d), 1155 U.N.T.S. 331.

32 *See, e.g.*, John A. Boyd, *Digest of United States Practice in International Law 1977* 375-376 (1979)
(October 27, 1977 Memorandum by Robert G. Beckel, Deputy Assistant Secretary for

Congressional Relations, Department of State to Mary Jane Checchi, staff attorney, Senate Committee on the Judiciary); Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate* 97 (1993).

33 Panama Canal Treaty, 33 U.S.T. 39 (T.I.A.S. 10030).

34 Supplemental Treaty Concerning the Extradition Treaty Between the Government of the United States and the Government of the United Kingdom and Northern Ireland (June 8, 1972), *reprinted in* 24 I.L.M. 1105 (1985) (T.I.A.S. 12050).

35 Exec. Rpt. No. 103-18.

36 Replies of the United States to the questionnaire on the law and practice relating to reservations to treaties received by the United States Mission to the United Nations from the Secretary-General on December 27, 1995. The replies were transmitted by note from the United States Mission to the Secretary-General of the United Nations on March 18, 1996. Annex I to the note contained materials dealing with reservations to bilateral treaties (question 1.4).

37 The issue was specifically addressed in condition III of the Senate's draft resolution of advice and consent to the SALT II Treaty: "The advice and consent of the Senate to ratification of the SALT II Treaty is further subject to the condition that, in connection with the exchange of instruments of ratification pursuant to Article XIX of the Treaty, the President shall obtain the agreement of the Union of Soviet Socialist Republics to" two reservations that followed. S. Rep. No. 96-14, at 78 (1979).

Such acceptance is generally manifested in the protocol of exchange of instruments of ratification. An example is the protocol of exchange of instruments of ratification regarding the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal and the Panama Canal Treaty, 33 U.S.T. 31-38 (1979-1981). *See also*, I Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* 1232 & n.3 (9th ed. 1992) ("Thus, for instance, when the Senate of the USA on 20 December 1900, in consenting to the ratification of the Hay-Pauefote Treaty, added amendments which modified it, the UK did not accept the amendments, and considered the Treaty to have fallen to the ground. By contrast, when the Senate adopted a similar course in relation to the Supplementary Extradition Treaty with the UK concluded in 1985, the UK chose to agree to the newly proposed terms and the Treaty, as amended, duly entered into force.").

38 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (done at Paris Jan. 13, 1993).

39 143 Cong. Rec. S3651-57 (daily ed. Apr. 24, 1997).

40 *Id.* at S3656.

41 Although not a party to the Vienna Convention, the United States applies the 12-month rule in its practice. On June 11, 1986, Deputy Legal Adviser Mary V. Mochary testified at a hearing before the Senate Foreign Relations Committee on the Vienna Convention on the Law of Treaties. In her discussion of the reservations articles she noted: "The right of other states to object to a reservation and to refuse treaty relations with the reserving state is maintained in Article 20. If a state does not object to a reservation within 12 months, the reservation operates between the reserving state and the non-objecting state."

In connection with the hearing, the Committee subsequently submitted a number of questions to the Department of State. One of the questions was: "Are there any conflicts between treaty law and practice as set out in the Convention and present U.S. law and practice?" The Department replied: "Although there are a few differences on matters of detail, there are no conflicts between treaty law and practice as set out in the Convention and present U.S. law and practice." For additional information concerning the 1986 hearings on the Vienna Convention on the Law of

Treaties, *see* I Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law 1981-1988* 1229-39 (1993).

42 § 720.2 (d). For text cite, *see* note 6, *supra*.

43 E.g., on November 12, 1976, the Department of State published a draft bilateral extradition treaty for that purpose. 41 Fed. Reg. 51,897-51,899 (1976).

44 Peter H. Pfund, *Contributing to the Progressive Development of Private International Law: The International Process and the United States Approach*, 249 *Recueil des cours*, 52-57 *passim* (1994-V).

45 As the Chairman of the Advisory Committee has pointed out, members of the study groups can continue to meet after negotiations have been concluded and the United States is reviewing the final text of the convention for possible signature and ratification. Given the perspective they have on the development of the text they are in a good position to assess the advantages that the convention may provide for the United States. Moreover, since private international law conventions almost always affect State law, they tend to be sent to the Senate for advice and consent to ratification. Members of the study groups have the potential of playing an important role in the domestic political process that may lead to the granting of that advice and consent and the ratification of the convention by the United States. *Id.*

46 For guidelines concerning participation of private citizens as representatives of affected private sector interests on U.S. delegations to international conferences, meetings and negotiations, *see* the Department of State's Public Notice 655 of March 23, 1979, 44 Fed. Reg. 17,846 (1979).

47 Under Article 3 of the Amended Constitution of the International Labor Organization, meetings of the General Conference of the members shall be "composed of four representatives . . . , of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the work people of each of the Members." A process of tripartite consultations between labor, management and government is required by ILO Convention No. 144 Concerning Tripartite Consultations to Promote the Implementation of International Labor Standards, adopted by the International Labor Conference at Geneva on June 21, 1976. That Convention has been in force for the United States since June 15, 1989.

48 301 U.S. 324 (1937).

49 *Id.* at 330.

50 *Id.*

51 *Id.* at 331.

52 *Congressional Oversight of Executive Agreements -- 1975, Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 94th Cong., 1st Sess. on S. 632 and S. 1251 at 306-11 (1975).*

53 444 F. Supp. 1065 (D. Kan. 1977), *motion for injunction pending appeal denied*, 569 F.2d 1109 (10th Cir. 1977).

54 Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, 41 U.N.T.S. 135.

55 301 U.S. 324 (1937).

56 315 U.S. 203 (1942).

57 299 U.S. 304 (1936).

58 *Dole v. Carter*, 444 F. Supp. at 1071.

59 *Dole v. Carter*, 569 F.2d at 1110.

A subsequent case, *Greater Tampa Chamber of Commerce v. Brock Adams*, No. C.A. 78-0157 (D.D.C. 1979), *excerpted in* Marian Lloyd Nash (Leich), *Digest of United States Practice in International Law 1978*, at 678-80 (1980), further illustrates both the nonjusticiability and lack of standing principles on which Federal courts frequently rely when denying jurisdiction in treaty cases. District Judge June L. Green's opinion of November 29, 1979 noted that the plaintiffs had sought to enjoin enforcement of the Agreement Concerning Air Services between the United States and the United Kingdom, July 23, 1977, 28 U.S.T. 5367 (commonly known as the Bermuda II agreement), because it contravened provisions of the Federal Aviation Act of 1958, and the President should therefore have submitted it to the Senate for advice and consent to ratification. The court noted that it would "undoubtedly constitute an unprecedented encroachment upon the discretion traditionally vested in the executive branch to determine the form international agreements shall take. Although the State Department has promulgated guidelines to aid the President in making such a determination, these guidelines are not of such a legally binding nature as to merit the Court's inquiry into the exercise of that discretion." The court therefore concluded that the President's decision to negotiate an international agreement as a treaty or executive agreement was not reviewable, denied the plaintiffs' claim for injunctive relief, and granted defendants' motion to dismiss on grounds of nonjusticiability the issue of whether the President should have submitted the agreement to the Senate for advice and consent.

Plaintiffs appealed to the United States Court of Appeals which found that the plaintiffs lacked standing to maintain the action and remanded the case to the District Court with instructions to dismiss the complaint. *Greater Chamber of Commerce v. Goldschmidt*, 627 F.2d 258 (1980).

60 204 F. 2d 655, 660 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

61 *Id.* at 659.

62 *Id.* at 660.

63 In the case of *Edwards v. Carter*, the court affirmed the general principle that treaties may deal with matters within the legislative power of Congress. The court said:

"It is important to the correct resolution of the legal issue now before us not to confuse what the Constitution permits with what it prohibits. In deciding that Article IV, § 3, cl. 2 is not the exclusive method contemplated by the Constitution for disposing of Federal property, we hold that the United States is not prohibited from employing an alternative means constitutionally authorized. Our judicial function in deciding this lawsuit is confined to assessing the merits of the claim of appellants that in the conduct of foreign relations in this matter, involving, *inter alia*, the transfer of property of the United States, the treaty power as contained in Article 2, § 2, cl. 2, was not legally available. We hold, contrarily, that this choice of procedure was clearly consonant with the Constitution."

Edwards v. Carter, 580 F.2d 1055, 1064 (D.C. Cir.) (footnote omitted), *cert. denied*, 463 U.S. 907 (1978).

64 George H. Haynes, *The Senate of the United States: Its History and Practice* 633-35 (1938).

65 Marian Nash Leich, *Digest of United States Practice in International Law 1980* 408-409 (1986).

66 *See, e.g.*, Panama Canal Treaty, Art. IX, para. 11, & Art. XI, para. 7 (signed at Washington Sept. 7, 1977), 33 U.S.T. 39, 65, 73.

67 *See Dames & Moore v. Regan*, 453 U.S. 654 (1981) and text accompanying note 11, *supra*.

68 1 U.S.C. § 112a (1994).

69 *Id.*

70 Foreign Relations Authorization Act, Pub. L. No. 102-236, 108 Stat. 382, 396 (1994).

71 60 Fed. Reg. 54,320 (1995). The Final Rule appears at 61 Fed. Reg. 7,070 (1996).

72 *See* note 5, *supra*, for cite.

73 22 U.S.C. § 287(c) (1994).

74 *See, e.g.*, Article 55 of the French Constitution of October 4, 1958 and references in Monroe Leigh and Merritt R. Blakeslee, *National Treaty Law and Practice* 40 & n.64 (Studies in Transnational Legal Policy No. 27, American Society of International Law, 1995).

75 Recent cases in U.S. courts applying this principle include *Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 252 (1984); *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988); and *South African Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987), *cert. den.* 484 U.S. 896.

76 For a comprehensive discussion of the later in time rule *see Restatement (Third) Foreign Relations Law of the United States* § 115 (1987).

77 V Green Haywood Hackworth, *Digest of International Law* 309-12 (1943); *see, e.g.*, Convention concerning the Rights and Privileges of Consuls, Nov. 19 and Dec. 2, 1902, U.S.-Gre, 32 Stat. 2122 & N., *Treaties in Force* 105 (1997).

78 *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C. 1979), *rev'd*, 617 F. 2d 697 (D.C. Cir. 1979), *rev'd and remanded with directions to dismiss the complaint*, 444 U.S. 996 (1979).

79 *Treaties in Force* 350 (1997).

80 *See* Nash, *supra* note 41, at 1203-07.

81 Edwin J. Williamson, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia*, 1992 Proc. Am. Soc'y Int'l L. 10-12, 15 (1992).

82 Vienna Convention on Succession of States in Respect of Treaties, 23 Aug. 1978, U.N. Doc. A/CONF.80/31, 17 I.L.M. 1488 (entered into force Nov. 6, 1996).

83 For further particulars concerning this subject see "Depositary Practice of the United States of America in Relation to the Succession of States in Respect of Treaties." Council of Europe Committee of Legal Advisers on Public International Law, Doc. CAHDI (93)16 (Sept. 10, 1993).