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Reservations, Understandings, Declarations, and Other Conditions to Treaties

Article II, Section 2, clause 2, of the U.S. Constitution (the Treaty Clause) permits the President “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]” The Senate, as part of its constitutional role in the treaty-making process, may condition its advice and consent on reservations, understandings, and declarations (RUDs). These RUDs guide treaties’ content, effect, interpretation, and implementation.

Constitutional Roots of the Senate’s Conditional Consent Authority

Historical practice suggests that, when drafting the Treaty Clause, the Framers of the Constitution intended “advice” and “consent” to be separate steps in the treaty-making process. Under this interpretation, the President would consult the Senate during treaty negotiations and seek its advice before asking for its final consent when negotiations ended. Since the early years of President George Washington’s Administration, however, Presidents have not formally sought the Senate’s advice during treaty negotiations. Instead, the Senate has maintained an aspect of its advice function by using RUDs to influence treaties’ terms and implementation.

The Senate first exercised its conditional advice and consent authority in 1795 when it considered a commercial treaty with Great Britain, known as the Jay Treaty. The Senate provided advice and consent “on condition” that an article in the treaty regulating trade duties be suspended to the extent it concerned U.S. trade in the West Indies. At the time, conditional consent was viewed as a peculiar feature of the American constitutional system, but the practice has since become a common aspect of treaty-making worldwide.

Choosing Among RUDs

The label applied to a RUD or other condition varies depending on its function and legal effect.

Reservations change the United States’ legal obligations under a treaty without changing the treaty’s text. For example, in giving advice and consent to a treaty restricting use of incendiary weapons, the Senate provided that the United States reserves the right to use those weapons in circumstances that would minimize civilian casualties and collateral damage. A common reservation is to provide that the United States is not bound by a treaty’s articles that require international tribunals to resolve disputes.

Understandings are interpretive statements that clarify or elaborate on a treaty’s terms without altering the treaty’s text or legal effect. Understandings often identify broad and

potentially capacious terms in a treaty and more precisely lay out the United States’ understanding of their meaning. In one instance, the Senate added an understanding that the term *armed conflict* in the International Convention for the Suppression of Acts of Nuclear Terrorism does not include internal disturbances, riots, and isolated acts of violence.

Declarations are statements that express the Senate’s views or opinion on matters a treaty raises, often describing the Senate’s position on policy issues. For example, in giving advice and consent to protocols adding countries to the North Atlantic Treaty Organization, the Senate has used declarations to express its views about the organization’s importance to national security. Other declarations specify a treaty’s legal domestic status—most commonly by stating whether a treaty is self-executing. For background on self-execution and treaties’ role in the U.S. legal system, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Stephen P. Mulligan.

Other conditions: The Senate may impose other requirements under the label *condition*, *proviso*, or *statement*. These conditions often set forth procedural requirements for ratifying or implementing a treaty. For instance, the Senate has conditioned consent on requirements that the President make certifications to the Senate, produce reports, or consult certain congressional committees on issues the treaty raises.

Among RUDs and other conditions, reservations are unique because they change a treaty’s legal effect. Other than reservations, which are defined in international law, the label given to a condition generally derives from Senate practice and usage rather than clearly delineated legal frameworks or judicial decisions.

Domestic Law and RUDs

The Supreme Court has recognized the Senate’s authority to condition its consent to treaties, and lower courts have generally given effect to RUDs. For example, when considering the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, federal courts have held that the Senate’s understanding of the meaning of *torture* must apply, even if that understanding does not align with the prevailing interpretation in the international community.

RUDs must be consistent with the Constitution, and they cannot infringe on individual rights or exercise a power the Constitution assigns exclusively to another branch of government. Many commentators accept the view that, because the Senate’s conditional consent authority stems

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The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII
Gettysburg Address



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from its constitutional role in treaty-making, RUDs must relate to the underlying treaty.

RUDs in Domestic Treaty-Making

In the standard treaty-making process, a member of the executive branch negotiates a treaty's terms and signs the completed text when negotiations end. Next, the President transmits the treaty to the Senate for its advice and consent. The President may propose RUDs when transmitting treaties to the Senate.

At the next stage, the Senate considers whether to give advice and consent to the treaty. If it chooses to do so, it passes a *resolution of advice and consent to ratification*. Any RUDs the Senate approved are included in this resolution. The Senate's final vote on the resolution of advice and consent to ratification, including any RUDs in that resolution, must be approved by two-thirds of Senators present and voting, as provided in the Treaty Clause.

If the Senate consents to ratification, the process shifts back to the executive branch. At this point, the President decides whether to take the final step to ratify the treaty. As part of that decision, the President must choose whether to agree to the RUDs, if any, in the Senate's resolution. If the President ratifies the treaty, the President is considered to have accepted the RUDs. If the President finds the RUDs unacceptable, the President can decline to ratify the treaty.

If ratification goes forward, the President or an executive branch designee signs and affixes the United States' seal to an *instrument of ratification*. RUDs are generally included in the instrument of ratification, and some RUDs state that they must be included. The United States next exchanges its instrument of ratification with the other treaty parties or deposits it with a specified body. Most treaties define how many countries must submit instruments of ratification for the treaty to enter into force.

When the United States ratifies a treaty, the other parties to the treaty receive notification of the United States' instrument of ratification, including the RUDs contained in it. At this stage, the other parties have an opportunity to object to the United States' RUDs through a process defined in international law.

RUDs vs. Amendments

Along with RUDs, the Senate can propose to amend a treaty. The term *amendment* has different usages in this context. In the 19th and early 20th centuries, the Senate used the term *amendment* when proposing what would now be labeled as RUDs, but that usage has fallen out of favor. Amendments more often refer to changes to a treaty's text.

When the Senate proposes to amend a treaty's text, the ratification process for the President changes. Whereas the President can ratify a treaty subject to RUDs, the President cannot do so when the Senate includes text changes in its resolution of ratification. Rather, the President must reopen negotiations with the other treaty parties and seek their approval for the changes. Historically, when the Senate has proposed amendments, it has been to bilateral treaties. For multilateral treaties, the practical and political difficulty of

reconvening negotiations can make proposed amendments unlikely to be adopted.

The term *amendments* in the treaty context can also refer to "floor amendments" under Senate procedural rules. During floor consideration of a treaty and a resolution of ratification, proposals to amend the treaty's text or to add RUDs are treated, procedurally, as "floor amendments." For discussion of Senate rules for considering treaties and RUDs, see CRS Report 98-384, *Senate Consideration of Treaties*, by Valerie Heitsch.

International Law and RUDs

International law on RUDs is largely set forth in the Vienna Convention on the Law of Treaties (Vienna Convention). The United States has not ratified the Vienna Convention, but the executive branch views it as generally reflecting customary international law, although there is disagreement on the extent to which it does so. Understandings, declarations, and other conditions are not addressed directly in the Vienna Convention, as international law is predominantly concerned with reservations.

The Vienna Convention permits reservations unless they are incompatible with the treaty's object and purpose or the treaty prohibits them. The Vienna Convention defines *reservation* as a condition that "purports to exclude or modify the legal effect of certain provisions of the treaty in their application" to the ratifying country. The label a country attaches to a particular condition does not determine whether it is considered a reservation under international law. Rather, the Vienna Convention allows countries to look beyond the label to analyze whether a condition's substance amounts to a reservation.

The Vienna Convention provides a set of rules on how countries respond to reservations. Unless the treaty provides otherwise, countries can accept reservations, object to them, or take no action. When a country accepts a reservation, the reservation modifies the treaty's legal effect for the party that made the reservation (the reserving country) and the accepting country. Acceptance may also be implied from the absence of an objection for a period of one year.

Countries can object to reservations, but objections ordinarily do not prevent a treaty from entering into force. A treaty still enters into force between the reserving country and the objecting country unless the objector "definitely expressed" a contrary intent. When a treaty enters into force despite an objection, the treaty's provisions related to the reservation do not apply between the reserving country and the objector. For multilateral treaties, every party responds separately to every other country's reservations. When one country objects and others do not, the treaty enters into force, subject to the reservation, between the reserving country and all countries that did not object.

Different rules apply when performing the entire treaty is essential to a treaty's object and purpose. In those cases, all parties must accept a reservation for it to be given effect.

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