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# REVIEWING THE U.S.-SOVIET INF TREATY: THE SENATE'S OPTIONS

## INTRODUCTION

With the United States-Soviet treaty on Intermediate-Range Nuclear Forces (INF) Treaty signed, attention now focuses on the Senate, where the battle over approval will rage. Ronald Reagan is urging strongly that the Senate accept the accord without any change. A number of Senators, however, have doubts about the treaty as it now stands. They suggest that they may approve it only with modifications or clarifications. Other Senators are talking about amending the treaty or adding reservations to it.

Such actions would be consistent with the Senate's constitutional role in the treaty process. The power to bind the U.S. to a treaty with another nation is shared between the President and the Senate. The President negotiates a treaty and submits it to the Senate for "advice and consent" to ratification. If the Senate gives its consent by an affirmative vote of at least two-thirds of the members present, then the President may ratify the treaty by signing an instrument of ratification. Only then does the treaty become effective.

**Price of Consent.** The Senate is not limited to simply accepting or rejecting a treaty submitted by the President. It may offer "advice" in the form of various kinds of conditions. If it adopts one or more conditions, these become, in effect, the price it demands for granting its consent to ratification. The President, and any other party to the treaty when necessary, must accept these conditions before the treaty can be ratified.

As with any treaty, Senate conditions to the INF accord could take a variety of forms. Some would change the terms of the treaty; usually called amendments or reservations, these are intended to bind both the Soviet Union and the U.S. Others would constrain the President's ability to carry out the treaty; usually termed understandings or declarations, these would not require Moscow's assent and would bind the President to the same degree as a statute passed by Congress.

Often an exaggerated emphasis is put on whether the Senate calls a particular condition a clarification, an amendment, or some other name. Yet the label used by the Senate is not critically important. What is important is that the Senate make it absolutely clear whether its actions are intended to bind only the President or both the President and the Soviet Union.

Senate hearings on the INF treaty begin late this month. In 1972 the Senate rushed through the hearings on the SALT I and Anti-Ballistic Missile agreements. As a consequence, little or no attention was paid to such key questions as the Senate's understanding of whether such future developments as a Strategic Defense Initiative were permitted by the ABM pact. No action should be taken on the INF agreement until all matters raised by the treaty are fully explored. Those who negotiated the accord must be examined in depth by the Senate; they must explain under oath what they have agreed to, why they agreed to it, and what they believe the Soviets have agreed to. The Senate also must hear testimony from a wide range of outside experts. A thorough review of the treaty, its terms, and its effect on the nation's security should be conducted. Only then, after extensive testimony and extensive consideration of attaching possible conditions, should the Senate vote on the matter.

## THE SENATE'S POWER TO MODIFY TREATIES

A treaty is an agreement between the U.S. and one or more sovereign nations. Once in force, it binds the U.S. under international law to abide by its terms. A treaty that has been ratified also becomes part of U.S. law, with the same standing as a federal statute. It thus supersedes all state laws as well as any prior federal law inconsistent with its terms.

The Senate's power to give conditional approval to a treaty is rooted in Article II of the Constitution. This article provides that the President may make treaties "by and with the Advice and Consent of the Senate." At first, George Washington gave this provision effect by consulting the Senate before negotiating a treaty. He soon abandoned this because of the Senate's tendency to put off difficult questions for study, thus delaying the negotiations. Washington also feared that sensitive bargaining positions could be compromised by involving the Senate too closely in the negotiations.[1]

**Senate Asserts Its Right.** By 1794, when the Jay Treaty averting war over British seizure of American ships was negotiated, Washington had taken to submitting the final text of a treaty to the Senate for a straightforward up or down vote. The Senate responded to this take it or leave it approach by asserting the right to condition its approval on changes in the treaty. In the case of the Jay Treaty, the Senate demanded a removal of the provision restricting U.S. trade with the West Indies. Neither Washington nor the British government objected. The two governments incorporated this change into the text of the treaty and ratified the amended document.

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1. U.S. Senate, Committee on Foreign Relations, *Treaties and Other International Agreements: The Role of the Senate*, A study prepared by the Congressional Research Service of the Library of Congress, S.Prt. 98-205, June 1984, pp. 34-36.

The practice of requiring some sort of modification in a treaty as a condition of Senate approval is now well established. Since 1794, the Senate has insisted on some type of change in close to 300 treaties.[2] Indeed, it is not uncommon today for the President to request that approval be granted with conditions he suggests. This usually occurs because of some change in circumstances, the discovery of a matter that was overlooked during negotiations which necessitates a modification in the original agreement, or a presidential request for the Senate to clarify the terms of a multilateral treaty.

## THE PROCESS OF SENATE MODIFICATION

Formal Senate consideration of a treaty begins once it is submitted to the body by the President.[3] It is normally referred to the Committee on Foreign Relations, which reviews the treaty, taking testimony from executive branch personnel and other witnesses. In the case of arms control, recent treaties typically have been reviewed informally by the Senate Armed Services and Intelligence Committees as well.

If the majority of the members of the Foreign Relations Committee approves the treaty, a resolution of ratification is reported to the full Senate with a favorable recommendation. The resolution recites that the Senate consents to the treaty's ratification. Any conditions recommended by the Committee are listed at the end of the resolution, and the resolution indicates that consent is subject to these conditions.

**Two-Thirds Vote.** The full Senate then reviews the treaty and any conditions that the Foreign Relations Committee has adopted. The full Senate may add new conditions or delete any of those recommended by the Foreign Relations Committee. Conditions may be added to or stricken from the resolution by a simple majority vote of those Senators present and voting. After the Senate has debated the various conditions, it votes on the question of advice and consent to ratification. Article II of the Constitution requires an affirmative vote by two-thirds of those Senators present and voting for Senate consent to ratification.[4]

If two-thirds of the Senate approve the treaty, it is returned to the President along with the resolution of ratification. He may agree to ratify the treaty, subject

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2. "The Reservation Power and the Connally Amendment," *New York Journal of International Law and Politics*, Vol. 11(1987), p. 326.

3. At the time it is submitted to the Senate, the President or some lesser official already will have signed the treaty. This signature represents, in effect, a commitment to the other party to seek Senate approval. While the President is seeking this approval, the United States has an obligation under international law "to refrain from acts that would defeat the object and purpose of the agreement." Sec. 312(3) of American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States (Revised)*, Tentative Final Draft, Philadelphia, ALI, 1985.

4. If all 100 Senators are present, at least 67 must vote for a treaty for it to receive consent to ratification. By comparison, only 60 votes are needed to end a Senate filibuster. For this reason, treaties are rarely filibustered. If there are enough votes to sustain a filibuster, there are enough to defeat a treaty outright.

to whatever conditions the Senate has included in the resolution of ratification. Or if the President finds the conditions objectionable, he may decline to ratify it. President William Howard Taft, for example, refused to ratify an international agreement on arbitration because of the conditions attached by the Senate. The decision is the President's alone. The Senate cannot force him to ratify a treaty that includes conditions of which he disapproves.[5]

**Other Party Consent.** If the Senate has imposed conditions that require the consent of the other party to the treaty, the President must obtain that consent. This might require reopening the negotiations, or the other party might simply agree without further discussion. Were negotiations reopened and other changes besides the Senate's made, the new document would have to be resubmitted for Senate advice and consent.

If the Senate has not made changes requiring the other party's consent, or if the other party has agreed to them, ratification by the United States (in the person of the President) can proceed. At some stage the executive authority of the other party to the treaty will indicate to the Department of State that it is prepared to ratify the treaty. This will mean that whatever internal procedures it must go through (approval by the Supreme Soviet in the case of the Soviet Union, for example) have been completed.

An instrument of ratification containing a copy of the treaty and the text of the agreed upon Senate conditions is then prepared. The President signs this instrument on behalf of the United States, and the Secretary of State affixes the official seal of the U.S. For a bilateral agreement, the President exchanges this instrument with the other party. At this point, the treaty has been ratified by both parties. Unless the treaty specifies otherwise, it is effective immediately as an international legal obligation of the United States, and the United States is bound by international law to observe its terms.

**President Interprets.** Once the treaty has been ratified, it is interpreted by the President in disputes with the other party. If, during its deliberations on the treaty, the Senate included a specific interpretation in the resolution of ratification or otherwise made an interpretation unambiguously clear, the President is bound to respect that interpretation. Absent such an explicit statement of the full Senate's view, the President is free to interpret the treaty as he sees fit.[6]

The Senate's role is limited to actions taken at the time it gives consent to ratification. Subsequent attempts to interpret a treaty have no legal effect. Early in the 20th century, the Senate, after approving a peace treaty with Spain, sought by resolution to clarify certain terms. The Supreme Court rejected this effort saying that "the meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it."[7]

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5. Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, New York: The Foundation Press, 1972), p. 136.

6. American Law Institute, *op. cit.*, Sec. 326 and Sec. 314, comment d.

7. *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 180 (1901).

Although the House of Representatives has no role in approving treaties, many treaties require legislation for their implementation. Funds may have to be appropriated, for example, to pay for the destruction of U.S. missiles should the INF treaty be ratified. As with any legislation, this spending measure would require House, as well as Senate, approval under normal legislative procedures.

## TYPES OF SENATE TREATY MODIFICATIONS

The conditions the Senate attaches to a treaty as the price of its consent to ratification usually are designated amendments, reservations, understandings, or declarations.[8] Amendments and reservations directly affect the legal obligations contained in the treaty. By contrast, understandings usually amplify or explain existing obligations without changing them. Declarations ordinarily refer to matters that are related to the treaty but which do not directly affect its terms.

### Amendments

In some cases, the Senate has sought to amend the text of the treaty itself. An amendment is an actual change in the language of the treaty and requires the explicit consent of the other party to the treaty. The Senate's modification of the West Indies trade provisions of the Jay Treaty, for example, took the form of an amendment; formal agreement of the British government to the amendment was required before the treaty could take effect. More recently, the Senate in 1978 required four separate amendments to the Panama Canal treaties before ratification could go forward.

### Reservations

A Senate condition can also be in the form of a reservation. A reservation modifies or varies the legal obligation of the U.S. from that contained in the text of the treaty. Example: the 1978 Panama Canal Treaty provides that while the treaty is in effect the U.S. may not negotiate for the rights to build another canal with a third country. One of the Senate reservations in effect nullifies this provision by explicitly permitting the U.S. to enter into such negotiations.[9] In 1986, the Senate adopted a reservation to the Genocide Convention exempting the U.S. from the jurisdiction of the World Court in disputes arising under the Convention.

### Understandings

The Senate has approved treaties subject to understandings. In contrast to reservations and amendments, which change U.S. legal obligations, an understanding is a Senate statement of how a certain term in a treaty is to be interpreted. Its intent is to elucidate or clarify a term rather than change its meaning. The

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8. *Treaties and Other International Agreements*, *op. cit.*, pp. 109-110.

9. U.S. Senate, Committee on Foreign Relations, *Senate Debate on the Panama Canal Treaty*, prepared by the Congressional Research Service, Library of Congress, 96th Congress, 1st Session, February 1979, p. 467.

Inspection Protocol to the INF treaty, for instance, provides that an inspection can be canceled "due to circumstances brought about by *force majeure*."[10] A Senate statement indicating just what type of circumstances are encompassed by this provision would be an understanding.

Some confusion has arisen in the past over whether an understanding must be shared with the other party to the treaty.[11] For example, the Senate might conclude, based on its review of the INF treaty, that the *force majeure* clause refers only to weather conditions. The Soviet Union, on the other hand, might interpret it to mean unforeseen mechanical failures as well. If the Senate were to include an understanding in the resolution of ratification stating that *force majeure* refers only to weather conditions, experts disagree on the understanding's effect on the Soviet Union.

Under one interpretation of the 1984 U.S.-Italian tax treaty, U.S. companies with offices in Italy would have been able to deduct dividends paid to their subsidiaries. This would have opened up a major loophole in U.S. tax law. The Senate added an understanding to the treaty that foreclosed this interpretation.

In approving the Genocide Convention in 1986, the Senate adopted three understandings. One clarified the definition of the term "mental harm"; one specified what the Senate understood the term "intent" to mean; and the third made it clear that the United States retained the right to prosecute U.S. nationals accused of violating the Convention.

### Declarations

A declaration relates to a treaty in some way but does not affect its terms directly. A declaration can be a simple statement of policy, or it can affect the way the President implements the treaty. Example: a statement added to the INF treaty that the U.S. supports a buildup of NATO conventional forces in Europe. Example: language that barred the President from ratifying the treaty until the Soviet Union withdrew from Afghanistan.

## LEGAL EFFECTS OF SENATE CONDITIONS

Senate conditions that change the legal obligation of either the U.S. or the other party to the treaty, such as amendments or reservations, are as binding under international law as any provision in the original agreement. Within the U.S., Senate conditions have the force of a federal statute. There is an exception for a condition that has no plausible relation to the treaty's adoption or implementation.[12]

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10. Article X, Protocol Regarding Inspection relating to the Treaty Between the USA and the USSR on the Elimination of their Intermediate-Range and Shorter-Range Missiles.

11. D.M. McRae, "The Legal Effect of Interpretive Declarations," *British Year Book of International Law: 1977-1978* (Oxford: The Clarendon Press, 1978), pp 155-173.

12. American Law Institute, *op. cit.*, Sec. 303, comment d and Reporter's Note 4; *Power Authority of New York v. FPC*, 247 F.2d 538 (D.C. Cir. 1957).

One example of an unrelated condition would be a provision attached to the INF treaty requiring the President to construct a bridge across the Potomac before ratifying the treaty. Whether a condition meets the plausible relation test is up to the President, or in some cases the federal courts, to decide.

## PROBLEMS WITH CURRENT SENATE PRACTICE

There always has been some question about what action the President and the other treaty party must take to give full legal effect to Senate reservations and amendments. The answer is clearest in the case of an amendment. The President must gain the formal acceptance of the other party to the Senate's amendment. There thus can be no possibility of misunderstanding.

The situation is different in the case of reservations. During the Foreign Relations Committee's consideration of SALT II in 1979, Committee staff advised that, as long as the Senate's reservations were included in the instrument to be exchanged with the Soviet Union at the time of ratification, they would be binding upon the Soviet Union unless the Soviets explicitly objected to them. Relying upon common law doctrine, the staff asserted that Soviet silence constituted consent to Senate reservations.

**Explicit Concurrence Needed.** A group of Yale professors, including Eugene Rostow and Robert Bork, took a different view.[13] They asserted that international law on this point was unsettled. Accordingly, they concluded that there was no guarantee that Soviet silence in the face of Senate reservations meant that the Soviet Union agreed to be bound by them. They also pointed to Soviet statements that Senate conditions were internal U.S. matters. As a result, they counseled the Senate that, if it were to conclude that changes in the U.S. legal obligation under the treaty were called for, the Senate should require the unequivocal and explicit concurrence of the Soviet Union to these changes.

The Committee sided with the Yale professors. In drawing up the resolution of ratification to accompany the SALT II treaty, the Committee abandoned the use of the terms amendments, reservations, understandings, and declarations in favor of a tripartite scheme that classified Senate conditions into three categories:

1) **those that need not be formally communicated** to the Soviet Union in the instrument of ratification;

2) **those to be formally communicated** but which need not be agreed to by the Soviet Union; and

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13. Eugene V. Rostow, *et al.*, Letter to Senator Frank Church, Chairman, Senate Committee on Foreign Relations, September 27, 1979, reprinted in U.S. Senate, Committee on Foreign Relations, *Hearings on the SALT II Treaty*, 96th Congress, 1st Session, part 4, 1979, pp. 15-17; Michael J. Glennon, "The Senate Role in Treaty Ratification," *American Journal of International Law*, Vol. 77, 1983, pp. 257-280.

3) **those that would require the explicit agreement** of the Soviets for the treaty to take effect.[14]

Category 3 corresponds to conditions that the Senate traditionally has called amendments or reservations. It includes any condition that would alter either the U.S. or the Soviet legal obligation under the treaty. The requirement of explicit Soviet consent directly addresses the problem of Soviet silence in the face of a Senate reservation.

Category 2 conditions, those that the Senate has decided should be communicated to the Soviet Union, encompass Senate statements of the U.S. position that Moscow need not accept for the treaty to be ratified. One example would be a statement that the U.S. will proceed with the development of weapon systems related to the defense of Europe but not covered by the INF treaty. The Soviet Union thus is on notice of the U.S. intention, and could object if it believed the weapon systems are in fact covered by the treaty, but this objection by itself would not prevent U.S. ratification.

Conditions classified as category 1, those that the Senate has decided need not be officially communicated to the Soviet Union, include statements that in the past have been termed declarations. A Senate declaration in favor of an increase in NATO conventional forces in Europe, for example, would fall into this category. It is a matter solely between the U.S. and its allies, has no effect on the treaty *per se*, and is of no legal significance to the Soviet Union.

## IMPROVING SENATE TREATY PRACTICE

The SALT II treaty was set aside after the Soviet invasion of Afghanistan; as a result, the full Senate never had an opportunity to consider the merits of the Foreign Relations Committee's novel approach to classifying Senate conditions. Nor has the Committee itself adhered to this scheme in subsequent treaties. Instead, it has reverted to the more conventional approach of labeling its conditions amendments, reservations, understandings or declarations. Should the Senate decide that some sort of modification or clarification of the INF treaty is necessary, it should return to the approach used with SALT II.

This scheme assures the Senate that if it should determine that some change is required in either the U.S. or Soviet legal obligation under the INF treaty, the Soviet Union will have to respond explicitly in order for the treaty to take effect. The Soviets, for example, will not be able to remain silent in the face of a Senate condition called a reservation and then later contend that it was not part of the treaty.

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14. U.S. Senate, Committee on Foreign Relations, *Report of the Committee to accompany the SALT II Treaty*, Ex. Rept. 96-14, 1979, pp. 28-35.

This scheme also avoids any confusion about the effect of a Senate understanding. If the Senate concludes that the *force majeure* clause is limited to certain narrowly drawn situations, and it finds that the record is unclear as to whether the Soviets share this interpretation, it can put the understanding in category 3. This will require the Kremlin to agree to it before ratification takes place. If Moscow were to refuse, it would be far better to reopen negotiations and resolve the issue in advance of ratification than to wait for a disagreement during an inspection visit.

**Label Not Important.** There has been a tendency in recent treaty debates to view an amendment as "stronger" than a reservation and a reservation as "stronger" than an understanding. As a result, the Senate sometimes has labeled understandings "reservations" and reservations "amendments" in the mistaken belief that the stronger the label, the greater the legal weight of the proposed modification. Were the Senate, for example, to adopt a condition stating that the INF treaty cannot be ratified by the President until the Soviets withdraw from Afghanistan, under the traditional nomenclature it would be labeled a declaration. Whatever such a provision is labeled, it does not change the legal obligations contained in the treaty once it is ratified and does not require the consent of, or even notice to, the Soviet Union to be effective. It is solely a matter between the Senate and the President, one that is binding on him without in any way affecting the Soviet Union. There is no point in calling it a reservation or amendment to make it stronger.

The advantage to the approach devised by the Foreign Relations Committee for SALT II is that it ends the confusion created by different labels. The key issue for the Senate is whether it should demand that the Soviet Union be bound by a condition, or simply put on notice as to its content, or whether it even need be formally brought to Soviet attention. The SALT II classification device focuses on this crucial question. A label adds nothing. In some circumstances it can even obscure the Senate's purpose for imposing a condition, leaving both the nation's would-be treaty partner and the President unclear about how it should be interpreted.

## CONCLUSION

The Senate has the power under the Constitution to demand changes or clarifications in the INF treaty as the price of its consent. This power has been exercised in the past when the Senate has found that a treaty as negotiated does not serve the national interest. Some conditions bind only the President; others bind the would-be treaty partner as well .

If the Senate decides to hinge advice and consent to the INF treaty on the acceptance of certain conditions, it should carefully spell out which conditions must be accepted by the Soviet Union and which need only be accepted by the President. One way to do this is to follow the scheme devised for the SALT II treaty, which

explicitly defined conditions on the basis of whether they were binding on the President and/or the treaty partner. This will ensure that the Senate's conditions are given full legal effect.

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