



TACIT AMENDMENTS

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As a general rule, the President is “without authority, except by and with the advice and consent of the Senate, to modify a treaty provision.”² Thus, in amending a treaty, parties effectively sign and ratify a new treaty, to which the standard treaty processes apply. However, numerous treaties have established procedures for modifications to the regime that do not rise to the level of formal amendments to the treaty. This report focuses on such “unratified treaty amendments”—which include what are called “tacit amendments.”

Unratified amendments are amendments to treaties that are made without formal Senate ratification.³ They have proven a useful tool in creating robust treaty regimes in a changing world. Just as the use of executive agreements in general has expanded rapidly in the past century,⁴ treaty regimes increasingly have adopted amendment processes that do not require a full ratification process. And just as executive agreements have raised questions about Senate prerogatives, so too have unratified amendments.

There are two primary ways that the U.S. government modifies underlying treaties through an unratified amendment⁵—first, through the use of executive agreements; and, second, through the use of tacit amendments. Part I describes how each process works. It argues that both pass constitutional muster so long as the Senate has provided its clear advice and consent to the use of such processes (although not necessarily to the substance of the modifications) in the first instance. Part II outlines and evaluates the various ways in which the Senate has responded to attempts to modify treaties by executive agreement or by tacit

² See CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. PRT. 106-71, at 181 (2001) [hereinafter “CRS Report”], available at http://www.au.af.mil/au/awc/awcgate/congress/treaties_senate_role.pdf (quoting 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 429 (1927)).

³ See Curtis A. Bradley, Unratified Treaty Amendments and Constitutional Process 1 (Feb. 6, 2006) (unpublished manuscript on file with author, prepared for Duke Workshop on Delegating Sovereignty) (“Unratified treaty amendments are changes to treaties proposed by international bodies that become binding upon parties to the treaty without the expectation of a national act of ratification.”).

⁴ See CRS Report, *supra* note 2, at 21-22.

⁵ Parties also can modify treaty terms in a number of ways that may not require subsequent Senate ratification where they did not anticipate the modifications in the treaty itself. For example, the U.S. government might acquiesce in actions of foreign governments that effectively modify a treaty. Since World War II, the President has not submitted foreign reservations to a U.S. ratified treaty to the Senate for approval, even though those reservations modify the terms of the treaty. Similarly, the President has in the past acquiesced to temporary departures by foreign governments in times of abnormal conditions, such as war or pending action to a new treaty. *Id.* at 181.

amendment in the past. It concludes that the Senate's requirements of prior notice and its focus on technical provisions, while not always easy to achieve in practice, are sensible ways to maintain Senate prerogatives. Part III concludes.

I. UNRATIFIED TREATY AMENDMENTS

This section divides unratified amendments into two primary categories: those that proceed by executive agreement and those that proceed by some form of tacit amendment. In this report, treaties that can be modified by executive agreement are those that allow the President to agree expressly on changes with other parties that modifies the treaty terms, binding the parties but not requiring Senate consent. Tacit amendment regimes as those where the treaty terms can be modified and the United States bound to the new terms, even without the President taking any action at all.⁶ In fact, the President may specifically oppose the amendment altogether and yet still be bound by the change.⁷ In all cases, the amendments occur without returning to the Senate or to Congress as a whole for any further consent.

As we will see, notwithstanding important concerns about Senate prerogatives, all of these unratified amendment procedures pass constitutional muster—provided, again, that the initial treaty clearly provides for such

⁶ The literature does not consistently define the notion of “tacit amendment,” and while some definitions seem to focus on whether the executive (speaking on behalf of the party) must give tacit assent, others focus simply on whether the modifications require Senate consent and therefore appear to equate “tacit amendments” and “unratified amendments.” Compare Bradley, *supra* note 3, at 1 (defining tacit amendments as those which “are adopted by an international body and automatically take effect for a party unless the party objects within a specified time period”) with CRS Report, *supra* note 2, at 182 (describing tacit amendment regimes as those that “establish processes for their own modification which do not require further Senate involvement”). Unsurprisingly, then, the term “tacit amendment” has been used to describe many different types of amendments. See CRS Report, *supra* note 2, at 175 (“The [tacit amendment] practice takes various forms—Presidential acquiescence, nonsubmission of reservations by other parties, implementing bodies with the authority to make changes, and amendment by fewer than all of the parties”). The Senate Foreign Relations Committee in one report seems to have adopted the terminology that equates “tacit amendment” (or in this case, “tacit agreement”) with “unratified amendments.” See S. EXEC. REP. NO. 108-12, at 34 (2004) (borrowing from the CRS Report and describing ‘tacit agreement’ regimes as those that “establish processes for their own modification which do not require further Senate involvement.”). This report, however, will use the term “tacit amendment” regimes to refer to one subset of unratified amendment regimes: those that allow modifications without explicit executive consent.

⁷ Bradley, *supra* note 3, at 1 (explaining that “[o]ften these amendments will apply to a party only if it fails to object to them, but sometimes they will apply to a party even over its objection”).

subsequent modifications. This conclusion is rooted in the well-established history of executive agreements made pursuant to an Article II treaty.

A. Modifications by Executive Agreement

As the Congressional Research Service has noted, “[n]umerous agreements pursuant to treaties have been concluded by the Executive, particularly of an administrative nature, to implement in detail generally worded treaty obligations.”⁸ One scholar, David Koplow, has distinguished between “filling the gaps” executive agreements—those that fill in with specific detail what the treaty establishes in broad strokes—and “changing the standards” agreements—those that amend provisions of the originally ratified treaty directly.⁹

Treaties that provide for “standard changing” executive agreements—the primary focus of this section—might outline an initial standard in the treaty text but then allow parties to later amend that standard through executive agreement.¹⁰ They may present greater concern to the Senate insofar as they allow the treaty text ratified by the Senate to be *changed*, rather than simply supplemented, without subsequent Senate approval.¹¹

1. Examples of Treaties Amended by Executive Agreement

A couple of bilateral wildlife conservation treaties provide for amendments to certain treaty provisions without Senate ratification. The United States-Japan Convention on the Protection of Migratory Birds provides an initial list of birds to be protected, but allows parties to modify that list by diplomatic note.¹² The United States-Canada Treaty on Pacific Salmon is similar, allowing parties to agree to modifications of each nation’s allowable catch of salmon.¹³

⁸CRS Report, *supra* note 2, at 86.

⁹David A. Koplow, *When is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate*, 59 U. CHI. L. REV. 981, 1042-43 (1992).

¹⁰*Id.* at 1035-36, 1042.

¹¹*But see id.* at 1045 (recognizing that “the distinction between ‘gap filling’ and ‘standards changing’ is unreliable, subject to differences of view and amenable to evasion by clever wordsmiths”).

¹²Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment art. II(2), U.S.-Jap., Mar. 4, 1972, 25 U.S.T. 3329 (providing that “[t]he list of the species defined as migratory birds in accordance with paragraph 1 of this Article is contained in the Annex to this Convention” and “[t]he competent authorities of the Contracting Parties shall review from time to time the Annex and, if necessary, make recommendations to amend it”). In 1988, the parties exchanged diplomatic notes to amend the list of protected birds pursuant to this process. *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service: Treaties List*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/laws/lawsdigest/>

While these treaties contemplate amendment through a simple diplomatic note, a number of treaties in the arms control context establish commissions that operate as forums for the parties to negotiate and effectuate standard-setting agreements. At least some of the amendments the parties agree on through these commissions are not subject to Senate ratification. Such treaties include the Intermediate-range Nuclear Forces (INF) Treaty¹⁴, the 1990 Protocol to the Threshold Test-Ban Treaty (TTBT)¹⁵, the Strategic Arms Reduction Treaty (START),¹⁶ and most recently, the New START Treaty.¹⁷

The INF Treaty, signed in 1987 and ratified by the Senate in 1988, established a “Special Verification Commission” (SVC). The parties could “meet within the framework”¹⁸ of the SVC to, among other things, “agree upon such measures as may be necessary to improve the viability and effectiveness of this Treaty.”¹⁹ Notably, “[s]uch measures shall not be deemed [formal] amendments to the Treaty,”²⁰ and thus are not subject to ratification. The other treaties contain similar provisions. The original START I Treaty creates a “Joint Compliance and Inspection Commission” with a similar “viability and effectiveness” mandate²¹ and an additional proviso that the changes may not affect “substantive rights or obligations” of the parties.²² The 1990 Protocol to the TTBT created a Bilateral Consultative Commission (BCC) which has slightly more specific authorities, including the ability to modify verification procedures to enhance “effective

treaty.html#MIGBIRDJAP (last visited Dec. 4, 2010).

¹³ Treaty Concerning Pacific Salmon art. XIII, U.S.-Can., Jan. 28, 1985, T.I.A.S. No. 11,091.

¹⁴ Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles art. XIII, U.S.-U.S.S.R., Dec. 8, 1987, S. TREATY DOC. NO. 100-11 [hereinafter “INF Treaty”].

¹⁵ Protocol to the Treaty on the Limitation of Underground Nuclear Weapons Tests, §XI, U.S.-U.S.S.R., Jun. 1, 1990, S. TREATY DOC. NO. 101-19 [hereinafter “Protocol to the Threshold Test-Ban Treaty”].

¹⁶ Treaty on the Reduction and Limitation of Strategic Offensive Arms art. XV, U.S.-U.S.S.R., July 31, 1991, S. TREATY DOC. NO. 102-20 [hereinafter “START I Treaty”].

¹⁷ Treaty On Measures for the Further Reduction and Limitation of Strategic Offensive Arms art. V, U.S.-Russ., Jan. 3, 1993, S. TREATY DOC. NO. 103-1 [hereinafter “New START Treaty”].

¹⁸ INF Treaty, *supra* note 14, art. XIII.

¹⁹ *Id.*

²⁰ Protocol Regarding Inspections Relating to the INF Treaty, *supra* note 14 art. VI(4).

²¹ START I Treaty, *supra* note 16, art. XV.

²² Protocol on the Joint Compliance and Inspection Commission Relating to the Start I Treaty, *supra* note 16, art. VIII (“[T]he Parties may agree upon such additional measures as may be necessary to improve the viability and effectiveness of the Treaty. The Parties agree that, if it becomes necessary to make changes in this Protocol that do not affect substantive rights or obligations under the Treaty, they shall use the Commission to reach agreement on such changes, without resorting to the procedure for making amendments set forth in Article XVIII of the Treaty.”).

implementation of the basic aims” of the arrangements.²³ The New START Treaty also creates a Bilateral Consultative Commission similar to the commission established in START I.²⁴

2. *Legality of Amendment by Executive Agreement*

Courts have yet to rule on the legality of using executive agreements to amend treaties, either as gap-fillers or as standard-changers. Nonetheless, there is a general consensus among international law authorities and scholars that such executive agreements are permissible, as long as they are expressly authorized either by an Article II treaty or by an ex post congressional-executive agreement.²⁵

The delegation of authority to the President to conclude an executive agreement is generally considered legal—as long as it is explicit.²⁶ In such cases, the President may use the authority delegated to him to amend the treaty through executive agreement without submitting the agreement to the Senate.²⁷ These

²³ Protocol to the Threshold Test-Ban Treaty, *supra* note 15, §XI (providing for a Bilateral Consultative Commission through which parties may, among other things, “agree upon such modifications” to “verification procedures” under the treaty that would enhance “effective implementation of the basic aims of the Treaty or this Protocol”); *see also id.* (clarifying that “[s]uch agreed modifications shall not be considered amendments to the Treaty or this Protocol”).

²⁴ New START Treaty, *supra* note 17, art. V; *see also* Protocol on Exhibition and Inspection of Heavy Bombers Relating to the New Start Treaty, *id.*, §2(3) (“The Parties agree that, if it becomes necessary to make changes in this Protocol that do not affect substantive rights or obligations under the Treaty, they shall use the Bilateral Implementation Commission to reach agreement on such changes, without resorting to the procedure for making amendments set forth in Article VII of the Treaty.”).

²⁵ *See* 11 U.S. DEP’T OF STATE, FOREIGN AFF. MANUAL (FAM) 723.2-2(A) (2006) (“The President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate, the provisions of which *constitute authorization* for the agreement by the Executive without subsequent action by the Congress.” (emphasis added)); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 303(3) (1987) (“[T]he President may make an international agreement as *authorized by treaty* of the United States.”) (emphasis added) [hereinafter RESTATEMENT].

²⁶ *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 219-220 & n.167 (2d ed. 1996) (noting that the President’s power to “execute treaties may include authority to do so by supplemental executive agreement”); Koplow, *supra* note 9, at 1035-36. For work questioning the wisdom of such delegations and their effect on the balance of power between the President and Congress, see Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L. J. 140 (2009).

²⁷ *See* CRS Report, *supra* note 2, at 180-81; Koplow, *supra* note 9, at 1035 (providing that at least with respect to gap-filler executive agreements, “if the Senate, in approving an initial treaty, explicitly authorizes the executive to conclude follow-on accords that supplement or modify the

executive agreements, moreover, are enforceable: They have “the same effect and validity as the treaty itself, and [are] subject to the same constitutional limitations as the treaty.”²⁸ It follows that executive agreements concluded pursuant to a treaty authorization may supersede any contrary provisions in that same treaty.²⁹

Nevertheless, two countervailing constitutional doctrines cast some doubt on the legality of treaty amendment by executive agreement—even when clearly authorized in the treaty to be amended. We consider these constitutional concerns briefly, ultimately concluding that neither prohibits the practice.

First, the non-delegation doctrine theoretically guards against the delegation of legislative powers outside the legislative branch.³⁰ Although never directly repudiated, the non-delegation doctrine fell into disuse almost as soon as it emerged.³¹ Today it is understood to simply require Congress to articulate “intelligible principle[s]” to cabin subsequent agency action.³² We therefore

terms, than a later executive agreement within that delegated cope would appear to be fully warranted); *id.* at 1042.

²⁸ RESTATEMENT, *supra* note 25, § 303 cmt f. (“An executive agreement may be made by the President pursuant to a treaty, Subsection (3), when the executive agreement can fairly be seen as implementing the treaty, especially if the treaty contemplated implementation by international agreement. Such an executive agreement has the same effect and validity as the treaty itself, and is subject to the same constitutional limitations as the treaty..”).

²⁹ *See* *Wilson v. Girard*, 354 U.S. 524, 528-29 (1957) (“In the light of the Senate’s ratification of the Security Treaty after consideration of the Administrative Agreement, which had already been signed, and its subsequent ratification of the NATO Agreement, with knowledge of the commitment to Japan under the Administrative Agreement, we are satisfied that the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol embodying the NATO Agreement provisions governing jurisdiction to try criminal offenses.”).

³⁰ *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539-42 (1935) (holding the Recovery Act’s “sweeping delegation of legislative power” to the executive branch was unconstitutional in that it “se[t] up no standards” to constrain administrative action); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (holding that “in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend,” and that such limitations were exceeded in the present case).

³¹ *See* George I. Lovell, *That Sick Chicken Won’t Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 CONST. COMMENT. 79, 79-80 (2000) (“[T]he doctrine’s existence remains ‘fugitive,’ both in the law and in the academy. The Supreme Court has shown little sustained inclination toward reviving the doctrine, and many of the scholars who express some support for it don’t seem to take it very seriously.”); Harold J. Krent, *Delegation and its Discontents*, 94 COLUM. L. REV. 710, 710-11 (1994) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993) and also noting the “demise of a judicially imposed nondelegation doctrine”); Bradley, *supra* note 3, at 6.

³² *Touby v. United States*, 500 U.S. 160, 165 (1991) (“So long as Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to

conclude that it is unlikely that the non-delegation doctrine presents a legal barrier to amendment by executive agreement, as long as the Senate authorizes such practice in clear terms in an Article II treaty.³³

Second, the Supreme Court has invalidated congressional efforts to delegate authority to the President to actually change legislation after its passage by Congress—other than through a veto of the entire piece of legislation. In *Clinton v. New York*, the Court struck down the Line Item Veto Act on the grounds that constitutional separation of powers prohibited the President from effectively amending legislation after it had become law.³⁴ However, the *Clinton* holding only applied to statutes, and the Court has never indicated that a similar prohibition should apply to treaties as well. In fact, treaties are sufficiently distinct from statutes in at least three ways, such that applying the *Clinton* reasoning would appear improper. First, unlike statutes, only the President may negotiate the terms of a treaty; the creation of treaty provisions is therefore not a matter of legislative craft akin to writing a statute. Second, only the President may ratify the treaty, meaning that the President may choose whether and when to ratify a treaty once he has secured Senate advice and consent. Finally, the President arguably retains authority to unilaterally withdraw from a treaty, whereas the President may not unilaterally repeal laws.³⁵ All three differences suggest that the President has more constitutional authority to amend treaties after receiving advance consent than he does for statutes, and that *Clinton* is thus not a barrier to treaty amendment via an executive agreement duly authorized by an Article II treaty.³⁶

Thus, it seems unlikely that existing constitutional precedent precludes treaty amendment by executive agreement. The weight of authority supports the constitutionality of amendment by executive agreement when the agreement is

conform, such legislative action is not a forbidden delegation of legislative power.”) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

³³ For a discussion of the nondelegation doctrine in this context, see Hathaway, *supra* note 26, at 176-80.

³⁴ *Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998). Curtis Bradley has explored the potential application of *Clinton* to the treaty context. See Bradley, *supra* note 3, at 5 (“If applied to the treaty context, [*Clinton*] might suggest that treaty amendment authority cannot be delegated to either the President or to an international body because such a delegation allows for the creation of treaty obligations without compliance with the procedures specified in Article II for making treaties.”).

³⁵ For a discussion of withdrawal from treaties and congressional-executive agreements, see Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking In the United States*, 117 *YALE L. J.* 1236, 1323-1338 (2008).

³⁶ Bradley has similarly concluded that *Clinton* “concerned the legislative process rather than the treaty process” and given the “important differences between the two,” it is defensible to argue that *Clinton* does not apply to bar unratified treaty amendments. Bradley, *supra* note 3, at 7.

within the express scope of the authority granted by the Senate in the underlying Article II treaty.

B. Modifications by Tacit Amendment

A second manner by which unratified treaty amendments can take effect is through a “tacit amendment” (sometimes described as “tacit acceptance” or “tacit agreement”) process. Several multilateral treaties, including those to which the United States is a party, have allowed for processes. The most common form of tacit amendment regime is when a treaty provides for an international body or conference of the parties to make future amendments to the underlying treaty, without further action by the parties. The international body will promulgate policies fleshing out or modifying the terms of the treaty, and those policies will take effect without Senate ratification and without a formal executive agreement. As will be shown below, sometimes the amendments created by tacit amendment regimes can become effective in the United States without the President’s participation in the international body process (if the President does not act, he may nonetheless “tacitly” accept the amendment); and sometimes, the amendments can become effective even if the President objects.

The United States has a long history of entering into treaties with tacit amendment processes. In the 1940s, the United States joined the Convention on International Civil Aviation³⁷ and the International Convention for the Regulation of Whaling,³⁸ both of which included tacit amendment apparatuses. Tacit amendment processes in treaties became more prevalent in the 1970s, when they became a part of a number of maritime treaties that operated under the auspices of the International Maritime Organization (IMO, then known as the Intergovernmental Marine Consultative Organization).³⁹ IMO adopted these procedures after encountering substantial delays in implementing technical provisions of various maritime treaties.⁴⁰ Since then, tacit amendment processes

³⁷ See *infra* note 65.

³⁸ See *infra* notes 54-56 and accompanying text.

³⁹ See, e.g., International Convention for the Safety of Life at Sea art. VIII, Nov. 1, 1974, T.I.A.S. No. 9700, 1184 U.N.T.S. 2 (detailing the procedure by which “tacit amendments” to the convention can enter into force); and the Convention on the Facilitation of International Maritime Traffic art. VII, Apr. 9, 1965, 18 U.S.T. 411, 591 U.N.T.S. 265.

⁴⁰ See William Tetley, *Uniformity of International Private Maritime Law --The Pros, Cons, and Alternatives to International Conventions --How to Adopt an International Convention*, 24 TUL. MAR. L. J. 775, 817 (2000) (recounting history of the tacit acceptance process for the IMO treaties); see also *Conventions: Adopting a Convention, Entry into Force, Accession, Amendment, Enforcement, Tacit Acceptance Procedure*, INTERNATIONAL MARITIME ORGANIZATION,

have appeared in multilateral treaties relating to the environment, arms control, and other areas. The United States has been a party to a large number of these treaties. The tacit amendment procedures have been lauded for handling regular technical updates efficiently, for introducing predictability to amendment processes, for encouraging conformance with international norms, and for limiting reservations.⁴¹

1. *Different Types of Tacit Amendment Treaty Regimes*

This section distinguishes between three regimes that allow for tacit amendments to treaties through the use of international bodies: regimes in which treaty alterations require the unanimous consent of all parties represented in the international body tasked with updating the treaty (what we will call “consensus amendments”); regimes in which international committees or conferences can pass amendments without full consent, but in which state parties may opt out of changes (“opt-out amendments”); and regimes in which a commission or conference creates changes, possibly without unanimous consent, that bind all parties (“binding amendments”). The Senate Foreign Relations Committee has referred to treaties in each of these categories as “tacit amendment” treaties.⁴²

a. Consensus Amendments

A number of treaty regimes that empower an international body to amend a treaty—e.g., an international commission, group, or conference of the parties—operate on a “consensus” model. Like treaties modified by executive agreement, these tacit amendment regimes require that all state parties represented in the international body tasked with carrying out the treaty agree to any future policy that the body adopts.⁴³ For example, the Open Skies Treaty creates an Open Skies Consultative Commission, which can make improvements “to the viability and effectiveness of the Treaty” (including setting annual quotas under the treaty) as well as implement “minor matters of a technical or administrative nature.”⁴⁴ The Open Skies Consultative Commission, however, requires consensus, defined as “the absence of any objection by any State Party to the taking of a decision or the

<http://www.imo.org/About/Conventions/Pages/Home.aspx> (last visited Dec. 4, 2010) (providing an extensive history of the introduction of the tacit acceptance process for IMO treaties).

⁴¹ CLEOPATRA ELMIRA HENRY, *THE CARRIAGE OF DANGEROUS GOODS BY SEA: THE ROLE OF THE INTERNATIONAL MARITIME ORGANIZATION IN INTERNATIONAL LEGISLATION* 71-72 (1985).

⁴² See S. EXEC. REP. NO. 108-12, at 34 (2004) (describing the “tacit agreement” or “tacit amendment” process and then citing a number of treaties including treaties discussed in every category below).

⁴³ See *supra* Subection I.A.1.

⁴⁴ Treaty on Open Skies art. X(5), Mar. 24, 1992, S. TREATY DOC. NO. 102-37.

making of a recommendation,” before it can act.⁴⁵ Similarly, the Treaty on Conventional Forces in Europe allows a Joint Consultative Group to make improvements on “minor matters of a technical or administrative nature” to the treaty⁴⁶, but only with consensus, defined again as the “absence of any objection by any representative of a State party.”⁴⁷

While the treaties in this category require consensus before amendments take hold, they arguably allow for “tacit amendments” since the consensus requirement only asks that no party objects. If a party were not present at the commission’s meeting, it could become bound by the amendments without its consent.⁴⁸ Moreover, the amendment process is “unratified” as the amendments take hold without being subject to formal state ratification procedures.

b. Opt-out Amendments

The standard form for an “opt-out” tacit amendment regime within a treaty is as follows: The treaty authorizes some international body or commission to effectuate and/or implement the terms of the treaty. The body then has meetings at

⁴⁵ *Id.* art. X(2).

⁴⁶ Treaty on Conventional Armed Forces in Europe art. XVI(5), Nov. 19, 1990, S. TREATY DOC. NO. 102-8, 30 I.L.M. 6. [hereinafter “CFE Treaty”].

⁴⁷ *Id.* art. XVI(4).

⁴⁸ The Chemical Weapons Convention presents an interesting example of how the Senate has in the past reacted to an amendment process that might allow for a party to be bound if it does not show up to the meeting. While this part of the Convention’s amendment process requires ratification and thus does not fit within the processes discussed in this report, the Senate’s approach might be applied to tacit amendment regimes that proceed by consensus amendment. *See* Convention on the Prohibition of Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 32 I.L.M. 800 [hereinafter “Chemical Weapons Convention”]. General amendments to the Convention can be made at “Amendment Conferences.” *Id.* art. XV(3). If a majority of the parties to the Convention vote in favor, no party votes against, and all parties voting in favor ratify it, the amendment takes effect. *Id.* This process is applicable to any sort of amendment to the Convention (as opposed to the limited matters that the relevant commissions handle in the Open Skies or CFE treaty). *Id.* art. XV(1). To handle the risk that major amendments could be passed in such conferences without United States approval, the Senate conditioned ratification of the Convention on a requirement that the United States attend all Amendment Conferences and provide a positive or negative vote to each amendment. *See* S. EXEC. REP. NO. 104-33 at 20 (resolution of ratification providing condition that “the United States will be present and participate fully in all Amendment Conferences and will cast its vote”). With this condition in place, amendments of this kind could not be made to the Convention without the advice and consent of the Senate: a positive vote would mean the Senate would have to ratify the amendment for it to enter into effect, and a negative vote would mean that the amendment would fail at the Amendment Conference itself. *Id.* Separately, the Convention provides for a tacit amendment process to its annexes, discussed in the next section, *infra*.

which it proposes amendments to the treaty. If the amendment passes some threshold, it is submitted to the state parties and those parties have a window of time to register their disapproval of the amendment. If a certain number of parties disapprove (sometimes called a “blocking minority”), the amendment may fail altogether. Otherwise, it will be adopted, but only with respect to the parties that did not object.⁴⁹ These regimes do offer clear channels for state parties to object to amendments, but they are “tacit amendment” regimes nonetheless. The reason is: like the consensus regimes profiled above (which provided for “tacit acceptance” of treaty amendments when a state party failed to attend a relevant meeting), opt-out regimes also allow for tacit acceptance of treaty amendments, if the representative of a state party fails to object to a proposed amendment either at the international body meeting or within a given time period thereafter.

The United States has entered into numerous treaties that fit into this framework, all with slight variations on the precise procedures. A few examples include:

- The Chemical Weapons Convention allows certain annexes to be amended by a tacit amendment process if the changes relate “only to matters of an administrative or technical nature.”⁵⁰ Specifically, such changes can be proposed to an “Executive Council,” (a rotating council of 41 member parties).⁵¹ If the Executive Council approves, then the amendment is adopted so long as no party objects within 90 days.⁵² If a party does so object, the amendment fails.⁵³
- The International Convention for the Regulation of Whaling allows the International Whaling Commission (a body represented by one member from each party) to amend a schedule attached to the Convention which covers issues like the species subject to protection, open and closed waters and seasons, among other things.⁵⁴ Amendments can be passed by a three-fourths vote of the Commission members voting.⁵⁵ They then go into

⁴⁹See e.g., A.O. Adede, *Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience*, 17 VA. J. INT'L. L. 201, 206-08 (1977).

⁵⁰Chemical Weapons Convention, *supra* note 48, art. XV(4).

⁵¹*Id.* art. VIII(23).

⁵²*Id.* art. XV(5)(d).

⁵³*Id.*

⁵⁴International Convention for the Regulation of Whaling art. V(1), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72. See *id.* art. III(1) for the makeup of the commission.

⁵⁵*Id.* art. III(2).

effect for all the parties except those that object within a certain period of time.⁵⁶

- The Convention on the Marking of Plastic Explosives for the Purpose of Detection allows a council to propose amendments to the technical annexes to the parties.⁵⁷ If a proposed amendment has not been objected to by five or more state parties within 90 days, it goes into effect for all parties not objecting.⁵⁸ Otherwise, the amendment is referred to the Commission for further reconsideration.⁵⁹
- The Convention on the Facilitation of International Maritime Traffic has an annex with “standards” and “recommended practices”⁶⁰ that governments are urged – but not required – to follow.⁶¹ As amended in 1973, the convention provided for a tacit amendment procedure to modify the annex.⁶² Specifically, a committee of the International Maritime Organization can approve amendments, which then go into effect at the end of 15 months unless within 12 months, at least one third of parties formally notify the IMO that it is unacceptable to them.⁶³ The amendments only apply to those who do not object.⁶⁴

Other treaties with similar provisions include the Convention on International Civil Aviation,⁶⁵ the Convention on the Prevention of Marine

⁵⁶ *Id.* art. V(3).

⁵⁷ Convention on the Marking of Plastic Explosives for the Purposes of Detection art. VII, Mar. 1, 1991, S. TREATY DOC. NO. 103-8, 2122 U.N.T.S. 359.

⁵⁸ *Id.* art. VII(3).

⁵⁹ *Id.* art. VII(5).

⁶⁰ Convention on the Facilitation of International Maritime Traffic, *supra* note 39, Annex sec. B.

⁶¹ S. EXEC. REP. NO. 93-37, at 2 (1974) (explaining that the Annex sets forth standards and recommended practices relating to public health, customs, and immigrations regulations, and that “governments are urged to bring their practices and procedures into conformity with the recommended levels but are not required to do so”).

⁶² *Id.* at 2-3 (describing that the earlier methods for amending the treaty did not “allo[w] changes to be made in the Annex as quickly or as efficiently as desired” and so that in 1973, the treaty was amended to include a “tacit amendment procedure”).

⁶³ 1973 Amendment to Article VII of the Convention on Facilitation of International Maritime Traffic art. VII(2)(b), Nov. 19, 1973, 1394 U.N.T.S. 527.

⁶⁴ *Id.* art. VII(2)(d).

⁶⁵ Convention on International Civil Aviation art. 54, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (providing for annexes that will contain “standards and recommended practices” under the treaty); *id.* art. 90 (providing for amendment of annexes (with standards and recommended practices) by a council that administers the treaty unless a majority of contracting states register their disapproval).

Pollution by Dumping of Wastes and Other Matter,⁶⁶ the International Convention for the Safety of Life at Sea,⁶⁷ the 1973 Protocol to the 1949 International Convention for the Northwest Atlantic Fisheries,⁶⁸ the Convention on International Regulations for Preventing Collisions at Sea,⁶⁹ and the International Convention for the Prevention of Pollution From Ships.⁷⁰

c. Binding Amendments

Finally, some treaties empower international bodies to amend the treaty provisions without requiring either unanimous consent at the international-body level, or offering an opt-out process. We call these “binding amendments.” Three examples include the World Trade Organization (WTO), the Montreal Protocol, and a protocol between the United States and the International Atomic Energy Association (IAEA).

First, the WTO can amend its agreements through Ministerial Conferences.⁷¹ Although the WTO encourages the use of consensus at these conferences, it does not require it, and at least in theory, changes can be made to

⁶⁶ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter art. XV(2), Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120 (providing for a procedure whereby annexes can be amended based on “scientific or technical considerations” and providing that if an amendment is approved by “a two-thirds majority of those present at a meeting,” it goes into effect for all parties who do not object within a hundred days).

⁶⁷ International Convention for the Safety of Life at Sea, art. VIII(b), Nov. 1, 1974, 32 U.S.T. 47 (providing a procedure whereby much of the Annex can be amended by a two-thirds vote of a committee. (provided that at least one third of the “contracting governments” are present at the time of a vote) and the amendment is deemed accepted with respect to all non-objecting parties within two years, unless a sufficient number of parties object).

⁶⁸ 1973 Protocol to the 1949 International Convention for the Northwest Atlantic Fisheries art. I, Oct. 6, 1970, 1082 U.N.T.S. 276 [hereinafter “Protocol for N.W. Fisheries”] (amending art. XVII of the underlying Convention to allow amendments to the Convention when approved by three-fourths of the parties at a meeting of a commission, if they are thereafter approved by three fourths of contracting governments; but specifying that the amendment does not take effect at all, however, if at least one party objects within ninety days of being notified of the proposed amendment); *see also infra* note (discussing how the Senate required the President to object unless the Senate consented to the amendment).

⁶⁹ Convention on International Regulations for Preventing Collisions at Sea art. VI, Oct. 20, 1972, 28 U.S.T. 3459 (providing for amendment of the regulations if an assembly votes in favor by a two-thirds majority, and if within a time decided by the assembly, no more than one-third of the parties object; the amendments are effective on any non-objecting party).

⁷⁰ International Convention for the Prevention of Pollution from Ships art. 16(2)(f), Nov. 2, 1973, 1340 U.N.T.S. 184 (providing for amendment of annexes and appendices after a two-thirds vote by the appropriate body, in no less than ten months unless a sufficient number of parties object).

⁷¹ *See* Agreement Establishing the World Trade Organization art. X, Apr. 15, 1994, 1867 U.N.T.S. 154.33 I.L.M. 1144.

agreements by a supermajority over the objections of any one party.⁷² Another well-known example is the Montreal Protocol.⁷³ Conferences of the parties called under this protocol can adopt changes to certain annexes by two-thirds majority vote, even over the objection of the remaining parties.⁷⁴ Finally, the Protocol Additional to the Safeguards Agreement Between the United States and the IAEA⁷⁵ also potentially allows for amendments without the United States' consent. This protocol allows the IAEA's Board of Governors to amend the annexes to the Protocol (setting forth the definitions of nuclear activities, equipment, and material subject to declaration) "upon the advice of an open-ended working group of experts established by the Board."⁷⁶ The Board (comprising representatives of 35 member states, including the United States) generally takes action on the basis of consensus, but may act even when there is dissent.⁷⁷

What is common across all three examples mentioned above—and what distinguishes them from the first two tacit amendment treaty regimes—is that such treaties allow for amendments to take effect vis-à-vis a State party, even in the face of *an explicit objection* by that party to the amendment. Scholars have questioned whether such unfettered delegation of authority to these institutions is real, because the institutions in practice almost always act by consensus.⁷⁸ That may be true. But these treaty regimes nonetheless do at least formally provide the possibility that a party will be bound to an amendment even if it registers outright dissent.

⁷² See *id.* art. X(3) (providing a process whereby, even for changes to the agreement that alter "the rights and obligations" of parties to the WTO, members of a Ministerial Conference may decide by a three-fourths vote that an amendment either requires a party to consent, to exit the WTO, or to remain in the WTO but only with the consent of the Ministerial Conference).

⁷³ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 3.

⁷⁴ *Id.* art. 2(9)(c) & (d) (providing that the decisions adopted by the two-thirds vote of the parties present at a meeting in which they are adopted "shall be binding on all Parties").

⁷⁵ Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency (IAEA) for the Application of Safeguards in the United States of America, June 12, 1998, U.S.-IAEA, S. TREATY DOC. NO. 107-7.

⁷⁶ *Id.* art. 16(b); see *id.* art. 2 for references to the content of the annexes.

⁷⁷ Bradley, *supra* note 3, at 2.

⁷⁸ See Andrew T. Guzman & Jennifer Lansidle, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693, 1708 (2008) (noting "the simple fact is that no adjustment has been made in the history of the Montreal Protocol with anything less than consensus"); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1509 (2004) (finding the power of a supermajority to amend the WTO agreement is "more apparent than real").

2. Legality of Tacit Amendments

The involvement of international organizations through the tacit amendment process potentially introduces a new layer of constitutional complexity to evaluating the legality of the amendment regime. This discussion considers each type of tacit amendment regime in turn. The first two types are not constitutionally problematic because they are structurally similar to executive agreements concluded pursuant to a treaty. On the other hand, the third type presents unique constitutional issues.

a. Consensus Amendments

The first form of tacit amendment process described above involves international bodies making amendments to treaties, but only after receiving the consent of all state parties present at the meeting of the international body. When the amendment process is included in the treaty's text, this type of procedure is similar to amending a treaty via executive agreement. It follows the procedure contemplated in the Restatement: "An international agreement may be amended by agreement between the parties."⁷⁹ As a matter of domestic law, the President's role in concluding the amendment is indistinguishable from the President's role in concluding executive agreements, as long as the President attends the meetings. Thus, this form of tacit amendment process introduces no new constitutional questions.

b. Opt-out Amendments

This second form of tacit amendment process involves amendments taking effect after the recommendation of an international body (in which unanimous consent was not necessarily present), but only becoming binding with respect to State parties that fail to object. These amendment regimes do not alter the rights of objecting parties.⁸⁰ As a matter of domestic law, they are also a functional equivalent of a treaty that calls for amendment via executive agreement. The executive concludes or declines to conclude an international agreement to amend the United States' international obligations. As with other executive agreements, the Senate is permitted to give its advance consent to such agreements.

⁷⁹ RESTATEMENT, *supra* note 25, § 334.

⁸⁰ RESTATEMENT, *supra* note 25, § 334(3).

c. Binding Amendments

The final type of tacit amendment is one to which states parties are bound, even in the absence of their consent. U.S. consent to such an amendment involves a delegation of authority to an international body. Some scholars have suggested that this form of delegation raises distinct constitutional concerns.⁸¹ A few features of tacit amendments reveal, however, that the delegation is never complete. First, the United States, even though it may be bound without affirmative consent, usually participates in the decision-making at the international body that produces the amendment.⁸² Second, the United States may never be bound entirely against its will. Most treaties make provision for withdrawal, or else such provision may be derived from the nature of the agreement.⁸³ Although this veto is undoubtedly a blunt instrument,⁸⁴ both of these features enable the executive to retain some degree of control. Third, the Senate—as part of the Congress—has domestic legal recourse against some amendments, inasmuch as it may override the international agreement with a later-in-time statute.⁸⁵ Finally, the actors who execute the international agreement that delegates the amendment-making authority to an international body remain accountable for their decisions to do so.⁸⁶

Even if the delegation is complete, there is no basis for a claim that delegation of authority to an international body is unconstitutional *per se*. The process of sovereign nations agreeing to bind themselves to some external authority is the very essence of international law. Amendment-making power is only one form of authority that the U.S. government delegates to international bodies and institutions by virtue of joining an international agreement.⁸⁷ The aforementioned mechanism for withdrawal, coupled with the possibility of

⁸¹ Bradley, *supra* note 3, at 8; Swaine, *supra* note 78, at 1537-40.

⁸² Swaine, *supra* note 78, at 1537.

⁸³ RESTATEMENT, *supra* note 25, § 332 cmt. a (“Modern agreements generally specify either a term for the agreement, or procedures whereby a party may withdraw . . .”); *id.* cmt. B (“A right to terminate an agreement is often expressed but may also be implied.”).

⁸⁴ See Swaine, *supra* note 78, at 1540.

⁸⁵ RESTATEMENT, *supra* note 25, § 115(1)(a). This mechanism would not alter the United States’ international legal obligation. *Id.* § 115(1)(b). Yet, as a matter of constitutional law, Congress has the same escape hatch for international delegations as it has for conventional executive delegations—at least for the range of international agreements that deal with issues within Congress’s legislative authority.

⁸⁶ Swaine, *supra* note 78, at 1603 (“Congress may, after all, be held responsible for authority it has distributed . . .”).

⁸⁷ For a description of other types of delegation, see *id.* at 1502-1529.

abrogation as a matter of domestic law, have long been regarded to be sufficient safeguards for constitutional prerogatives.

II. THE SENATE'S RESPONSE TO UNRATIFIED AMENDMENT PROCESSES

As noted above, treaties that can be modified by executive agreement may threaten Senate prerogatives, since the treaty's provisions may change subsequent to ratification without direct Senate involvement. Treaties with tacit amendment processes present similar concerns, because they also allow for the treaty to evolve in the future without Senate ratification at each stage. Tacit amendment treaties also present an additional concern since the treaty may be amended without even the *President*, let alone the Senate, taking any action at all. This section outlines how the Senate has in the past approached treaties that can be modified either by executive agreement or by tacit amendment.

The Senate has regularly accepted the use of either process within treaties, because it "recognizes the need for an expedited amendment process for highly technical treaties . . ." ⁸⁸ In fact, the Senate often has accepted their inclusion with apparently no comment or concern. For example, the Senate's report for the Convention on the Marking of Plastic Explosives for the Purpose of Detection does not mention that the treaty allows for tacit amendment; ⁸⁹ the Senate's report for the International Convention for the Safety of Life at Sea mentions that amendments can be via tacit amendment but contains no further comment; ⁹⁰ and the reports for the Migratory-Bird Convention (which provides for amendment by diplomatic note) did not mention the issue at all. ⁹¹ The Senate has even been silent on tacit amendment processes that create binding amendments. For example, the Montreal Protocol allows for tacit amendments to the Protocol that can become effective over the United States' objection. Yet, the Senate report recommending ratification of this protocol did not discuss this aspect of the treaty. ⁹²

That said, the Senate has also stated that it considers these processes only on a "case-by-case basis" ⁹³ and expects the executive to consult closely whenever it seeks consent for a treaty with such a process. As discussed below, the Senate

⁸⁸ S. EXEC. REP. NO. 96-36, at 2 (1980).

⁸⁹ See S. EXEC. REP. NO. 103-15 (1993).

⁹⁰ See S. EXEC. REP. NO. 95-23, at 2 (1978).

⁹¹ See S. EXEC. REP. NO. 93-8 (1973).

⁹² See S. EXEC. REP. NO. 100-14 (1988).

⁹³ S. EXEC. REP. NO. 96-36, at 2 (1980).

has sought to condition the use of executive agreement or tacit amendment, either through demanding that such processes only cover technical amendments or requiring prior notice. In more rare cases, the Senate has gone further—requiring the executive to object automatically unless the Senate provides its consent or by creating a mechanism for Congress to object by resolution. The remainder of this Part outlines and evaluates these different responses.

A. Technical or Administrative Provisions

The Senate Foreign Relations Committee at times has indicated expressly that it will only consent to unratified treaty processes when they deal with technical or administrative provisions.⁹⁴ As noted above, treaties will often have this limitation specifically in the text. For example, the Chemical Weapons Convention restricts tacit amendments to those that are “administrative or technical” in nature,⁹⁵ and the START treaty also emphasized that the executive agreements made through the joint commission could not make changes that modified “substantive obligations.”⁹⁶ The treaties, including the Chemical Weapons Convention and START, almost always maintain a typical ratified amendment process for substantive amendments, while establishing the unratified amendment process for changes to technical annexes or other specific issues.⁹⁷ Moreover, the Senate regularly has gone further than the treaty text to ensure that the executive maintains this line. For example, debate over the 1990 Protocol to the Threshold Test Ban Treaty elicited significant assurances from the Administration that the unratified changes would be “of a technical, administrative or procedural nature [and therefore would] not affect substantive rights and obligations.”⁹⁸

In theory, such a line between technical and substantive provisions provides a reasonable way to distinguish when Senate consent should be required. From a practical perspective, the Senate likely would not be particularly concerned with minor matters, and would want the President to have a free hand

⁹⁴ *Id.* (“[T]he Committee will approve this procedure . . . only with respect to technical provisions.”); *see also* S. EXEC. REP. NO. 108-12, at 34 (2004) (“The Senate has also at times specifically limited its acceptance of future tacit amendments to those of a technical or administrative nature.”)

⁹⁵ *See supra* note 50 and accompanying text.

⁹⁶ *See supra* note 22 and accompanying text.

⁹⁷ *See e.g., supra* note 48 (discussing the Chemical Weapons Convention’s process for formal amendments); START I, *supra* note 21, art. XVIII (providing for formal amendments using the same process for entry into force as the treaty itself).

⁹⁸ Koplou, *supra* note 9, at 1018 (citing a letter from Ronald F. Lehman II, Director of the U.S. Arms Control and Disarmament Agency, to Senator Claiborne Pell, from September 11, 1990).

to resolve those matters appropriately. Additionally, the solution facially alleviates concerns over separation of powers. Commentators note that technical amendments resemble the administrative discretion the President must exercise in executing a treaty.⁹⁹

That said, it is far from clear that this line between technical and substantive matters can be consistently maintained in practice. The Senate grappled with how to sensibly draw this line in its debate over the INF Treaty.¹⁰⁰ The issue also drew significant concern recently among senators during the debate over the New START treaty, with several expressing worry that the joint commission could modify the nation's ability to proceed with missile defense without Senate consent.¹⁰¹ Indeed, multiple scholars have argued that any line between technical amendments and those that bear on substantive obligations is illusory: “[S]uch amendments may change the parties’ substantive obligations to a degree that rivals or exceeds any nontechnical developments.”¹⁰²

The Open Skies Treaty, the International Convention for the Regulation of Whaling, and the Montreal Protocol provide three examples of instances in which the Senate consented to tacit amendment processes that arguably reached beyond mere technical issues to substantive provisions of the treaties.¹⁰³ The Open Skies

⁹⁹ See Bradley, *supra* note 3, at 7 (“[U]nratified treaty amendments often are limited to technical or administrative matters, and the use of annexes and schedules can be seen as a formal way of distinguishing between fixed treaty commitments and regulatory implementation.”); Koplow, *supra* note 9, at 1036 (arguing that “the President must possess at least some degree of inherent responsibility for inserting a consensus meaning into the interstices” of a treaty.); see also HENKIN, *supra* note 26, at 219-220.

¹⁰⁰ Koplow, *supra* note 9, at 1011.

¹⁰¹ See S. EXEC. REP. NO. 111-6, at 67-68 (2010) (outlining concerns of Senator McCain regarding the powers of the Bilateral Consultative Commission under the proposed New Start treaty); Jack Goldsmith & Jeremy Rabkin, *New START Treaty Could Erode Senate’s Foreign Policy Role*, WASH. POST, Aug. 4, 2010 (raising concern that the Bilateral Consultative Commission’s ability to modify the treaty would erode Senate’s role and allow for changes regarding missile defense without ratification).

¹⁰² Swaine, *supra* note 78, at 1514; see also Koplow, *supra* note 9, at 1044 (“[T]he crucial distinction between ‘big’ and ‘small’ changes in a treaty regime, while superficially plausible, is ephemeral in practice. . . . [T]he fine points are typically crucial.”).

¹⁰³ In addition, Koplow points out that the 1989 INF Treaty Memorandum of Agreement, agreed to by the Special Verification Commission, was negotiated over a period of eighteen months by numerous U.S. officials “who thought that they were developing a great many provisions that were necessary to sustain the treaty as a practical, viable agreement.” *Id.* at 1045. Another points to the Convention on International Civil Aviation, *supra* note 65, which allowed tacit amendments to annexes containing “standards and recommended practices.” See Frederic L. Kirgis, Jr., *Specialized Law-Making Processes*, in 1 UNITED NATIONS LEGAL ORDER 109, 126 (1995). While

Treaty allows for unratified modification of some of “the most controversial issues in the treaty negotiations,” including assignment of national quotas for overflights, types of sensors to be used, and dissemination of the acquired data.¹⁰⁴ Similarly, the International Convention for the Regulation of Whaling delegates to the International Whaling Commission the authority to make changes to the “Schedule,” an “integral part” of the Convention that details “basic issues” including the species subject to protection, timing, method, and intensity of the whaling seasons. And the changes to the Montreal Protocol regime “transformed the parties’ obligation to reduce production and consumption of chlorofluorocarbons (CFCs).”¹⁰⁵

Nevertheless, if the treaties are clear in their text about their delegations of authority to international bodies (which is required for these treaties to pass constitutional muster in the United States anyway, as explained above), the Senate should be presumed well aware that when it ratifies the treaty, it is consenting to an amendment process that could modify substantive provisions. Moreover, to the extent that there may be doubt about whether a substantive provision may be modified, the Senate could also be more explicit about its understanding of what is *not* a simple technical matter. For example, the Senate Foreign Relations Committee recently in its proposed resolution for ratification for the New START treaty suggested an understanding that the BCC may not make any modifications limiting missile defense or strategic-range non-nuclear weapon systems without ratification.¹⁰⁶

B. Prior Notice

For treaties that can be modified by executive agreement or by tacit amendment, the Senate “has required, or received assurances of, prior notice of proposed modifications before the executive branch accepted their inclusion in such treaties.”¹⁰⁷ For example, the proposed resolution for ratification approved by the SFRC for the New START Treaty requires the President to consult with the SFRC at least 15 days prior to any meeting of the joint commission considering a modification to discuss whether such a modification should require ratification.¹⁰⁸ The Senate also elicited assurances during the debate for the 1990

there is some question as to whether the standards are binding, they are certainly “highly authoritative,” and thus the amendments are quite meaningful. *Id.*

¹⁰⁴ Koplow, *supra* note 9, at 1046.

¹⁰⁵ Swaine, *supra* note 78, at 1514.

¹⁰⁶ *See* S. EXEC. REP. NO. 111-6, at 91 (2010).

¹⁰⁷ S. EXEC. REP. NO. 108-12, at 34 (2004).

¹⁰⁸ S. EXEC. REP. NO. 111-6, at 103.

Protocol to the Threshold Test Ban Treaty that it would be advised “prior to such modifications or changes becoming binding.”¹⁰⁹ In at least one case, the Senate has applied a notice requirement specific to an area of special concern. In consenting to the Open Skies Treaty, the Senate’s resolution of ratification required the President to provide 30-day advance notice only of any proposed modifications that would affect the use of sensors.¹¹⁰

The Senate has also required prior notice of modifications in the case of opt-out tacit amendment processes, where the president may not have proposed the amendment but nevertheless is required by the Senate to pass along notification in a timely manner: “The Committee expects the Administration to inform it of any proposed amendments subject to this procedure prior to the time for tacit acceptance. This will enable the Committee to voice an objection to tacit acceptance in appropriate cases, before the issue becomes moot.”¹¹¹

Finally, Congress has required prior notice in at least one case where the United States might be bound over its objection. In approving the Uruguay Round Agreement establishing the World Trade Organization, Congress¹¹² required the U.S. Trade Representative to inform it in advance of any vote that might amend United States obligations, and also to report on all such amendments that occur in any given year.¹¹³

Prior notice provisions are a sensible way to provide the Senate the opportunity to be informed of modifications and defend its prerogatives, while still retaining the benefits of an expedited amendment process. Scholar David Koplow has questioned, however, whether the “casual verbal assurances” of prior notice can truly replace the requirement of Senate advice and consent in these situations.¹¹⁴ The Senate often ignores offers for informational briefings, and in one situation regarding the INF Treaty, concern has been voiced that the president agreed to amendments without properly notifying the Senate.¹¹⁵

¹⁰⁹ Koplow, *supra* note 9, at 1018 (citing a letter from Ronald F. Lehman II, Director of the U.S. Arms Control and Disarmament Agency, to Senator Claiborne Pell, on September 14, 1990).

¹¹⁰ S. EXEC. REP. NO. 103-5, at 17-18 (1993).

¹¹¹ S. EXEC. REP. NO. 96-36, at 2 (1980).

¹¹² This agreement was ratified through an act of Congress, and not by the advice and consent of the Senate. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

¹¹³ *Id.* § 122 (codified at 19 U.S.C. §3532 (2006)).

¹¹⁴ Koplow, *supra* note 9, at 1047.

¹¹⁵ *Id.*

C. Consent Requirement

In at least one case—the 1973 Protocol to the 1949 International Convention for the Northwest Atlantic Fisheries, the Senate conditioned its consent on a requirement that the Secretary of State must object to any amendment, thereby precluding its entry into force, until the Senate provided its advice and consent on that amendment.¹¹⁶ Whereas, as discussed above, the SFRC in the New START Treaty expressed the view that certain types of changes should require ratification,¹¹⁷ in this case the Senate went further and required ratification of any amendment, regardless of what the treaty itself required. While such a ratification process may help preserve Senate prerogatives, it of course defeats the purpose of such a provision to streamline the amendment process.

D. Objection by Resolution

Congress asserted even more power over a tacit amendment process with regard to the Convention on the International Regulations for Preventing Collisions at Sea.¹¹⁸ In that case, the Senate ratified the treaty with no conditions or discussion about the tacit amendment process.¹¹⁹ However, in subsequent implementing legislation, Congress required the President to communicate any proposed amendment to Congress, after which the proposed amendments would be referred to the relevant substantive committees (e.g., the Senate Committee on Commerce, Science, and Transportation and the House Committee on Transportation and Infrastructure). If within sixty days, Congress passed a concurrent resolution of disapproval of the amendment, the President would be required to register an objection to the amendment. If Congress did not pass such a resolution, the President would have the discretion to register his own objection or tacitly accept the amendment.

From a practical perspective, this process would seem to allow Congress to weigh in on potential amendments while retaining the benefits of the expedited process. However, this process arguably falls afoul of the Supreme Court's ruling in *INS v. Chadha*.¹²⁰ In that case, the Supreme Court found unconstitutional a

¹¹⁶ See Protocol for N.W. Fisheries, *supra* note 68, Reservation Made Upon Ratification, United States of America (providing “The ratification is subject to ‘the understanding that ...it shall be the duty of the Secretary of State to register an objection to any proposed amendment if’ the amendment has not yet received Senate consent”).

¹¹⁷ See *supra* note 106 and accompanying text.

¹¹⁸ See *supra* note 69.

¹¹⁹ See S. EXEC. REP. NO. 94-8 (1975).

¹²⁰ 462 U.S. 919 (1983).

provision of the Immigration and Nationality Act “authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress . . . , to allow a particular deportable alien to remain in the United States.”¹²¹ The Court held that the bicameral requirement and the Presentment Clause defined how the legislative power must be exercised, and that pragmatic considerations could not justify deviations from this procedure.¹²² Objecting resolutions therefore arguably depart from constitutionally proscribed procedures for Senate or congressional involvement in the creation of international agreements.¹²³

III. CONCLUSION

While unratified amendment processes may raise concerns about the Senate’s prerogatives, they pass constitutional muster so long as the Senate provides explicit advice and consent to the process in the first instance. The Senate has responded in various ways to these processes, but most typically requires that they amend only technical provisions and that the executive provide notice to the Senate when potential modifications may arise. Such distinctions are reasonable in theory, though their practical value remains in doubt. In some instances, the Senate has rejected the use of these processes or employed creative but constitutionally suspect means to maintain its prerogatives. These rare cases aside, the Senate has generally recognized that unratified amendment processes, including those providing for tacit amendments, provide a necessary and flexible tool to develop robust treaty regimes.

¹²¹ *Id.* at 923.

¹²² *Id.* at 951.

¹²³ See Hathaway, *supra* note 26, at 194-205 (discussing in detail the effect of *Chadha* on foreign relations law and in particular how Congress responded to the decision in a number of contexts where it had previously had the power to reject executive action by concurrent resolution).