

AGORA: THE END OF TREATIES?

AN EMPIRICAL LOOK AT U.S. TREATY PRACTICE: SOME PRELIMINARY CONCLUSIONS

*Cindy Galway Buys**

The title of this Agora and the first question it poses both ask whether treaties are in decline. With respect to multilateral treaties to which the United States is a party, the answer is a clear yes.

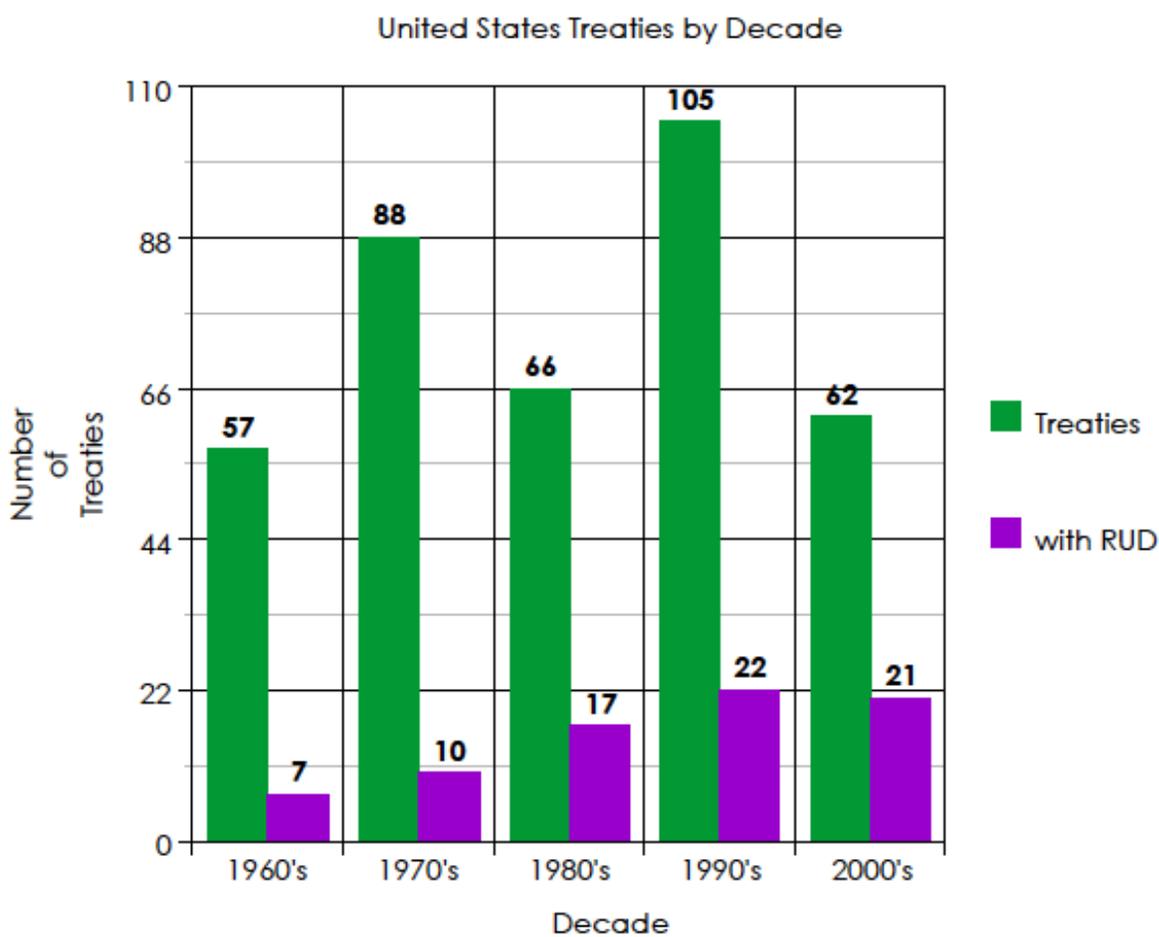
According to the U.S. State Department's *Treaties in Force*¹ database, the United States became a party to a record number of 105 multilateral treaties between 1990 and 1999. As set forth in Graph A below, during the period 2000–2009, the number of multilateral treaties the United States joined dropped to just 62, the lowest number since the 1960s. The preliminary data from the first part of this decade beginning in 2010 suggests that this downward trend continues, but it is still too early in the decade to draw any definitive conclusions.

* *Professor of Law, Southern Illinois University School of Law.*

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¹ *Treaties in Force*, U.S. DEP'T OF STATE.

Graph A:



What accounts for this decline? There are likely many explanations. One possible explanation that is supported by the data is that the growth or decline in treaties reflects major world events.

The break-up of the Soviet Union and the warming of relations between the United States and the former Soviet Republics in the late 1980s and early 1990s opened a window of opportunity for international cooperation that had not been seen since the end of World War II and the establishment of the United Nations. This increased cooperation led to progress on many fronts, such as the creation of ad hoc international criminal tribunals² in Rwanda and the former Yugoslavia. The 1990s were also an era of soaring growth in international trade and business,³ partly as a result of many new free trade agreements such as the 1994 North American Free Trade Agreement⁴ and the creation of the World Trade Organization⁵ in 1995.

² *About the ICTY*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA.

³ Shujiro Urata, *Globalization and the Growth in Free Trade Agreements*, 9 ASIA-PACIFIC REV. 20 (2002).

⁴ *North American Free Trade Agreement (NAFTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE.

⁵ *What is the WTO?*, WORLD TRADE ORGANIZATION.

That era of relative peace and international cooperation largely ended with the terrorist attacks of September 11, 2001. The United States retreated into a protective shell and focused on threats abroad and security at home. Initially, the United States enjoyed the support of the international community in pursuing Al-Qaida in Afghanistan as reflected in UN Security Council Resolutions.⁶ But when the United States could not obtain UN Security Council approval of its desire to go after Saddam Hussein in Iraq, the United States initiated war anyway with a “coalition of the willing.”⁷ Thus, the focus of the United States shifted from international cooperation with respect to peaceful matters such as trade and commerce, and became focused on international cooperation with respect to matters involving national security. The recession of 2001⁸ and the “Great Recession” of 2007–2010⁹ also likely contributed to the inward focus away from global trade and commerce. The types of multilateral treaties the United States joined during the last two decades supports this narrative.

As illustrated by the U.S. State Department’s treaty classifications depicted in Graph B below, during the 1990s, the most common type of multilateral treaty the United States joined were treaties relating to trade and commerce (21). The second most common treaty it joined related to cooperation in the area of telecommunications. It did not join a single treaty relating to terrorism. The United States did become a party to a number of new treaties (7) relating to the North American Treaty Organization (NATO), a mutual defense pact; however, most of those agreements concerned the entry of new member states into NATO that used to be part of the Soviet bloc.

Things changed dramatically after September 11, 2001. In the first decade of the twenty-first century, the number-one treaty priority of the United States was national security. The United States became a party to three terrorism-related treaties, along with nine more NATO-related agreements. It only joined three agreements relating to trade and it joined zero agreements relating to telecommunications. In fact, out of sixteen categories of multilateral treaties, the United States’ participation declined in ten areas (e.g., atomic energy, aviation, fisheries, and maritime matters); remained flat in three areas (labor, nuclear, and pollution treaties); and increased in only three areas (terrorism, corruption and bribery, and NATO-related treaties).

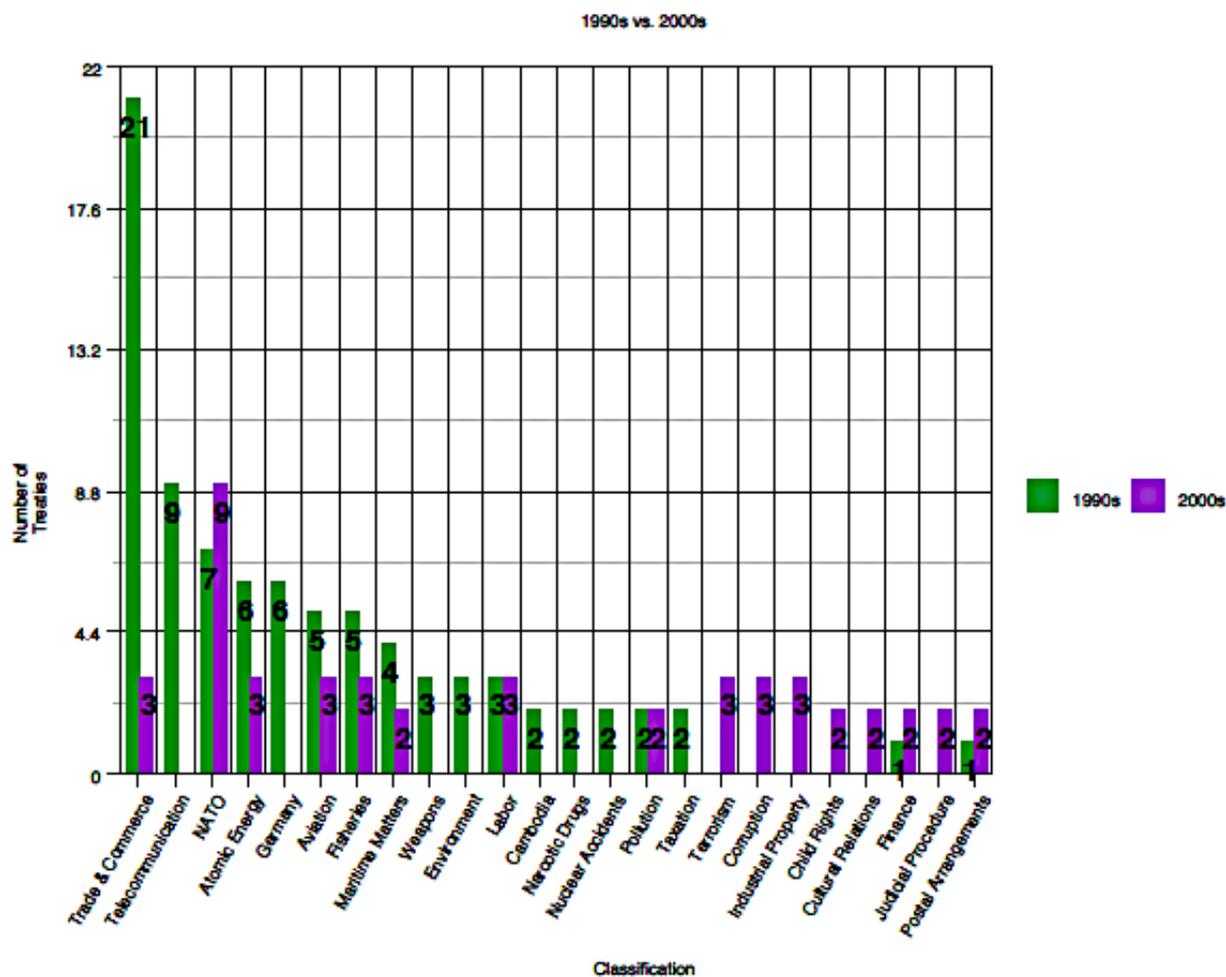
⁶ *Security Council Resolutions-2001*, UNITED NATIONS.

⁷ Lionel Beehner, *The ‘Coalition of the Willing’*, COUNCIL ON FOREIGN RELS. (Feb. 22, 2007).

⁸ *It’s Official: 2001 Recession Only Lasted Eight Months*, U.S.A. TODAY (July 17, 2003).

⁹ Jeffrey A. Frieden, *The Financial Crisis Was Foreseeable and Preventable*, N.Y. TIMES (Jan. 30, 2011).

Graph B:



This narrative and data is likely only part of the story, however. Another question posed by this Agora is whether the U.S. Senate's unwillingness to give advice and consent to treaties is part of the decline in treaties. Under Article II, section 2 of the U.S. Constitution,¹⁰ the President makes treaties, while the Senate gives its advice and consent to a treaty's ratification. In U.S. practice, presidents initiate the treaty ratification process by negotiating and signing multilateral agreements. The president then submits the treaty to the Senate for its advice and consent. Pursuant to Senate Rules XXX¹¹ and XXXV, after an initial reading, the Presiding Officer refers the treaty to the Committee on Foreign Relations. The treaty remains on the Committee's calendar from Congress to Congress until the Committee reports it to the full Senate or recommends its return to the president or until the Committee is discharged of the treaty by the Senate. The Committee Chairman decides whether and when to schedule one or more public hearings on the treaty. The chairman also decides on the

¹⁰ U.S. CONST. art. II, § 2.

¹¹ Rule XXX: Executive Session-Proceedings on Treaties, Rules of the Senate, COMM. ON RULES AND ADMINISTRATION.

timing of mark-ups. If the Committee reports the treaty to the Senate and two-thirds of the Senators give their consent to the treaty, the President may proceed with the ratification process, usually by depositing an instrument of ratification with the appropriate body.

Through this process, the United States has joined a total of 372 treaties between 1961 and 2009. Democratic presidents have controlled the White House twenty years during that period and Republican presidents have controlled the White House twenty-eight years during the same time period. The United States joined 177 multilateral treaties during Democratic presidencies and 195 treaties during Republican presidencies. Stated as a yearly average, slightly more treaties have been adopted during Democratic presidencies (approximately 7 per year) as compared to Republican presidencies (approximately 9 per year). Thus, there appears to be some difference between Democratic and Republican presidencies, but not an enormous one.

During the same time period (1961–2009), presidents of both parties have recommended adoption¹² of an additional 22 treaties that are still pending in the Senate. There are several well-known recent examples where the Senate thus far has failed to give its advice and consent to major multilateral treaties, despite urging from the executive branch. For example, several presidents from both the political parties have urged ratification of the UN Convention on the Law of the Sea,¹³ but the Senate¹⁴ has not complied. Likewise, President Obama's administration has urged ratification of the Convention on the Elimination of Discrimination against Women¹⁵ and the UN Convention on the Rights of Persons with Disabilities¹⁶ and yet the Senate again has not given its advice and consent.

Often, these treaties have stalled in the Senate Foreign Relations Committee,¹⁷ where powerful Committee Chairmen or other influential Senators on the Committee have opposed adoption of these treaties. For example, when Senator Jesse Helms was Chairman of the Senate Foreign Relations Committee from 1995–2001, he was famous for using his position and the Senate's rules to stall or block adoption of a number of multilateral treaties, such as the Comprehensive Test Ban Treaty, the Kyoto Protocol, Convention on the Elimination of all Forms of Discrimination against Women, the UN Convention on the Rights of the Child, and the International Criminal Court.

More recently, Senators have argued that U.S. law is already sufficient¹⁸ and these new legal norms are not needed; or they have argued that to adopt the treaty would be to give up a measure of sovereignty and to subject the United States to unwanted international scrutiny and criticism. These Senators suggest that the only types of treaties the United States should sign are those that advance "a specific U.S. security or economic interest." These Senators have also incorrectly asserted that ratification of a convention would lead to that convention having the same legal authority as the U.S. Constitution. (Of course, the U.S. Supreme Court long ago established that the U.S. Constitution trumps any inconsistent treaty obligations.)¹⁹ Some Senators also have argued that the treaty might infringe on state and federal law despite the ability of the Senate to add more or more reservations, understandings or declarations ("RUDs") to limit this possibility.

¹² Treaties Pending in the Senate, U.S. DEP'T OF STATE (Updated June 20, 2016).

¹³ President's Statement on Advancing U.S. Interests in the World's Oceans, THE WHITE HOUSE UNDER PRESIDENT GEORGE W. BUSH (May 15, 2007).

¹⁴ Zack Colman, *Republican Senator Says Sea Treaty Might Pass After Election*, THE HILL (Aug. 17, 2012).

¹⁵ Press Statement, Deputy Dep't Spokesman Robert Wood, Thirtieth Anniversary of the United Nations' Adoption of CEDAW, U.S. Dep't of State Press Statement (Dec. 18, 2009).

¹⁶ Issues: Disabilities, THE WHITE HOUSE UNDER PRESIDENT BARACK OBAMA.

¹⁷ STAFF OF S. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE U.S. SENATE, S. Prt. 106-71 (Comm. Print. 2001).

¹⁸ Convention on the Rights of Persons with Disabilities, S. EXEC. REP. NO. 112-6 to accompany Treaty Doc. 112-7 (July 31, 2012).

¹⁹ See Reid v. Covert, 354 U.S. 1 (1957).

In international law, a “reservation²⁰ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of a treaty in their application to that State.” An illustration would be a reservation pursuant to which the United States declines to be bound by one or more provisions of the treaty, such as the settlement of disputes at the International Court of Justice. In the context of this article, an “understanding” is the Senate’s interpretation of the impact of a treaty. For example, the U.S. Senate sometimes includes a federalism understanding, which states that the federal government will implement the treaty provisions where it has jurisdiction to do so and otherwise implementation will be done by state and local governments. And “an interpretive declaration²¹ is an instrument that is annexed to a treaty with the goal of interpreting or explaining the provisions of the latter.” The U.S. Senate will sometimes include a declaration that the treaty will not become effective in domestic law, meaning that the treaty is not self-executing until the U.S. Congress has enacted implementing legislation. Finally, some statements by the U.S. Senate may be viewed as interpretive conditions,²² which set forth the United States’ interpretation of a vague treaty term.

One might think that the ability to include one or more RUDs would encourage Senate advice and consent to multilateral treaties, because the Senate can essentially opt out of any objectionable provisions while still accepting the main provisions of the treaty. In fact, as demonstrated by Graph A above, it is fairly common for the United States to attach a RUD to a treaty to limit or clarify the legal obligations undertaken by the United States with respect to that treaty. Since the 1960s, the United States has added RUDs to the multilateral treaties it has joined 20 percent of the time. However, this number is on the rise. In the 1960s and 1970s, the United States only added RUDs to its multilateral treaties 11–12 percent of the time. By the 2000s, the United States added RUDs to the multilateral treaties it ratified 34 percent of the time. Despite the rise in the use of RUDs, however, the number of multilateral treaties ratified by the United States has fallen. Thus, the ability to use RUDs to limit a treaty’s reach does not seem to explain what is happening with respect to U.S. treaty practice.

There are many other possible answers to the question of why multilateral treaties are in decline, which are beyond the scope of the data set collected and analyzed thus far. For example, the current data set does not take into account bilateral treaties or the rise in international executive agreements²³ that the President makes on his own authority without seeking the advice and consent of the Senate. Thus, much more research will need to be done to determine other causal factors.

The purpose of the essay is to confirm through empirical data that multilateral treaties are on the decline in the United States and to suggest some reasons why this decline has occurred. The preliminary conclusions that may be drawn from the data suggest that there are likely many factors that contribute to the decline in U.S. ratification of multilateral treaties, including global events such as wars and economic crises, as well as domestic politics. More research is needed to explain why the decline is occurring, what lack of U.S. participation may mean for international law more generally, and what, if anything, should be done about it.

²⁰ *Vienna Convention on the Law of Treaties*, art. II, May 23, 1969, 1155 UNTS 332

²¹ *Glossary, Declarations*, UN TREATY COLLECTION.

²² Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT’L & COMP. L. REV. 89 (1996).

²³ Glen S. Krutz & Jeffrey S. Peake, *Treaties and Executive Agreements: A History*, in TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS 24 (2009).