

An opportunity cost theory of US treaty behavior

Abstract

Although the United States often leads in treaty creation, it often lags in ratification. Theories that treat states as unitary actors argue that this reflects state preferences. Multi-level game theories argue that key political players impair the process. In either case, ratification lags or stalls because they lack support. Yet some treaties stall despite support. We propose a new, complementary explanation. We argue that the advice and consent process imposes opportunity costs in terms of legislative time, and that these costs slow down the process or even block it completely. Statistical analysis supports the existence of such opportunity costs. The priority the Senate and President assign to treaties depends not only on the value they assign to the treaty itself, but the value of other possible policy achievements.

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The United States Senate can be speedy at ratifying treaties. In March 2003, the US signed the NATO protocols to enable the accession of several new members. By April, the President had sent the treaty to the Senate and by May the Senate provided its advice and consent. Such speed is rare, however. In the same year, the World Health Organization concluded the Framework Convention on Tobacco Control (FCTC), which the United States signed. Then-Senator Barack Obama, a long time tobacco control advocate also fighting personal tobacco addiction, joined in a letter urging President George W. Bush to transmit the FCTC to the Senate for ratification. Yet, despite Obama's strong personal support for the treaty, as President has himself failed to even transmit the treaty to the Senate. By 2012 it still lingered in the vaults of the State Department.

The fact that many treaties get stuck has long ago earned the Senate a reputation as "the graveyard of treaties." Some treaties fail simply for lack of requisite support. President Clinton transmitted the Law of the Sea to the Senate in 1994, and it has been on the Treaty Priority List of not only President Clinton, but also Presidents Bush and Obama. Moreover, it has had the support of over two-thirds of the Senate (Winter 2009). Why then has the Senate not provided advice and consent? Why, more generally, do some treaties remain on the President's desk or remain tabled in the Senate despite strong incentives to move them forward? Indeed, given that the US is often in the forefront of treaty creation, why does it often lag behind other states in treaty ratification? A study of 76 treaties open to all states and concluded between 1990 and 2005 found that the US had ratified only 34, far behind European countries and the second lowest among

Organization for Economic Cooperation and Development countries (Elsig, Milewicz and Stürchler 2012, 8).

Often observers attribute ratification failures to treaty content that the US or key American veto players cannot accept. Curiously, however, scholars have not explored why this occurs so often given the US possesses considerable influence in treaty negotiations. Although some scholars have analyzed the Senate advice and consent process for Presidential nominations (Binder and Maltzman 2002; McCarty and Razaghian 1999; Derouen, Peake and Ward 2005), we know of only one broad study of standard political factors and treaty content of the US treaty process across treaties and time (Krutz and Peake 2009). Another study examines determinants of treaty reservations attached by the Senate (Auerswald and Maltzman 2003), and others focus on security treaties (Krepon and Caldwell 1991; Delaet and Scott 2006), or various individual treaties (Evans and Oleszek 2003). Scholars have focused more on why the US treats a particular international agreement as an executive agreement or as a treaty that requires Senate advice and consent (Krutz and Peake 2009; Martin 2005), than on the advice and consent process itself.

Yet, the treaty advice and consent process matters for several reasons. First, the treaties that require Senate advice and consent tend to be, by constitutional design, matters of significant commitments. Second, the process influences US participation in international cooperation. Delays prevent the US from participating fully in the organizational work that flows from the treaty. Despite actively cooperating with the treaty organization, the US may be relegated to observer status, a point the President sometimes bemoans in his transmittal letters to the Senate (Clinton 1997). Furthermore,

as demonstrated by the Kyoto Protocol on global warming, the absence of Senate advice and consent may diminish global efforts to cooperate on important issues. Lastly, when treaties repeatedly get stuck in the Senate, other states discount the likelihood that the US will ratify new treaties, and this can diminish future US influence over the negotiations (Galbraith 2012). As a former Legal Advisor to the State Department stressed, “It may well be that we will sign the treaty, but our negotiating partners have no confidence that the executive branch will necessarily be able to get a potentially controversial treaty through the Senate” (Johnson 2010). Contrary to existing theory on two-level games (Putnam 1988), domestic ratification difficulties may diminish, not boost, leverage. Thus, Senate advice and consent is consequential.

Traditional national interest arguments

Most analyses of treaty ratification focus on a single treaty and treats states as rational, unitary actors (Simmons 2000, 2009; Moravcsik 2000; Buthe and Milner 2008; Fredriksson 2000). The logic may vary across issues, but the underlying assumption usually is that states join treaty regimes that are in their national interest. Sometimes the benefit is a signaling value that states attribute to joining a treaty even if they have no intent of observing it (Vreeland 2008), but the fact remains that a state is thought to weigh the pros and cons of the treaty and join if the benefits outweigh the costs. Based on this logic, if a treaty is in the interest of the US, the US should ratify it.

This frame of analysis can take us a long way in understanding the fate of many treaties, but it cannot explain why the US fails to ratify some treaties that it clearly values. Why, when US negotiators push hard for certain provisions and manages to obtain nearly

all its demands, does the US sometimes fail to ratify the treaty? Why, when the US initiates treaties and shapes their form, does it then fails to ratify them? For example, the US has not joined the ILO Convention on Seafarers' Identity Documents, which the US pushed in response to the 9/11 terrorist attacks to strengthen port of entry security. The treaty has been held up in the Senate, supposedly due to a visa provision that contradicts federalism provisions in US immigration law (Brimmer 2010). Thus, despite the strong US support for this treaty, the Senate has not implemented it.

Similarly, if US interests truly drive ratification, why does the US not ratify some treaties although it participates actively in them, seeking to meet their requirements and build their organizational structures? The US played a major part in the treaty negotiations for the Biodiversity Convention and has an excellent compliance record, but has not ratified the treaty itself.

In yet another discrepancy between interest and ratification, the US will refer to unperfected treaties as precedential for US-authored treaties. For example, although the US has not ratified most ILO Conventions, it reinforces their content in a trade agreement with Peru (Charnovitz 2008, 96). This suggests that, paradoxically, despite not ratifying them, the US agrees with the general content of these international treaties.

Classic domestic explanations

The classic response to these puzzles is that domestic politics and institutions intervene in foreign policy (Putnam 1988; Allison 1971; Stoll 1984). Thus, the Senate rules enable 1/3 of senators, or the Senate foreign relations chair to block treaties. This is why Haller and Holden have argued that a supermajority ratification rule such as the one

in the Senate increases the bargaining position of a country, but it does so at the cost of also increasing the risk that a treaty fails to become ratified (Haller and Holden 1997). Thus, a major obstacle to the Senate treaty process is the political opposition to a treaty in the Senate (Krutz and Peake 2009).

However, even considering partisanship and domestic politics some Senate advice and consent behavior remains a puzzle. For example, why do some treaties have 67 votes in support on the Senate floor as well as the support of the President and Senate foreign relations chair, yet do not get brought to the floor for consideration? The Law of the Sea clearly meets this threshold. Similarly, the Rotterdam Convention and the Stockholm Convention each made it out of committee, and although both Republican and Democratic foreign relations committee chairs have supported them, both have stalled. Thus, even treaties with the requisite support to overcome the institutional rules fail.

As with the basic national interest arguments, the legal and institutional arguments may often go a long way towards explaining the US behavior towards international treaties. However, we propose another explanation that may be at work in addition to these factors and may help explain these puzzling outcomes.

Opportunity costs

This paper presents an opportunity cost theory of treaty ratification. We argue that the US sometimes delays or derails treaties not because they engender such opposition that passing them would be impossible given the institutional rules, but because the President and the Senate often does not prioritize them because they know the battle would be long and they consider the opportunity cost of the floor time too costly. This

occurs because the legislative agenda is a fixed and highly prized resource, as, for the President, is political capital.

Advice and consent as a two-step process

The fate of US treaties, and thus an opportunity cost theory of treaty ratification, cannot be examined without considering the entire ratification process. After the US signs an agreement, the President decides whether to transmit it to the Senate, and then the Senate Foreign Relations Committee (SFRC) decides whether to recommend the treaty and pass it out of committee along with a treaty document drafted by that Committee. This treaty document then moves to the floor for debate, possible amendments, and a vote. To provide its advice and consent, the Senate must pass the document with no less than a two-thirds majority. Only then can the President deposit the instrument of ratification, formally ratifying the treaty.¹

The nature of the two-step process makes it necessary to account for behavior at both stages to understand outcomes. The first step, the transmittal decision, is important, because it may well be strategic. Indeed, when President Clinton wanted to transmit the UN Convention on the Rights of the Child in 1995, Senator Jessie Helms, Chair of the SFRC, opposed it so strongly that he, along with 26 cosponsors, introduced a Senate Resolution urging the President to not transmit the Convention to the Senate. Thus, if some Senators are very opposed to a treaty, they may take action that can be distracting or politically harmful for the President. Furthermore, because the President usually endorses the treaty in the transmittal letter, he may incur a reputational cost by

¹ In addition, at any time a treaty can be returned to the President or, if the committee reports the treaty but no vote transpires, the treaty can go back to the committee.

transmitting treaties that stall (Krutz and Peake 2009, 140). Withholding transmittal can therefore be politically astute and conserve political capital. The transmittal decision may also be strategic in that the President is prioritizing what he wants to accomplish with his available political capital. Thus, when theorizing the Senate advice and consent process, it is important to consider both the factors that influence the President's transmittal decision and the Senate's advice and consent process.

The fixed political agenda space and policy priorities

Opportunity costs arise when resources are fixed and fully employed. We argue that political agenda space is such a resource; there are only so many policy priorities a President can promote, and only so much Senate floor time to consider them. When prioritizing legislative agendas, Senators and Presidents favor issues that increase their popularity and chances for reelection (Mayhew 1974). This usually means a focus foremost on domestic politics (Abramson, Aldrich and Rohde 1987). This is not because the public does not care about international issues. Indeed, trade agreements can engender considerable domestic debate, as in the case of NAFTA, and when the US engages in war, the public clearly cares deeply (Howell and Pevehouse 2007). Thus Senators and Presidents devote considerable time to these. These issues, however, are not typically the topics of treaties submitted for Senate advice and consent. Trade-related treaties are usually handled through congressional-executive agreements, and although some article II treaties may be related indirectly to war, issues of specific wars are usually not treaty issues. Thus, Article II treaties are rarely the bread and butter of domestic politics. Voters may hold preferences on a given treaty, but treaties rarely motivate voters. For example,

public support for the International Criminal Court has not translated into a mobilized voter base for the Rome Statute, and the issue is not one that Senators consider integral to their re-election. As the State Department Treaty Analyst & Depositary Officer noted in an interview: “Treaties don’t have a constituency (Halloran 2011).”

The implication of this insight is central: contrary to standard assumptions, the decision to push a treaty through the advice and consent process may be less about an objective examination of costs and benefits of the treaty than about the benefit of spending time on the treaty *relative* to the benefit of other possible agenda activity that may produce important domestic legislation such as health care reform, for example. In other words: Senate advice and consent depends on the associated opportunity cost. The opportunity cost can manifest itself for many types of treaties. Even non-divisive treaties require some presidential attention to move through the process (Johnson 2010), and therefore these may fall by the wayside because they gather little attention. More important treaties might also be affected by the opportunity cost, however. Even if opponents might not technically command the requisite 1/3 of Senators to block the treaty, their willingness to obstruct it (even the threat to obstruct it) may impose such high time costs that supporters are reluctant to spend time on it when there are many competing priorities.

So how great is the opportunity cost of treaty ratification in terms of Presidential and Senate time? First and foremost, the opportunity cost is a function of the value of the legislative agenda space at any given point: It depends on what else could be accomplished with the time. This leads to a quite unconventional proposition. Whereas pure institutional analysis would expect the President to be most likely to transmit treaties

to the Senate when he has a lot of political support and can garner the requisite 2/3 vote, the opportunity cost theory predicts that this is exactly when he will be *least* likely to spend time on treaties. When the President commands support in the Senate, the chances of passing valuable legislation is higher (McCubbins and Cox 1993). In other words, when the President commands support in the Senate, he has the opportunity to move valuable legislation on the political agenda and the calendar of the Senate. This boon of political capital raises the opportunity cost of the Senate agenda time. Thus, the greater the President's political support, the less likely he will be to transmit treaties to the Senate.

In addition, although the House does not have a formal role in the treaty process, it does have a role in the domestic legislation process. Because of this, we expect the level of political support in *both* the House and the Senate to be relevant in the decision to transmit. That is, with sizable majorities in both legislative chambers, the President would be especially likely to focus on domestic priorities. This leads to an observable proposition:

P1: The more co-partisans the President has in the House and the Senate, the less likely he will be to transmit treaties to the Senate.

There is also strong empirical evidence that a President's approval rating is positively correlated with his ability to further his legislative agenda (Canes-Wrone and De Marchi 2002). In particular, the empirical evidence points to increased Presidential efforts in areas of high salience to the public. If this is the case, it likely that higher approval levels will lead the President to follow through on domestic, rather than foreign policy, agenda items. This suggests the following proposition:

P2: The greater the President's approval ratings, the less likely he will be to transmit treaties to the Senate.

In the Senate, the value of floor time depends on the political cycle. When the President transmits a treaty the time costs rarely materialize in the very near term, because the treaty has to pass through the foreign relations committee. However, if the Senate places a treaty on the legislative calendar, then the impending time cost is more immediate. Our opportunity cost theory predicts that the Senate will be less inclined to spend time on treaties during times when Senators want to instead push for domestic legislative victories. Although time is always scarce in the legislative branch (Hall 1996), the legislative calendar does vary. In election years, particularly Presidential election years, domestic legislation becomes too contentious, as the election grows nearer. Subsequently, the President and Congress shun policy positions that could upset their electorate. This lowers the cost of Senate floor time. Similarly, when the President is not up for reelection, the lame-duck status hinders effective domestic legislation. Thus, calendar time becomes more plentiful. This leads to the following expectations:

P3: In Presidential election years, and especially during “lame duck” years, treaty ratification will be faster.

P4: The Senate is more likely to spend time on the treaty advice and consent process in the fall of election years, speeding the ratification process.

Finally, not all treaties are self-executing. Some require the passage of additional legislation to bring the US into compliance with the treaty at hand. The opportunity costs for the Senate is greater when it has to vote on not only the treaty itself, but also consider and pass implementing legislation. The President often states in the transmittal letter whether the treaty requires implementing legislation, and such requirements will demand that the Senate spends additional time on the necessary legislation. Our opportunity cost theory expects requirements for implementing legislation to encumber treaty success.

P5: Treaties that require implementing legislation will take longer to receive Senate advice and consent.

Costs Magnifiers

The opportunity cost theory argues that times with higher political capital entail greater opportunity costs. These costs, however, are magnified with the anticipated opposition. This makes it essential to also to consider the strength of key veto players as institutional theories suggest (Moravcsik 2005, 150-51). Just like Senator Helms could signal opposition that stopped Clinton from transmitted the Convention on the Rights of the Child, strongly opposed minority actors can make advice and consent more time consuming and therefore costlier.

What factors capture such opposition? Sometimes opposition is clearly treaty specific. For example, the US may simply not derive any added benefit from ratifying human rights treaties because the these rights are already guaranteed domestically (Bradley 2010, 331, 33), or treaties may stall because they conflict with the federal structure of US policy making (Bradley 2010, 330). Still, these explanations tend to be idiosyncratic. Our goal here is not to study how specific treaty attributes hinder ratification, but to make sure that we control for any treaty-level characteristic that might be correlated with the propensity to conclude these treaties. To this end, we include measures of issue are in our multivariate analysis below.

More generally, however, we expect that of the two political parties, Republicans will be more likely to oppose treaty commitments. Republican Senators traditionally stress sovereignty and conservative morals, both of which are elements that are at times seen as threatened by multilateral agreements. For example, past work suggests that

Republicans are more reluctant to support arms treaties (Delaet and Scott 2006; Krepon and Caldwell 1991) and that “conservative Senates and pivotal senators systematically exploit the right to add reservations” (Auerswald and Maltzman 2003, 1097). Trade treaties, which may differ, are usually handled through congressional executive agreement.

Based on ideological preferences, therefore, we expect Republicans to be relatively less supportive of international treaties. Thus, Democratic Presidents should be more inclined to transmit treaties, and, in line with standard institutional arguments, the more conservative standard veto players such as the Foreign Relations Committee chair and the 2/3 Senator, the slower treaties will progress through the process.

Furthermore, even staunchly opposed individual senators can hold the process hostage, as Senator Richard Lugar (R-Ind) lamented in a 2009 speech to the Washington Foreign Law Society:

“[T]oo often, narrow objections to treaties are allowed to prevent any Senate consideration. The Senate’s rules allow the Senate to vote to cut off debate on a treaty, and thereby to ensure that a vote on the treaty may occur. But the Senate’s leadership – both Democrat and Republican -- has been reluctant to exercise this option in recent years. Their concern appears to be that doing so would require the Senate to spend too much time debating particular treaties, to the exclusion of other matters that have greater domestic political appeal. As a result, the Senate has not held a significant debate on a treaty since the late 1990s, when the Senate debated and approved the Chemical Weapons Convention, and debated and rejected the Comprehensive Test Ban Treaty. In essence, for more than a decade, treaties have had to meet a standard for Senate approval that approaches unanimity -- far exceeding the already difficult two-thirds majority requirement established in the Constitution (Lugar 2009).”

In sum, based on both the opportunity cost theory and on a simple preference-based theory, the general expectation is that the more opposed Senate veto players, including the most conservative senators, are to a treaty, the longer the Senate advice and consent process will take.

Treaty Selection

Our data includes multilateral treaties signed after 1945 and still active in the advice and consent process post-1967. This means that the treaties may have been signed prior to 1967, but they are only in our sample if they had not yet been ratified or returned to the President by then. We include treaties that the US has signed but the President has not yet transmitted to the Senate.

Assembling a dataset of these treaties was difficult, because no list of them exist. Furthermore, it is challenging to decide which international agreements belong on this list, as some may be executive agreements. To devise an accurate list, we searched multiple available treaty databases for agreements signed by the United States, but to which the United States had not yet become a party. These databases include the United Nations Treaty Database, ECOLEX, The Hague Conference on Private International Law, and Oceana Law. We also compared our list against a list of multilateral treaties from Gamble's dataset on treaties and Wikipedia's "treaties by year of conclusion (Wikipedia 2012)." After assembling this list, we consulted with the Office of the Assistant Legal Adviser for Treaty Affairs in the State Department to identify treaties that were not designated for the advice and consent process, and also made sure our list was as complete as possible.

We limit our analysis to multilateral treaties, because although half the treaties that go through the advice and consent process in the United States are bilateral, these differ in at least four important ways. First, bilateral treaties tend to deal with a smaller set of topics. Thus, the bilateral treaties transmitted to the Senate between 1967 and 2011

belong primarily to five categories: consular conventions (17), property or copyright treaties (9), tax conventions (129), investment treaties (49) and extradition treaties (147). Together these treaties make up 350 treaties, which constitute 88 percent of all the non-multilateral treaties in the Thomas database.

Second, bilateral treaties often are renewals or revisions of treaties with a given country. For example, 8 of the tax conventions since 1967 are with Canada. This means that these treaties often are minor revisions of previous documents, which reduces the need for debate. For these reasons, Galbraith calls these treaties “repetitive bilateral treaties” (Galbraith 2012, 4).

Third, bilateral treaties often follow standard formats. This enables the Senate to bundle them, meaning that the Senate passes two or more treaties of the same kind on in the same vote. Typically 4-8 treaties are bundled. Thus, half the consular conventions were bundled with at least one other treaty. Since 1967, the Senate has bundled 95 percent of the tax conventions, 89 percent of the property or copyright treaties, 87 percent of extradition treaties and 88 percent of investment treaties. The Senate bundled extradition treaties 82 percent of the time, in one case providing advice and consent to 30 treaties on the same day. This bundling means that any delay in passing these bilateral treaties is irregular because the Senate will hold on to them until there is a hearing for treaties of a given type.

Thus, bilateral treaties differ significantly from multilateral treaties, both in content, partners, and in how the Senate handles them. Of course, the fact that the Senate often bundles bilateral treaties supports the opportunity cost argument. The similarity of these treaties reduces the need for debate and subsequently facilitates bundling, which in

turn reduces the need for Senate floor time and thus the opportunity cost to the Senate.

Although in international law executive agreements are identical to so-called Article II treaties that receive Senate advice and consent, we exclude them here because, whether they are sole or congressional-executive agreements, their process of ratification, and often their subject matters, differs from that of the Article II treaties.

Descriptive data

We found 352 multilateral treaties signed after 1945 and still in the advice and consent process post-1967. Of these, the President has transmitted 320, and the average time to transmittal is about 1.8 years (standard deviation about four years), with the maximum being 43 years. In all 268, or roughly $\frac{3}{4}$ of the treaties were ultimately ratified. The average ratification time was two years, with the standard deviation being about four and half years, and the longest spell being 41 years.

The next three figures display signature, transmittal, and ratification trends over time since 1967. Figure 1 reveals a bursts of signatures in the early 1970s and the 1990s, and a much lower rate in recent years: Whereas until 2003 the US has always signed at least 4 multilateral treaties a year, after 2003 there has been three years when it signed only one such agreement, and one year, 2008, when it signed none. This shows that the flow of treaties available for transmittal is not at all constant, something we will consider later in the model. Figure 2 and 3 also shows considerable variation over time. Again, recent activity is low. Indeed, 2010 marks the first year in our sample that no multilateral treaty gained advice and consent at all. This was also the time when President Obama had a majority in the Senate and House and spent huge political capital on health care reform.

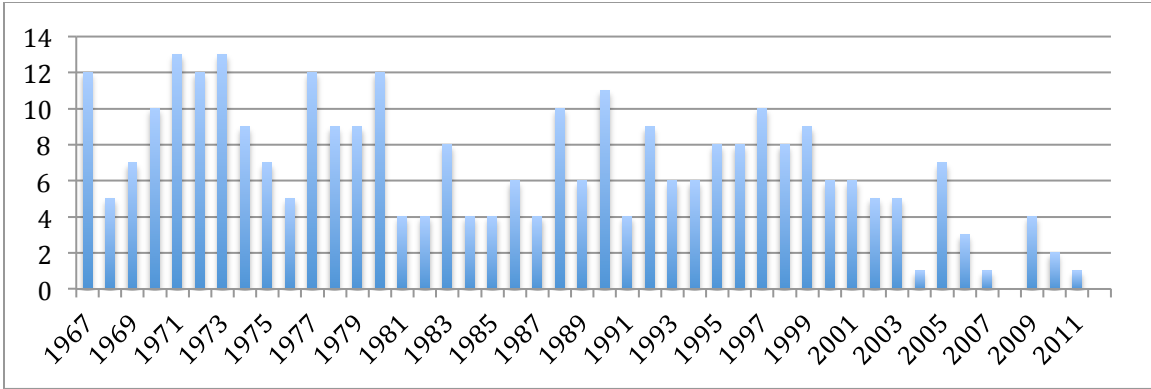


Figure 1: Number of multilateral treaties signed by the United States per year since 1967

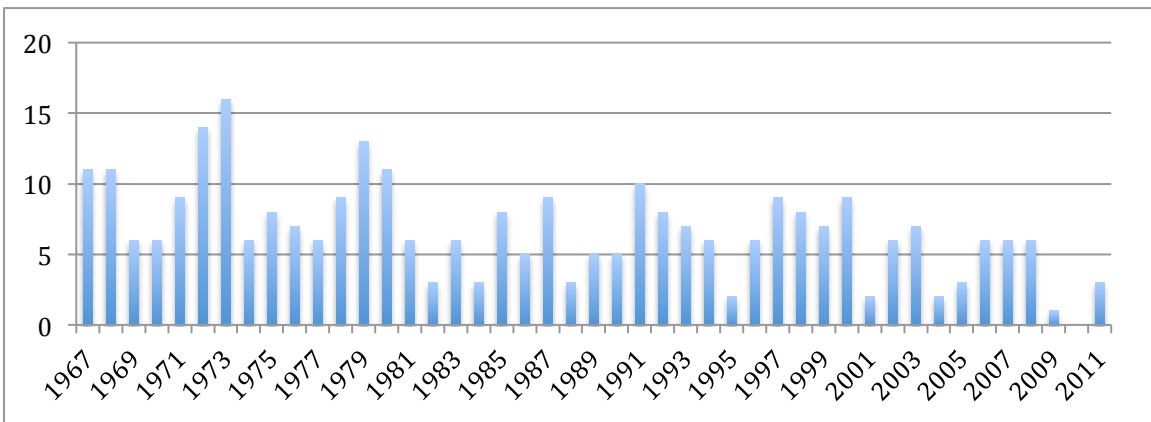


Figure 2: Number of multilateral treaties transmitted to Senate per year since 1967

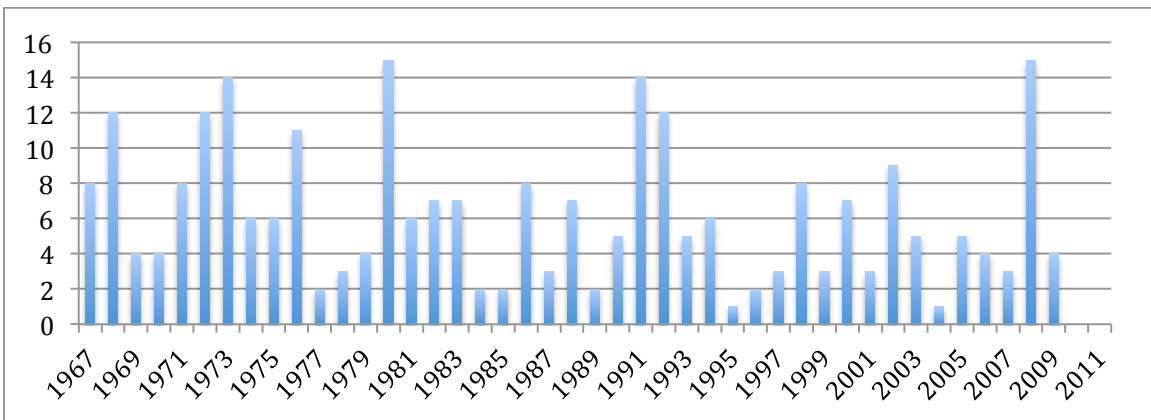


Figure 3: Number of multilateral treaties receiving advice and consent by the Senate per year since 1967

P3 expected that treaty ratification would be faster in Presidential election years, and especially during lame-duck years. Figure 4 shows that on average the fewest

multilateral treaties are passed in non-election years, more in midterm election years, and even more in Presidential election years. Finally, the average number of treaties passed in “lame duck” years is the highest, and is more than twice that in non-election years.

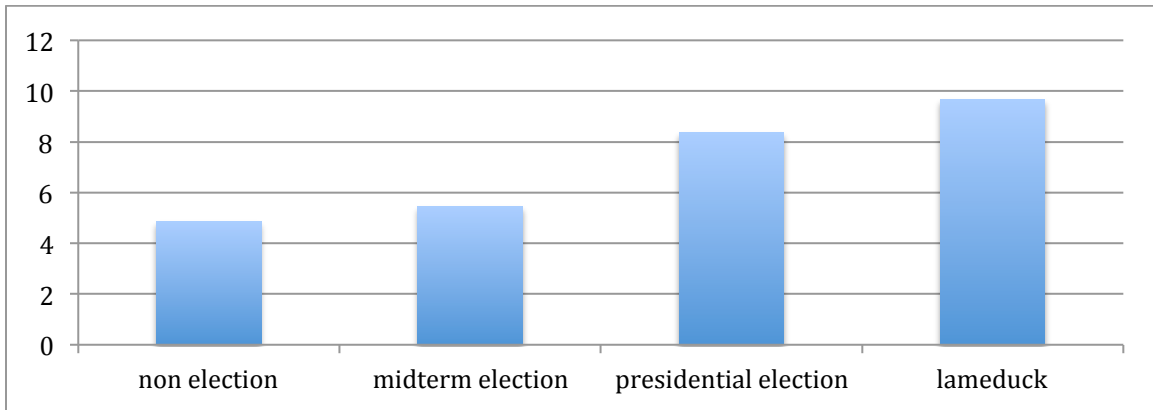


Figure 4: Average number of multilateral treaties given Senate advice and consent during a particular type of year, 1967-2011

P4 expects the fall to be more active for treaties. Figure 5 shows that in general there is a certain rhythm to the year. Even in non-election years, treaties are more likely to be passed late summer and fall. However this trend grows increasingly pronounced in election years, then Presidential election years and finally “lame-duck” years, where it is by far the most pronounced with September seeing burst of treaty actions.

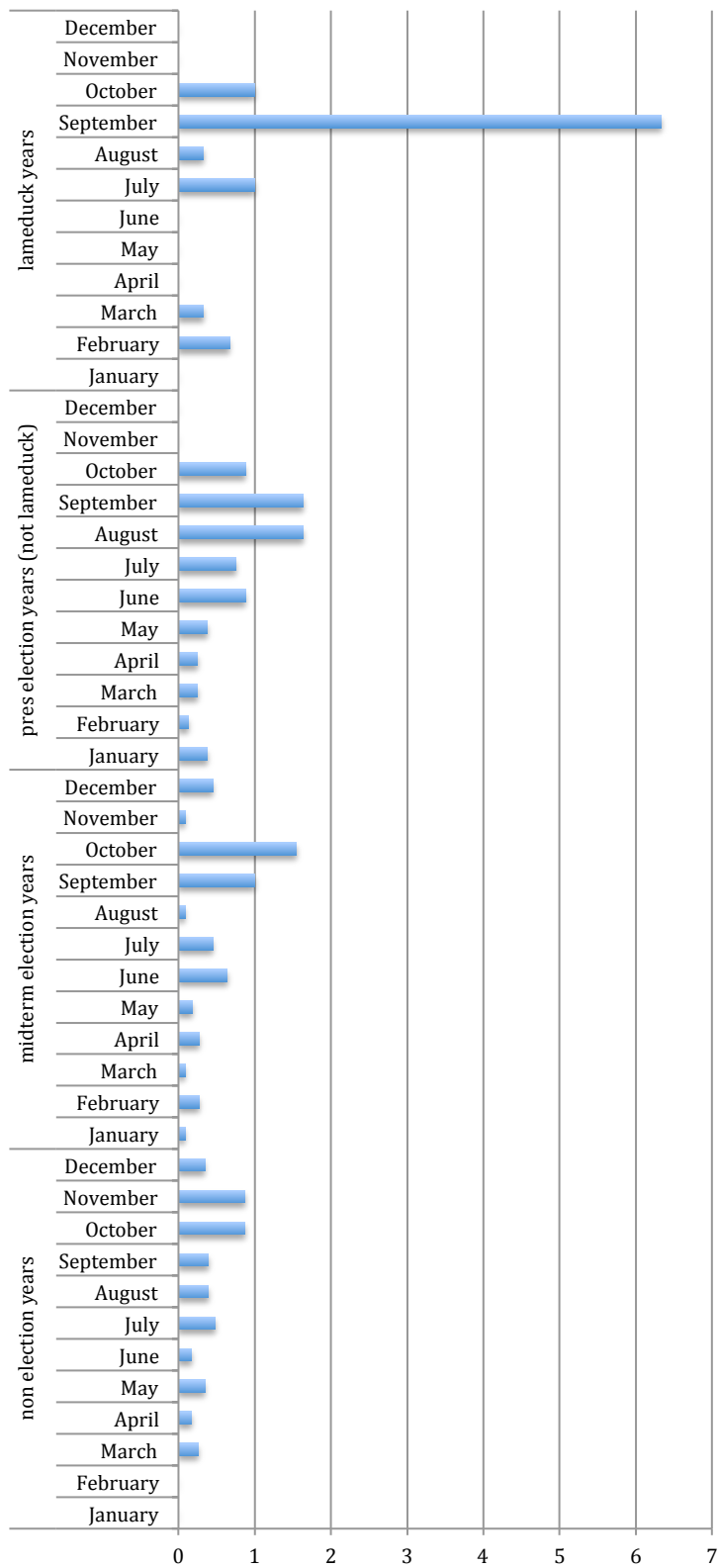


Figure 5: Average number of multilateral treaties passed in a given month, 1967-2011

Analysis

We have cast our theory as one of timing: although Presidents do refuse to send treaties to the Senate and the Senate does occasionally vote down a treaty (the last time being the Comprehensive Nuclear Test Ban Treaty in 1999), the more interesting question is to understand what factors lead to delay in the Senate advice and consent process. In a similar vein, scholars have chosen to analyze delays in Senate consent on nominations (McCarty and Razaghan 1999; Binder and Maltzman 2002; Derouen, Peake and Ward 2005). Moreover, because Presidential transmittal decisions may be strategic, only examining transmitted treaties leaves out a valuable and quite likely non-random set of the sample. On the other hand, simply modeling signature time to the advice and consent decision ignores that the Senate cannot provide with advice and consent on treaties that have never been transmitted.

We therefore undertake a two-step multivariate analysis of both the transmittal decision and the Senate advice and consent decision. First we estimate a model for the transmission decision, and then we take the predicted scores from this model into account in the subsequent advice and consent model to account for possible selection issues. Our data is time-series, cross-sectional by nature, set up in treaty-year format, to capture changes in the key independent variables when a treaty remains on the President's desk or in the Senate for more than one year. Thus, each variable we describe below is coded on a yearly basis.

Core Variables

Our theory expects several variables to influence the length of time it takes for Presidents to transmit treaties to the Senate as well as the time from transmittal until the Senate provides advice and consent.

We examine the influence of political party support in both houses of the legislature (P1) by defining *President % Control*, which is the percentage of the House and Senate controlled by the party of the President. Traditionally, scholars would expect this variable to lead to an easier road to advice and consent. We, however, expect this to be associated with a longer time to advice and consent. We include this variable in both stages of our model. We include both the Senate and House since any domestic legislation pursued by the President would need to pass both houses of the legislature.

We expect higher Presidential approval ratings (P2) to be correlated with a lower desire to transmit treaties to the Senate, given that this approval is likely to translate into bigger momentum on domestic legislative imperatives. To examine this idea, we introduce *Approval*, the annual average of the Gallup Presidential approval poll for each year of observation (Gallup 2012). We include this variable only in the first stage of our model given that this is a factor that Presidents are likely to consider, but not the Senate in their decision-making.

To address P3 and P4, involving the dynamics of the electoral calendar and its effect on opportunity costs, we define two variables: *Lame duck* and *Re-election*. The first of these two variables is coded as 1 in the final year of a President's second term. The second of these is defined as 1 in the final year of a President's first term, when he is up for re-election. We expect both of these variables to be associated with shorter Senate advice and consent times given that there is little incentive for the Senate to work on

domestic issues during these two periods of time. Moreover, we include these only in the Senate advice and consent model since they are likely to be more important for Senate decision-making.²

Finally, we address P5 by introducing the variable *Implementation*, which indicates whether the President's transmittal letter notes that further domestic legislation is required to implement the treaty.

Control variables

Other factors may influence both the process and the opportunity costs. We therefore include several control variables. We define *SFR Chair* as the DW-Nominate score of the chair of the Senate Foreign Relations Committee. The Nominate score measures the underlying liberal-conservative spectrum of the voting record of members of Congress (Lewis and Poole 2004). Higher DW-Nominate scores suggest a more conservative committee chair, while lower values suggest a more liberal chair. Because the chair of the committee remains for two years, this variable varies every other year. Alternatively, we also use the DW-Nominate score of the 67th senator, because the advice and consent process requires support from 2/3 of Senators. Similarly, we use the DW-Nominate scores to define *Conservative Senator* to measure the ideology of the most conservative Senator in the chamber. We expect that the more conservative these variables, the longer both transmittal and ratification will take. The last ideological variables is an indicator for *Democratic President* with the expectation that Democratic

² Inclusion of these variables in the transmittal stage of the model yields no evidence they influence Presidential decision-making.

Presidents will be more likely to transmit sooner and push for quicker advice and consent in the Senate.

We also calculate *Treaties Available for Transmittal* as the number of treaties available to be transmitted based on the number of untransmitted treaties left from previous Presidents and the new number of treaties concluded during the year. We control for these same dynamics in the ratification stage by computing the number of treaties under consideration in the Senate, labeled *Treaties Available for Ratification*.

Finally, issue area could have important implications for the speed at which the treaty moves through the process. Thus, we classify treaties into four broad categories of types: *Human Rights* (e.g., UN human rights treaties), *Commercial* (e.g., trade agreements), *International Law* (e.g., technical treaties regarding rules and procedures in international law), *Environment* (e.g., regulatory treaties involving the environment), and *Arms Control* (e.g., multilateral arms treaties such as the Comprehensive Test Ban Treaty).

In terms of the ratification model, we also are interested in the effects of the first stage (transmittal) on the second (advice and consent). This is investigated by calculating a predicted time to transmit from the President's desk. We estimate a first stage model, then calculate a predicted median survival time – that is, the time the treaty will sit on the President's desk. We expect that if the President is not merely deciding whether to transmit a treaty based on his other legislative priorities, but also based on anticipated opposition, then longer periods of time on the President's desk should lead to faster action in the second stage of the process: Senate advise and consent.

To analyze data on time to transmittal or advice and consent, we turn to event history or duration models following Krutz and Peake (2009). As shown in Figures 6 and 7, the underlying distributions of the time-to-transmit and time-to-advice and consent dependent variables follows a Weibull distribution. In our subsequent multivariate analysis, we estimate a series of Weibull models, using the accelerated failure time metric to ease interpretation. For our coefficient estimates, it should be noted that positive signs indicate a positive effect on the hazard rate, meaning *shorter* transmission/ratification times. Negative signs indicate *longer* transmission/ratification times.

Figure 6. Hazard rate for treaties signed by the US transmitted to the Senate.

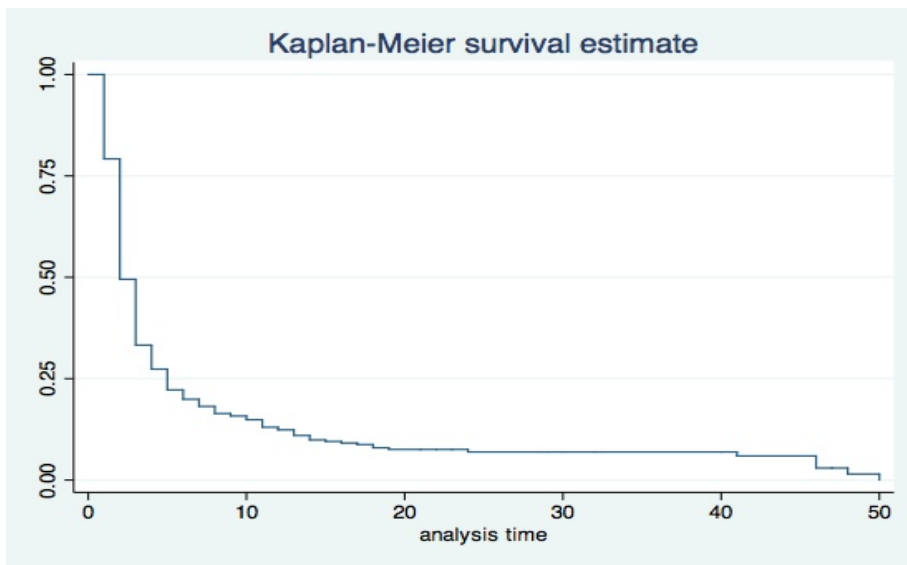
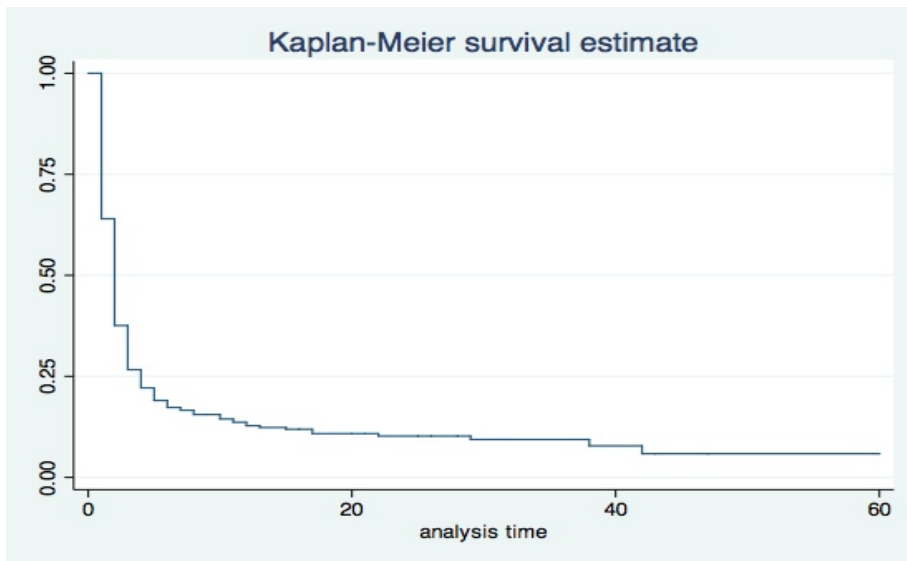


Figure 7. Hazard rate for ratification of treaties transmitted to Senate.



Results

The estimates of the transmit stage of the model are found in column 1 of Table 1. Consistent with our expectations, *President Percent Control* is negative and statistically significant. This finding is strong evidence of the opportunity cost logic: the more co-partisans the President has in Congress, the more greater he values Senate time and the longer he takes to transmit treaties. Again, this logic is in contrast to extant theories of the production of domestic laws, where it is presumed stronger partisan support will facilitate legislative production. Moreover, this effect is substantively important as well. Increasing the average number of co-partisans by one standard deviation yields an increase in the predicted transmit time of over 25 percent, or roughly one year.³

³ All predicted probabilities are computed against a baseline model assuming a Republican President, an environmental treaty, and all other variables held at their mean or modal value.

Similarly, the estimate of *Approval* is negative and statistically significant at the ten percent level, indicating that higher levels of public approval may encourage the President to spend time on key priorities and therefore increase transmit times for treaties.

Several control variables do achieve statistical significance and the estimates are consistent with our theoretical expectations. First, *SFR Chair* is negative and statistically significant, indicating that more conservative chairs lead to a lower hazard rate – i.e., longer transmit times. Similarly, the more conservative is the most conservative Senator, the longer the transmit time from the President’s desk, as suggested by the negative and statistically significant coefficient on *Conservative Senator*. This is consistent with the President’s anticipatory logic that staunchly opposed senators may be willing to take up extraordinary floor time to block a treaty. This stalling potential deters the President from

Table 1: Weibull models of the multilateral treaty process, 1967-2008.

	Transmit	Ratify	Ratify	Ratify
President % Control	-3.506* (0.897)	-1.814* (1.028)	-1.481 (1.105)	-1.673 (1.048)
Approval	-0.008* (0.004)	--.---	--.---	--.---
International Law	-0.241 (0.188)	0.215 (0.262)	0.231 (0.267)	0.128 (0.257)
Human Rights	-0.479 (0.300)	-1.307* (0.391)	-1.207* (0.406)	-1.456* (0.395)
Arms Control	-0.059 (0.234)	0.422* (0.235)	0.409* (0.235)	0.352 (0.233)
Commercial	-0.412* (0.176)	0.470* (0.233)	0.546* (0.253)	0.327 (0.233)
Dem. President	0.638* (0.169)	0.153 (0.194)	0.080 (0.201)	0.158 (0.190)
Availability ⁺	0.014* (0.007)	0.001 (0.007)	0.001 (0.007)	-0.003 (0.007)
SFR Chair	-0.632* (0.144)	-0.764* (0.158)	-0.714* (0.164)	-0.792* (0.156)
Conserv. Senator	-1.241* (0.727)	0.204 (0.718)	0.451 (0.730)	0.477 (0.697)
Predicted Transmit	--.---	--.---	-0.054 (0.061)	--.---
Lame duck	--.---	0.532* (0.161)	0.551* (0.161)	0.524* (0.156)
Re-election	--.---	0.393* (0.116)	0.386* (0.116)	0.377* (0.116)
Implementation	--.---	--.---	--.---	-0.399* (0.205)
Constant	0.923 (0.609)	-1.093 (0.708)	-1.254* (0.701)	-1.008 (0.702)
N	1871	1408	1408	1402
ln_p	-0.071* (0.043)	-0.136* (0.054)	-0.136* (0.054)	-0.114* (0.053)

Note: * signifies at least $p < 0.10$; all tests two-tailed. Robust standard error estimates in parentheses.

+ = Availability altered based on transmit or ratification stage.

submitting treaties the more conservative the most conservative senator is. Conversely, the positive estimate of *Democratic President* indicates that democratic Presidents more quickly transmit signed treaties to the Senate for ratification. The substantive effect of this variable is quite high: switching from a Democratic to a Republican President yields a predicted increase of transmittal time of approximately 2 years: nearly a doubling over the baseline prediction.

And while the *Commercial* indicator for treaty type is statistically distinct from the reference category, chi-square tests show it cannot be distinguished from other treaty categories. The rest of our treaty type categories are statistically indistinguishable from the reference category and each other. It is also worth noting that if we remove these type variables completely from the model, our estimates do not change significantly, suggesting that although these treaty specific variables may be important in explaining the outcomes, they are not systematically related to our variables of interest.

This first stage model is important in that it both helps to determine what makes the President decide to send treaties into the advice and consent process, and it allows us to generate an instrument for use in the second model, which estimates the time-to-ratification once the treaty hits the Senate.⁴ We thus use this transmit model to predict the time that a treaty remains with the President – and later introduce this predicted variable into the second stage of our model to account for possible selection bias.

Turning to our model of ratification, the estimates can be found in Column 2 of Table 1. Note that two of the domestic political variables that were statistically

⁴ Note that the model gains identification from the inclusion of *Approval* in the first stage and *Lame duck and Re-election* in the second stage. In addition, because *Treaties Available* is measured as only those treaties on the President's desk in the first stage, it can also be used to help in model identification.

significant in the first stage, *Democratic President* and *Conservative Senator*, do not achieve statistical significance in the second stage. *President Percent Control* does achieve statistical significance at the ten percent level, but as we discuss below, this estimate is not particularly robust.

Interestingly, our measure of the ideology of the Senate Foreign Relations chair is highly statistically significant and substantively powerful. A more conservative chair of the Senate Foreign Relations Committee slows down the advice and consent process, independently of its effect on delaying Presidential transmission. Increasing the conservativeness of the chair by one standard deviation leads to a predicted increase of nearly 50 percent in the time of advice and consent or roughly two and a half years.⁵

The estimates of three variables are consistent with our opportunity cost argument. First, *Lame Duck* is positive and significant, indicating that the Senate moves faster on treaties in the final year of an executive's eight year time in office. This variable has a large substantive effect: moving to a lame duck year from a non-lame duck year yields an over 50 percent decrease in advice and consent time.⁶

The second variable that captures the opportunity cost of time, *Re-election*, is also positive and significant, indicating that treaties move through the advice and consent process about 40 percent faster in Presidential re-election years.

⁵ In the second stage models, the baseline probability is computed on an environmental treaty, democratic President, *Re-election* set to 0, and *Lame duck* set to 1.

⁶ Note that there only are three lame-duck years in the data, one of which is 2008, during which a flurry of treaties received advice and consent. The underlying story supports of our opportunity cost theory. In an interview, John Dalton, the Senior Advisor on Treaty Practice at the U.S. Department of State, explained that the flurry of activity was due to a Senate Foreign Relations Committee staff member who took it upon herself to take advantage of a legislative lull to clean up a backlog of treaties. John Dalton, December 20 2011.

The remaining estimates fail to achieve statistical significance, with one exception. The indicator variable for *Human Rights* treaties is statistically different than the reference category and also different from the other treaty types, suggesting that these types of treaties are delayed extensively. Indeed, compared to the reference category (environment treaties), human rights accords dwell over 15 years longer in the Senate. And while there are two high-profile UN human rights treaties that contribute to this finding (the Conventions of the Rights of the Child and on the Elimination of Discrimination Against Women), other human rights treaties in our data also linger for long times.

Next, as a robustness check, we re-estimate the model, but include the variable *Predicted Transmit*, which was generated from the previously estimated transmittal model to account for possible selection issues. As column 3 shows, the variable is not itself significant, nor does it change the main results of the ratification model.

The final implication of our opportunity cost theory, Proposition 5, hypothesizes that the requirement of implementing legislation should slow down the treaty ratification process as Senators balk at the additional requirement to change the status quo. To test this, we code an indicator variable, *Implementation*, which equals one if the treaty requires implementing legislation. As shown in our final model in column 4 of Table 1, the *Implementation* variable is negative and statistically significant suggesting that treaties requiring further legislative effort are more likely to experience a delay in ratification. This variable has a substantively important effect as well: treaties requiring implementing legislation experience an increase in ratification time of over two years, an increasing of roughly 55 percent.

As a final note on our empirical models, we note that in these final two sets of estimates, *Percent President Control* fails to achieve statistical significance. Our initial estimate of this parameter is thus quite fragile. We do find, however, that if this variable is recoded to include only the President's co-partisans in the Senate, this new variable continues to achieve statistical significance in the transmit model, but never in the ratification stage.

Conclusion

Existing international relations theory expects states to join treaty regimes that serve the national interest. Yet this is clearly an oversimplification: in many cases the US has not ratified a treaty, yet shows its support for the treaty in other ways. Some of this can be explained by theories of institutional processes, which stress the ability of veto players to use their power to control the success of treaties. Indeed, we clearly show the importance of veto players and our models are the first to do so while examining both the transmittal as well as the advice and consent process. However, we also argue that not even this traditional veto-player analysis fully explains US treaty participation.

Sometimes those opposed to the treaty are not in veto positions. Sometimes even uncontroversial treaties fall by the wayside.

Our theory advances another much less appreciated factor that influences the treaty process: the opportunity costs of Senate time. This theory argues that the fixed agenda space of the Senate adds an opportunity cost to ratification because the President and the Senate has to decide whether to spend time on the treaty or to spend time on other, often more valued, domestic legislation. The opportunity cost is partly a function of

political preferences, but, more interestingly, it is also a function of the political value of the Senate floor time. The decision to push a treaty through the advice and consent process may be less about an objective examination of costs and benefits of the treaty than about the benefit of spending time on the treaty relative to the benefit of other possible agenda activity that may produce important domestic legislation such as health care reform. Our analysis suggests the same: that the US often delays or abstains from ratifying treaties because the constitutionally required advice and consent process increases the political costs of treaty ratification.

Through interviews, descriptive analysis, and modeling of both the transmittal and advice and consent processes, we find strong support for this theory. We find that the type of election year matters, that implementing requirements slow treaties down, and that treaties are transmitted slower, not faster, the greater support the President enjoys. Most of these factors should not matter, but our theory explains their significance. The more support the President enjoys, both in popularity and in Congress, the more determined he is to prioritize legislative efforts at passing landmark domestic legislation. This makes him less likely to transmit treaties to the Senate. Similarly, the further the President and the Senate are from their re-election campaigns, the less politicized the legislative climate and the more valuable the time of the Senate agenda for domestic legislation. These conditions increase the opportunity costs for treaties, and the President or Senate may find them so large that treaties either get delayed or become entirely stuck.

These findings speak both to American politics and international law and relations. For American politics, the findings reveal something new and interesting. Prior analysis of the other Senate advice and consent process, namely that of Presidential nominations,

has found that divided government, political polarization and elections obstructs Senate advice and consent. In contrast, we find that treaty advice and consent is more, not less, likely when the President lacks strong support in the Senate, when the Senate is gridlocked, and during election years. Based on our opportunity cost theory, we argue that this is because Presidential nominations are domestic matters, which are forced onto the Senate agenda whereas treaties are foreign policy matters, which are optional and face multiple hurdles. Indeed, the work on Presidential nominations demonstrates the core of the opportunity cost argument, namely that it is time consuming to force controversial items on the Senate agenda.

The fact that the current advice and consent process delays treaty ratification also has implications for scholars of international law who advocate for amending the process (Hathaway 2008; Galbraith 2012). While a majority of scholars propose making greater use of the congressional-executive agreement process for a greater share of international agreements, some propose that the Senate should have greater involvement in the process earlier on and should then have the option of giving “prospective consent” prior to the treaties’ final negotiation. Our findings lend support to the argument that the current process does slow treaties down for reasons often unrelated to the presence of support for the treaty, but it also suggest that part of the problem is that the Senate may not prioritize treaties sufficiently to spend time on them, a problem that prospective advice and consent would not solve.

For international relations theory, the findings mean that at least in the United States, national preferences may not translate as straightforwardly into national politics as traditional cross-national analysis of treaty ratification assumes. Not only do states not act

as unitary actors; their decision to join treaties does not depend purely on an analysis of its costs and benefits. Contrary to assumptions, states may not join treaties that are in their general interests. More sophisticated incorporation of domestic preferences as advocated by theory on two-level games is useful, but it too expects that treaties that enjoy wide support would receive timely Senate advice and consent. However, we have found that in the United States, Senate rules can make treaty ratification time consuming if even very few senators are opposed. Importantly, a particular treaty may simply be too low a priority to compete with other legislative demands. Thus, even treaties that enjoy the support of 2/3 of Senators -- technically enough to win Senate advice and consent -- may have to wait a long time to be scheduled for a floor vote or may never make it.

The opportunity cost argument may not hold across all countries, but it may translate to systems that have similar legislative bottlenecks. In an analysis of ILO convention ratification by 17 countries, Boockmann (2006) found that the power allocation within the governing body enabled partisan blocking. Indeed, it could help explain otherwise puzzling variation across countries with different domestic ratification processes (Elsig, Milewicz and Stürchler 2012). But even if the finding only is meaningful for the United States, this is still noteworthy, given the United States often plays a pivotal role in whether international cooperative efforts are successful. Without the United States, it may be harder to get other countries to join, and the United States itself may lack a full voice within organizations. Thus, the opportunity cost of the advice and consent process can hamper global cooperation more broadly.

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Supplementary Table (on-line only)

Table A1. Descriptive Statistics

Variable	N	Mean	S.D.	Min	Max
<i>Transmit Model</i>					
Type: Arms Control	1871	0.09	0.29	0	1
Type: Commerce	1871	0.33	0.47	0	1
Type: In'tl Law	1871	0.26	0.44	0	1
Type: Human Rights	1871	0.13	0.34	0	1
Approve	1871	53.45	11.36	28.25	85.25
President % Control	1871	0.50	0.080	0.35	0.68
Conservative Senator	1871	0.72	0.082	0.51	0.91
Democratic President	1871	0.40	0.49	0	1
SFR Chair	1871	-0.07	0.43	-0.61	0.77
Transmit Available	1871	34.38	9.62	2	47
<i>Ratification Model</i>					
Type: Arms Control	1408	0.08	0.27	0	1
Type: Commercial	1408	0.18	0.38	0	1
Type: Int'l Law	1408	0.25	0.43	0	1
Type: Human Rights	1408	0.24	0.43	0	1
President % Majority	1408	0.49	0.06	0.37	0.64
Conservative Senator	1408	0.74	0.08	0.66	0.91
Democratic President	1408	0.34	0.47	0	1
SFR Chair	1408	-0.05	0.45	-0.61	0.77
Ratification Available	1408	50.92	8.39	28	66
Lame duck	1408	0.07	0.26	0	1
Re-election	1408	0.20	0.40	0	1
Predicted Transmit	1408	3.77	1.40	1.62	8.72
Implementation	1402	0.32	0.47	0	1