The Post-Cold War Geopolitics of International Environmental Law

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The Post-Cold War Geopolitics of International Environmental Law

Murray Carroll

A Thesis in the Field of International Relations
for the Degree of Master of Liberal Arts in Extension Studies

Harvard University
November 2017
Since the end of the Cold War, the United States has been routinely described in the international environmental politics literature as obstructing multilateral efforts to protect the global environment by weakening the effectiveness of treaty regimes and refusing to ratify widely supported treaties. In particular, it is alleged that the US has turned its back on those members of the international community who are seeking to create collectively beneficial international environmental agreements (IEAs).

With this thesis, in which I propose that US ratification decisions are more likely to reflect a consistent adherence to heuristic cost-benefit analysis, than a post-Cold War ideological rejection of multilateralism, I challenge that view.

The core research question of the thesis asks, is it possible to show that since the end of the Cold War, members of the international community have added a sufficient amount of costs to make these agreements unratifiable for the United States? And moreover, have soft balancing coalitions used the negotiation of international environmental agreements as a forum to intentionally impose costs on the United States based on objectives other than protecting the global environment? The thesis author makes no claim to be the first to consider the role of power politics in the negotiation of international environmental law and institutions, but observes that realism, statecraft, and geopolitics within the field of international environmental law and politics tend to be approached in a dismissive or otherwise ad hoc way compared with other fields of international relations. By constructing and applying a ‘geopolitics of international law’
framework to the macro-historical analysis of the eight most significant international pollution treaties from 1972 to 2012, it is argued that the presence of competing geopolitical objectives may be analyzed more systematically.

Using a rational choice approach structured by an analytic narratives method to compare cases detailing the negotiation of dynamic international agreements adopted during and after the Cold War, the author finds that the imposition of the operational mechanisms of the geopolitics of international law is pervasive. Advocated primarily by the European Union, and the ‘Group of 77 and China’ (G-77), these normative and structural foreign policies, that disproportionately benefit their norm entrepreneurs, have been routinely negotiated into the architecture of post-Cold War environmental agreements. As a consequence, from an American perspective, the defining feature of post-Cold War IEAs not ratified by the United States is that they impose economic, political, and structural costs on the US but fail to offer a reciprocal reduction of foreign pollution externalities impacting the US (or other comparable geo-economic or geopolitical benefits).

The author concludes that from the geopolitics of international environmental law perspective, there is persuasive evidence that in the post-Cold War era states seeking to bind, balance, and delegitimize the otherwise unrestrained unipolar hegemon have prioritized imposing net costs on the US (through Kaldor-Hicks agreements) over creating IEAs that provide stable individual benefits for all states (self-enforcing agreements).
Dedication

This thesis is dedicated to my parents Janet and Francis Carroll, and my aunt Georgia, who have been a continuous source of encouragement and support throughout my graduate work. The completion of this thesis project would not have been possible without their positivity and patronage.
I am immensely appreciative of the generosity shown to me by numerous individuals both at Harvard and beyond who have inspired me to pursue my research and facilitated the completion of this thesis project.

First and foremost, I want to express my deepest gratitude to my thesis director, Prof. Jack L. Goldsmith. After his scholarly work had resonated so strongly with me, it has been a great honor to work together on this thesis project. Jack has always offered me superb guidance and has demonstrated a sincere interest in my work. His mentorship in the mechanics of producing this thesis has been an enormous help to me. I am especially grateful for those innumerable hours he spent reading drafts and annotating them with insightful commentary.

I am greatly indebted to the staff of the Master of Liberal Arts (ALM) program at Harvard University, in particular to Sarah Powell, Chuck Houston, Don Ostrowski, and Director Stephen Blinn, for their extraordinarily tolerant and supportive accommodation of the scope of my research, and as a result, the amount of time necessary for me to complete my thesis project. I am also especially indebted to Dr. Doug Bond, my research advisor in the ALM program, who guided me throughout this entire process, from assistance with drafting my proposal to meticulously proofing the final product.

My experience at Harvard has been incredible. I am very fortunate to have done my graduate work at a university where it has been possible for me to study under luminaries as diverse as Prof. Sheila Jasanoff, Prof. Niall Ferguson, and Prof. Beth
Simmons, while benefiting from the expertise and innovation of the Weatherhead Center for International Affairs at FAS, the Program on Negotiation at HLS, and the Belfer Center for Science and International Affairs at HKS.

I would like to express my profound appreciation to several members of the Harvard community who were especially generous with their time and expertise. I want to specifically acknowledge the kind assistance of Prof. Richard Cooper and Prof. Beth Simmons in the early stages of my thesis project and for helping to structure my thinking on the interplay of international relations and international political economy on international law. Special thanks also to Prof. William Moomaw and Prof. Stacy VanDeveer for shaping my thinking on climate and energy governance as well as global environmental policy.

My research and this thesis are also the cumulative product of innumerable experiences I have had at other notable academic and professional institutions and from encounters with dozens of remarkable individuals who deserve acknowledgement.

I would like to offer special thanks to several faculty members at the London School of Economics; to Professor Sir Christopher Greenwood CMG QC (now Judge at the International Court of Justice) and Prof. Christine Chinkin CMG for informing my thinking on international law and institutions. Special thanks also to Lord Nicholas Stern CH and Prof. Veerle Heyvaert for contributing to my thinking on the interplay of climate policy and international environmental law. I am especially grateful also to those faculty members at the LSE who facilitated my three-month research internship with the International Maritime Organization.
My sincere thanks go also to my colleagues from the International Court for the Environment (ICE) Coalition; in particular Stephen Hockman QC, the co-chairs and directors on the ICE Board in the UK, Dr. Kenneth Smith of the US ICE Board, and all of the members of the Global Advisory Board. My experience as a co-founder, co-chair, and co-director of this organization has provided me numerous opportunities, including writing articles for the Carnegie Council for Ethics in International Affairs, the Oxford Research Group, and for the International Bar Association in the Journal of Energy and Natural Resources Law. I am especially grateful for the opportunity to represent the ICE Coalition as a visiting lecturer at Penn Design of the University of Pennsylvania, as a consultant at DLA Piper International LLP, and as an observer of the UNFCCC’s COP15 at Copenhagen in 2009 and COP21 at Paris in 2015. But most of all I am grateful to have worked beside the inspiring people of this incredible organization.

In closing, I would like to offer specific thanks to Kirsty Schneeberger MBE, then at the Stakeholder Forum, for securing access for me to observe the Rio+20 Prep-com Meetings in New York at the United Nations. Specific thanks goes also to Maria Ivanova at the Global Environmental Governance Project for illuminating for me how practitioners from international relations, global governance, and international law backgrounds may take contradictory routes to policy problem solving. And last, but not least, thank you to the dedicated and professional staff at the State Department, USCG, and EPA who shared their insights and advice with me as I pursued this research project.
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<th>Description</th>
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<tbody>
<tr>
<td>AQA</td>
<td>The 1991 US/Canada Air Quality Agreement</td>
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<td>CAA</td>
<td>The Clean Air Act (within the text, CAA is used primarily in reference to the 1990 Clean Air Act Amendments)</td>
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<tr>
<td>CBA</td>
<td>Cost Benefit Analysis</td>
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<tr>
<td>CBD</td>
<td>Biodiversity Convention</td>
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<tr>
<td>CBDR</td>
<td>Common But Differentiated Responsibilities</td>
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<tr>
<td>CFC</td>
<td>Chlorofluorocarbons (also known as an ODS)</td>
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<tr>
<td>COP</td>
<td>Conference of the Parties</td>
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<tr>
<td>COW</td>
<td>Crude Oil Washing system</td>
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<td>CPR</td>
<td>Common Pool Resource</td>
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<tr>
<td>CRC</td>
<td>The Chemical Review Committee of the 1997 Rotterdam Convention</td>
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<tr>
<td>DDT</td>
<td>Dichlorodiphenyltrichloroethane (a pesticide also known as a POP)</td>
</tr>
<tr>
<td>EIT</td>
<td>Former Eastern Bloc countries with Economies In Transition</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
</tr>
<tr>
<td>EP</td>
<td>The European Parliament</td>
</tr>
<tr>
<td>EPA</td>
<td>Environmental Protection Agency (also known as the USEPA)</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FAO</td>
<td>The Food and Agriculture Organization of the United Nations</td>
</tr>
<tr>
<td>FIFRA</td>
<td>The 1996 Federal Insecticide, Fungicide, and Rodenticide Act</td>
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</table>
GATT  General Agreement on Tariffs and Trade
GEF  Global Environment Facility
GMOs  Genetically Modified Organisms (addressed by the CBD regime)
GOP  Grand Old Party (the US Republican Party)
G-7  The Group of 7
G-77  The Group of 77 and China
HST  Hegemonic Stability Theory
IEA  International Environmental Agreement
IEL  International Environmental Law
IEP  International Environmental Politics
IMF  International Monetary Fund
IMO  International Maritime Organization
IPG  International Public Good
ISPPC  International Sewage Pollution Prevention Certificate
JUSCANZ  The coalition of Japan, the US, Canada, Australia, and New Zealand.
LC  The London Convention (the symbolically renamed London Dumping Convention)
LDC  The 1972 London Dumping Convention
LOT  Load On Top system
LRTAP  The 1979 Convention on Long-Range Transboundary Air Pollution
MARPOL  The International Convention For The Prevention Of Pollution From Ships (also known as MARPOL 73, before 1978, and MARPOL 73/78 thereafter), addresses marine, MAR, pollution, POL.
MEA  Multilateral Environmental Agreement
MLF  The Multilateral Fund of the Montreal Protocol
MOI  The 1980 Canada/US Memorandum of Interest (which preceded the 1991 AQA)
NIEO  New International Economic Order
NPE  Normative Power Europe
ODS  Ozone-Depleting Substances
OECD  Organization for Economic Co-operation and Development
OSPAR  The 1992 merging of the Oslo, OS, and Paris, PAR, Conventions
PIC  Prior Informed Consent
POPs  Persistent Organic Pollutants
POPRC  The POPs Review Committee of the 2001 Stockholm Convention
QER  Qualitative, Explanatory, Rationalist case studies
QMV  Qualified Majority Voting
REIO  Regional Economic Integration Organization
SBT  Segregated Ballast Tank system
SEA  The 1986 Single European Act
SOVC  Statement of Voluntary Compliance (functionally equivalent to an ISPPC)
TSCA  The 1976 Toxic Substances Control Act
UK  United Kingdom
UN  United Nations
UNCED  United Nations Conference on Environment and Development (held in Rio, Brazil in 1992), also known as the Rio Summit
UNCTAD  United Nations Conference on Trade and Development
<table>
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<tr>
<th>Acronym</th>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>UNECE</td>
<td>United Nations Economic Commission for Europe</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
</tr>
<tr>
<td>UNFCCC</td>
<td>The 1992 United Nation Framework Convention on Climate Change</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>USCG</td>
<td>United States Coast Guard</td>
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<tr>
<td>USEPA</td>
<td>United States Environmental Protection Agency (also known as the EPA)</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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From the early 1970’s to the late 1980’s, the United States was universally recognized as the global champion of the developing field of international environmental law. Since the end of the Cold War, however, the United States has been commonly described in the international environmental politics literature as obstructing multilateral efforts to protect the global environment by weakening the effectiveness of treaty regimes and refusing to ratify widely supported treaties. This pattern of US environmental foreign policy behavior seems apparent from the declining rate of treaty ratification in all areas of international environmental law but is perhaps most clearly demonstrated among international pollution treaties (Table 1).¹

Table 1. The eight major international pollution treaties from 1972 to 2012

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<th>Cold War Treaties</th>
<th>Post-Cold War Treaties</th>
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Source: Thesis author

¹ The core cases under analysis in this thesis are arguably the most significant environmental agreements regulating international pollution of the 1972-2012 period under review that, at a minimum, were signed by the US. The choice of these cases, and the exclusion of others, is discussed in Appendix I.
This observable pattern of the United States not ratifying post-Cold War international environmental treaties is consistent across numerous areas of international law, including the refusal to ratify the United Nations Convention on the Law of the Sea, the Landmines Convention, the Rome Statute of the International Criminal Court, the Comprehensive Nuclear Test Ban Treaty and the Convention on the Rights of the Child, among others. Accordingly, these foreign policy decisions are regularly used to support assertions of an ideological preference within American domestic politics for unilateralism over multilateralism, and an increasing disregard for international law as a problem-solving tool.

Comments by Niko Krisch that describe the United States as weakening the purposive content of treaties through the use of reservations or by downgrading hard law obligations to soft law declarations, and by Robert Faulkner describing the resulting perception of the United States as a “rogue state” in international environmental politics (IEP), are not uncommon in the literature. Jutta Brunnée, for example, is one of many IEP scholars who recoil at the readiness of the US government to “undermine multilateral approaches to global environmental problems.”

With an understanding that international problems require international solutions, multilateral cooperation is almost universally viewed positively in the literature. With consistent American obstructionism in multilateral negotiations and refusal to ratify multilateral agreements ex post, the United States, as a result, is portrayed as an outlier

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and as a destructive force. Further, the decision to reject norms painstakingly negotiated by the international community is described as a deliberate snub of the progressive development of international law and reflecting a US desire to exempt itself from normative commitments to the rest of the world. Moreover, the criticism by these authors and others concerned with American exceptionalism, unipolarity, or unilateralism seem to share a common concern that this behavior calls American global leadership into question.

The common framing of US environmental foreign policy behavior is that since the end of the Cold War the United States has taken a big step back from its general commitment to international law and leadership of the international order, and specifically to efforts designed to protect the global environment. As a result, the analysis in the IEP literature of post-Cold War US environmental foreign policy is often critical of the United States, and adopts a normative position that the US should behave differently.

The general research question of this thesis challenges this argument. Instead, it asks: Is it possible that after the end of the Cold War, the rest of the international community took an ill-advised big step forward (in an attempt to codify a (re)structuring of international law and institutions), while the American commitment to international law and leadership of the international order has remained broadly consistent?

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5 Erik Voeten, “Resisting the lonely superpower: Responses of states in the United Nations to US dominance,” *Journal of Politics* 66, no. 3 (2004), and William I. Zartman and Saadia Touval, *International cooperation: the extents and limits of multilateralism* (Cambridge, United Kingdom: Cambridge University Press, 2010), 52, consider similar questions. Indeed, a significant area of scholarship has arisen defending US post-Cold War ratification behavior in view of the development of a ‘new’ international law, although beyond defending the rejection of the Kyoto Protocol this approach has been under-employed in IEP.
The general hypothesis of this thesis is that the United States has maintained a broadly consistent approach to the ratification of international environmental agreements and, due to systemic imperatives to balance against the otherwise uncontested unipolar power, the international community has acted to impose costs on US foreign policy. As a result, I argue, post-Cold War international environmental treaties were structured in such a way that they added international costs sufficient to make US ratification unlikely.

If this interpretation is consistent with the historical evidence, it suggests a move by the international community from seeking to negotiate Pareto-improving agreements (that are designed to avoid individual net costs) to producing Kaldor-Hicks agreements (that allow for the imposition of net costs for individual states as long as the proposed agreement produces greater collective benefits than collective costs). The willingness of the international community to impose net costs on arguably the most important actor in the international system, I contend, is best explained as a form of geopolitical contestation.

The core objective of this thesis, then, is to determine the validity of these assertions, their relationship to the post-Cold War pattern of US environmental foreign policy, and their implications for inter-state coordination to supply international collective goods.

The area of analysis of this thesis is the negotiation of international environmental agreements (IEAs), with a specific focus on the eight most prominent international pollution treaties. Rather than adopt a black letter law or doctrinal approach to compare treaty obligations, my focus is on the politics behind the negotiation, and indeed ongoing negotiation, of these dynamic treaty regimes.

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6 For further explication of these terms, see Chapter 2, Part 1, pages 12-13.
The primary unit of analysis is the ratification behavior of the United States, but the behavior of coalitions, specifically the Group of 77 and China (G-77), and the European Union, are described to better explain US actions. To understand the strategic nature of US environmental foreign policy decisions, in other words, I provide a general summary of the perceived interests of the two most prominent partners (or competitors) the United States faces in an IEA negotiation, from an American perspective.

From a disciplinary point of view, my approach to explaining US ratification behavior incorporates a number of theoretical perspectives employed in international relations and international environmental politics scholarship, while eschewing or re-framing others.

Fundamentally, I am concerned with how geopolitical competition and contestation may impact international cooperation in the negotiation of international agreements. Unfortunately, I have found these influences on international cooperation to be considered in an ad hoc manner, especially in the literature on international environmental politics. As such, I propose to consolidate a number of elements from the rationalist and constructivist approaches to international environmental politics, as well as international law and politics scholarship, to produce a theoretical framework that describes, what I call, ‘the geopolitics of international law.’

The process of defining this theoretical framework begins in Chapter II with a literature review of rationalist and constructivist approaches to international environmental politics. The purpose of Chapter III is to consolidate or reframe elements of these rationalist and constructivist approaches, and a number of international law and politics theories that have received less attention in the IEP literature, into a cohesive
geopolitics of international law theoretical framework. This process of consolidation and reframing, I argue, alternatively strengthens and questions existing rationalist and constructivist approaches to IEP.

This conceptualization of the geopolitics of international law is informed by realist scholarship, but not exclusively so. Rather, guided by rational choice theory, the theoretical framework employs an instrumental approach to international law and politics as a theoretical foundation, to consolidate elements of the rationalist approaches, and synthesize a theoretical position on the instrumental use of normative statecraft.

The choice of ‘geopolitics’ rather than ‘realism’ to describe this approach is in part a result of the contradictions that exist between different realist traditions (classical realism, neo-realism, neo-classical realism, etc…). Although ‘geopolitics’ is not itself an entirely neutral term, its use allows for the avoidance of the inevitable debate over which is the realest realist theory, while at the same time signaling the author’s emphasis on power politics to the reader.

Furthermore, realism has largely eschewed the influence of geography on power politics. The language of spatiality and territoriality found in geopolitical analysis, on the other hand, is well suited to address the directionality and dispersion of pollution externalities and the negotiation of jurisdiction over the global commons central to a power politics approach to IEP.

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As such, the theoretical framework is grounded in rationalist approaches to international law and international relations, but these more conventional approaches are enhanced by the incorporation of both rationalist and normative approaches to statecraft, geopolitics, and the international order.

After providing a theoretical foundation for the geopolitics of international law framework, Chapter III concludes with an examination of how analogous conceptualizations of the geopolitics of international law are described in international relations literature. This section identifies several operational modalities of the geopolitics of international law.

Chapter IV begins by describing how these operational modalities have been present in the general development of international environmental law and institutions. The chapter goes on to describe the incorporation of the geopolitics of international law framework into an existing domestic cost-benefit framework to produce an analytic model. The purpose of this analytic model is to structure the comparison of the eight IEA cases so as to recognize the broader geopolitical context within which any individual negotiation takes place. My specific objective here is to facilitate an understanding of how the geopolitics of international law may add costs or benefits to IEA ratification decisions made by the US government.

I propose that the geopolitics of international law framework, when applied systematically using an analytic narratives approach, across these core cases, should improve our understanding of the success or failure of international cooperation to coordinate the supply or management of collective goods, by offering a clearer understanding of the post-Cold War IEA ratification decisions made by the United States.
The format of the thesis is as follows: Chapter II serves as a literature review of pertinent IEP scholarship (rationalist approaches to collective action and the influence of domestic politics, contrasted with constructivist approaches to international cooperation). Chapter III constructs a theoretical framework (defining and describing the geopolitics of international law) and identifies the operative mechanisms of the post-Cold War geopolitics of international law. Chapter IV identifies the operative mechanisms of the post-Cold War geopolitics of international environmental law, and concludes by merging the geopolitics of international law framework with a domestic cost-benefit framework, to produce an analytic model meant to structure and focus case comparisons. Chapter V describes the methodological framework (an elaboration of the general hypothesis, and the use of the analytic narratives approach to structure the comparative case studies). Chapter VI presents the case studies, analyzing the on-going negotiation of the eight most important treaties regulating the sources of international pollution both during the Cold War and post-Cold War. ‘Geopolitical Objective’ sections are employed to provide strategic and macro-historical context for the case studies. Chapter VII concludes with a summary of the findings. Appendices and Bibliography are also made available for reference.
Chapter II
International Environmental Politics Literature Review

The objective of the literature review chapter is to review, in three parts, an introduction to rationalist and constructivist approaches to the study of international relations and international environmental politics. Prior to addressing the normative approach addressed by constructivism, Part 2 examines the rationalist domestic politics literature on international environmental cooperation, as it relates primarily to US ratification behavior. Throughout the chapter, particular attention is directed to the incentives for, as well as the constraints on, international cooperation highlighted by each approach.

Part 1.

The Rationalist Approach to International Environmental Cooperation

The rationalist approach assumes that actors “engage in purposive, means-ends calculation in order to attain their goals—that is, they select actions so as to maximize their utility.” Rationalists weigh the benefits of cooperation against the constraints faced by the relevant goal-seeking actors, which condition the goals they pursue and their likely ability to meet those goals. Described by political scientists as rational-functionalism,

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the rationalist approach views participation in the negotiation of international agreements and institutions as a series of “ex ante choices [by] rational agents who seek functional benefits ex post.”¹⁰ This section reviews how this approach informs the analysis of international environmental cooperation.

Anarchy, Sovereignty, and the Design of International Agreements

The international system is defined by its horizontal nature. It is anarchic in the sense that unlike in a domestic legal system, there is no government to enforce a top-down rule of law. This limitation on the enforceability of international law in turn influences domestic cost-benefit calculations on the utility of treaty ratification. This section summarizes the most important implications of this constraint.

States prefer to address the regulation of pollution externalities at the domestic level, and they will do so as long as benefits exceed the costs of unilateral regulation. When foreign sources of pollution have sufficient domestic impacts, however, bilateral or multilateral cooperation is necessary to address these sources of pollution. As such, states have incentives to cooperate when the benefits of doing so exceed the costs imposed by the current status quo.

In a problem structure configuration where international pollution externalities are asymmetrical, however, the diverging interests of the state parties complicate international regulatory cooperation: The upstream state profits from the pollution and the downstream state does not. Downstream states seeking to regulate an upstream polluter in an anarchic international system suffer from what has been called the

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“Westphalian Dilemma,” where “international obligations may not be imposed on a sovereign state without its consent.”

This particular limitation of international law compels the downstream state to persuade the upstream state to voluntarily agree to a legal obligation of domestic regulatory action.

Moreover, even when states agree to be bound by international law, they retain the option to withdraw from the treaty. This seriously calls into question the credibility of voluntary commitments by states to international standards if doing so creates greater domestic costs than domestic benefits, either initially or at a later date.

Accordingly, Scott Barrett argues that these sovereignty constraints necessitate that agreements to supply collective goods must be self-enforcing. There are two requirements of self-enforceability: (1) treaty ratification must be individually rational (profitable) for all states; and (2) treaties must disincentivize free riders (to make the ongoing profitability of participation stable).

Profitability, the idea that states must view the benefits of participation outweighing the costs, is a necessary condition for self-enforcement, but not a sufficient one. A state that views coordination as profitable may consider it more profitable to not implement or comply with the obligations of the agreement. And likewise, non-participant free riding will, to some degree, reduce profitability for participants.

A stability mechanism addresses this risk by rewarding participation and penalizing free riding so that no state profits more from non-compliance/non-

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participation than from compliance/participation. This manipulation of incentives, via carrots and/or sticks, (or less metaphorically, positive linkage and/or negative linkage) stabilizes ongoing profitability for participants.\(^{14}\)

In theory, as long as a treaty is designed to ensure that state parties will gain more from ongoing participation than non-participation, states will comply with the objectives of the agreement. As Barrett argues,

> The worst harm that a signatory could do by not complying would be for it to choose an emission profile that matched what it would do if it withdrew from the agreement. Hence, *if every signatory is deterred from withdrawing, each also is deterred from not complying.*

> The binding constraint on international cooperation is free rider deterrence, not compliance enforcement. *Once free riding can be deterred, compliance can be enforced free of charge.*\(^{15}\) [Emphasis added]

The above international relations concept of self-enforcing agreements is usefully compared to the political-economy concepts of Pareto-improving and Kaldor-Hicks agreements. A Pareto-improving change in the *status quo*, codified in an international agreement, makes no state worse off and at least one state better off.\(^{16}\) Kaldor-Hicks improvements to the *status quo*, by contrast, prioritize aggregate costs and benefits over individual costs and benefits. Kaldor-Hicks agreements create greater aggregate benefits than aggregate costs for all states, but do not require net benefits for all states. In other words, the collective benefits must exceed the total costs (allowing for the possibility of


creating a Pareto-improving agreement), but for Kaldor-Hicks agreements it is not necessary to provide compensation to the net losers. 17

At the domestic level, Kaldor-Hicks legislative agreements are viable because the state is able to enforce the agreement on net losers, and this is justified by the fact that this enforcement secures stable net benefits to the nation state as a whole. Kaldor-Hicks agreements at the international level, however, are more problematic in an anarchic international system, despite the fact that they emphasize collective global benefits. Absent an international non-consensual law-making and enforcement mechanism, those states facing net costs are unlikely to participate.

Self-enforcing agreements share in common with Pareto-improving agreements the criteria that participation makes no state worse off than non-participation; but differ in that self-enforcing agreements also require that every state gain from participation. As a practical matter, however, states bear the transaction costs of negotiating international agreements because they expect to profit from participating in the new treaty regime.

Self-enforcing agreements share in common with Kaldor-Hicks agreements the requirement that collective benefits must exceed collective costs from participation, but by contrast, the former treat as necessary that net benefits be distributed so that every state profits more from participation than non-participation.

For the sake of clarity, I will hereafter treat self-enforcing agreements (requiring profitability and stability) and Pareto-improving agreements (requiring no individual net costs) as conceptually analogous.

I want to further clarify that my focus on net costs is primarily concerned with states that are, or are likely to become, a significant source of pollution, rather than the

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17 Cooter and Ulen, _Law and Economics_, 42.
true totality of states. Net costs of participation for those states that contribute a fraction of one percent to a pollution problem are much less relevant than net costs imposed on major polluting states. As it happens, those states that contribute a very small percentage of global pollution, and are unlikely to do so in the future, are also less likely to face net costs from international pollution regulations.

Kaldor-Hicks agreements, as I use the term, are distinguished from self-enforcing/Pareto-improving agreements in that they permit the imposition of net costs for powerful, high-polluting states, as long as the collective benefits outweigh the collective costs.

As such, with a focus on the net costs of participation for powerful and/or high polluting states, I will hereafter contrast (1) interchangeably, self-enforcing agreements or Pareto-improving agreements, with (2) Kaldor-Hicks agreements.

Neoliberal Institutionalism and the Collective Action Problem

Neoliberal institutionalism has been the dominant approach within the international environmental politics literature. Institutionalists theorize that international institutions can assist interdependent states to find stable mutually beneficial cooperative solutions in an anarchic system. And that participation and cooperation within institutions by states reflects, “rational, negotiated responses to the problems international

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actors face.” Assuming common interests in cooperation, neoliberal institutionalists have focused their attention on how institutions increase the stability of international agreements seeking to address collective action problems.

Robert Keohane concludes that the free rider constraint on cooperation can be addressed through institutions by (1) reducing the ‘relative costs of transactions’; (2) lengthening the ‘shadow of the future’ through ‘tit-for-tat’ reciprocity; and (3) increasing the amount of information available to states about each other, which helps build trust and thus encourages iterative cooperation.\(^\text{21}\)

Ronald Coase posited that in a situation analogous to upstream/downstream transboundary pollution, the downstream state in an anarchic system is not in all cases powerless to influence the behavior of its neighbor.\(^\text{22}\) In a situation where the cost of remediating the pollution damage for state B was $20,000, and the cost of eliminating the source of pollution in state A was $10,000, a bargaining solution was available that maximized the joint welfare of both states.\(^\text{23}\) Keohane has noted that, in the context of international transactions of this sort, institutions were useful to reduce the transaction costs of such agreements.\(^\text{24}\)


\(^{22}\) Coase, “The Problem of Social Cost.”

\(^{23}\) Keohane, After Hegemony, 85-88.

\(^{24}\) Keohane, After Hegemony, 85-88.
Robert Axelrod’s model of ‘tit-for-tat’ reciprocity describes how when individual actors share common interests and valuations of future benefits from cooperation, repeated interaction can reduce the threat of free riding.\textsuperscript{25} Keohane argues that international institutions facilitate these repeated trust-building interactions, and thereby enhance international cooperation.\textsuperscript{26}

A central intellectual target of neoliberal institutionalism has been hegemonic stability theory, and the question of whether “cooperation under anarchy” was possible absent the leadership of a hegemonic power.

Hegemonic stability theory borrowed from Mancur Olson’s solution to the ‘problem of collective action,’ and applied it at the international level.\textsuperscript{27} Olson observed that since non-excludable goods created an incentive for individuals to free ride on the contributions of others, this should result in the under-supply of public goods. However, he suggested, individuals who receive greater benefits than the costs of providing the public good would do so, despite free riders. Proponents of hegemonic stability theory argued, based on this insight, that a hegemonic state was needed to provide international public goods.

Thomas Schelling and Russell Hardin made important revisions to Olson’s theory by incorporating the possibility of a ‘\(k\)-group’ coordinating to supply collective goods.\textsuperscript{28}

\textsuperscript{25} Axelrod, \textit{Evolution of Cooperation}.

\textsuperscript{26} Keohane, \textit{After Hegemony}, 76.


Neoliberal institutionalists, Duncan Snidal in particular, who applied Schelling and Hardin’s revision to the broader field of international cooperation, asserted that this weakened the claims made by hegemonic stability theory scholars.\textsuperscript{29} For Snidal, in this context, the minimum number of states necessary for a k-group is defined by the point where,

the benefits of cooperation begin to outweigh the costs for the cooperating states. Once $k$ or more states cooperate, cooperators do as well as or better than they did before cooperation—withstanding the fact that noncooperators do even better by taking a free ride and that incentives to defect from cooperation persist.\textsuperscript{30}

In other words, international public goods could continue to be supplied ‘after hegemony.’ Snidal’s further contribution lies in the recognition that the k-group, while relatively homogeneous, is not made up of symmetrical actors, and that heterogeneity within and outside the k-group are important variables to consider in assessing the feasibility of the continued supply of a public good by states through an institution.

What is under-acknowledged within neoliberal institutionalism is that the mechanism provided by hegemonic stability from a single hegemon is simply replaced by k-group (or institutional hegemonic) stability offered by a small group of powerful states. It simply replaces hegemonic hierarchy with oligarchic hegemony. Nevertheless, this element of neoliberal institutionalist theory provides useful support to the claim that international law, through institutions, has the potential to assist in facilitating stable self-enforcing agreements. In particular, it claims that a hegemon or a k-group may be able to

\textsuperscript{29} Regrettably, the theoretical coherence/vulnerability of HST was frequently used as a proxy for the theoretical coherence/vulnerability of neorealism (or of realism in general) in the ‘Neo-Neo’ debates.

secure stable mutually profitable agreements, provided that the surplus of benefits is sufficient to make broad participation profitable.

Thus, it was argued that the constraints of sovereignty in an anarchic system and the incentive to free ride on the non-excludable benefits supplied by public goods may be managed as long as international cooperation provided joint benefits.

Collective Goods, Asymmetrical Externalities and Bargaining Leverage

A weakness of early work on the collective action problem is that it focuses almost exclusively on public goods. As a result it is prone to treat all collective goods the same. There are, however, important differences between them.

Two core elements define the nature of a good: its excludability and its rivalness. ‘Excludability’ describes the extent to which others may be prevented from enjoying the benefits of a good. ‘Rivalness’ describes the extent to which the enjoyment of a good by one actor detracts from the ability of another to enjoy the same good. ‘Public goods’ are non-excludable and non-rival. ‘Common pool resources’ are non-excludable and rival. As a general rule, non-excludability incentivizes free riding, whereas rivalness incentivizes overuse.

While public goods and common pool resources share non-excludability, and therefore concerns about free riding, the mechanisms of supply for each good are not analogous. For Todd Sandler, these differences constitute a cost-benefit duality.

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For the supply of international public goods, a state’s contributions impose a private (domestic) cost, but provide a public (international) benefit. The free rider problem is manifest in the need for action (contributions to the supply of the good). As Olson describes it, the large (hegemon or k-group) is exploited by the small (weaker or poorer states). Nevertheless, the hegemon or k-group may still receive net benefits from the supply of the good, despite the presence of free riders.

For the maintenance of a common pool resource, this problem structure is reversed, as the benefits are private to the user of the resource (individual actors), while the costs are public (imposed on all states who seek to use the resource). In this case, the free rider problem is manifest in the need for inaction (a reduced use or contamination of the resource). Olson’s exploitation hypothesis is reversed; the large (users of the resource) exploit the small.

Whereas a hegemon or k-group can mitigate the free rider problem by contributing more to the supply of a public good, the overuse of a common pool resource is mitigated by inaction. The hegemon or k-group can reduce their own use of the resource but a threat of punishment is required to reduce overuse by other states.

This does not render the maintenance of common pool resources impossible, but the problem structure is likely to be more constrained than the supply of public goods. ‘Overpaying’ for a domestic collective good that still provides net benefits is one thing, absorbing the costs of enforcing the domestic compliance of the international community

33 Olson, *Logic of Collective Action*.


is quite another. The problem structure of an international pollution problem, in other words, may constrain the ability of the k-group to provide stable solutions. **The power to ignore.** The presence of asymmetrical externalities in an anarchic international system, depending on the scale of pollution impacts, may imbue actors with considerable negative power leverage.

When upstream states have no incentive to accept demands by downstream states to mitigate their pollution, Axelrodian ‘tit-for-tat’ reciprocity is initially unavailable. Ronald Mitchell and Patricia Keilbach propose that in the absence of issue-specific reciprocity, the scope of the agreement must be expanded to include coercion (negative linkage) or exchange (positive linkage) to create opportunities for mutual-benefits from cooperation (profitability) assured by an ongoing reciprocal arrangement (stability).³⁶

The problem structure of any specific environmental pollution problem is contextual, preventing one-size-fits-all solutions. Specifically, the direction and symmetry or asymmetry of the pollution externalities, the bi-lateral, regional, or global scale of the source(s) of the externality, affect both the problem structure and the solution structure.

At the bi-lateral or transboundary level, the influence of the relative power and capacity of the downstream state is a crucial consideration in assessing the feasibility of cooperative solutions to address asymmetrical externalities. A weak state will have limited capabilities to coerce its stronger neighbor, nor is it likely able to afford the costs of enticing behavioral change. In this case, the powerful upstream state enjoys the power to ignore the complaints of its downstream neighbors.

At the multilateral level, these concerns magnify the difficulty of providing collective goods as the scope of the agreement grows in relation to the number of upstream stakeholders. Moreover, the inclusion of more weak downstream stakeholders is unlikely to increase their practical capacity to change the behavior of upstream states. When weak downstream states add further costs to a problem structure focused on improving the limited incentives for upstream states to alter their behavior, they merely add another layer of complexity to negotiations that are already likely to deadlock.

The power to destroy. Highlighting the differences among collective goods, it is noteworthy that in a negotiation to supply a public good, a state can do little more to obstruct than refuse to contribute to the proposed burden-sharing effort. In negotiations to manage a common pool resource, by contrast, an upstream state acquires the power to destroy the resource through overconsumption.37 As Samuel Barkin observes,

the ability to inflict costs on others by diminishing the amount of the good available to them changes the free rider from a nuisance to an important political actor.38

The power to destroy gives actors the ability to undo the efforts of other states while enjoying private profits no longer available to the regulated.39 This gives upstream states (rich or poor) considerable bargaining leverage. In fact, Barkin concludes,

free riders should be able to extract concessions up to, but not beyond, the point where the value of these concessions is equal to the benefits others would receive from joint management relative to competitive exploitation of a CPR.40

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The application of the power to destroy is frequently a product of the different time horizons or discount rates used by developed or developing states to justify prioritizing economic development over environmental protection. The potential use of this form of leverage in the negotiation of international or global agreements among heterogeneous parties further calls into question the assumptions of ‘common interest’ or ‘shared value of future benefits’ at the core of neoliberal institutionalism.

The power to exclude. The power to ignore and/or to destroy held by upstream states, however, competes against the power to exclude, held by powerful downstream states. In this scenario, powerful downstream states may link regulatory demands to access to club goods prized by the upstream state.

Club goods, like those offered by a regional trade agreement, provide membership benefits that are excludable and non-rival. An archetypal example of this form of linkage is to threaten the denial of existing or increased trade benefits, where the removal of the threat is conditional upon regulation of the upstream state’s pollution. The ability to utilize this form of coercive or negative linkage is constrained by WTO trade rules, but nevertheless provides a credible threat if the downstream state (or k-group) has a sufficient amount of market power.

As such, the presence of asymmetrical externalities does not make cooperation to supply international collective goods impossible, but coupled with the need for states to consent to international obligations, the problem structure of an environmental dispute may impact the feasibility of possible solutions. In other words, problem structure impacts both the profitability and stability of self-enforcing agreements.
Distributive Concerns: The Impact of Competition on Cooperation

The Prisoner’s Dilemma game at the heart of neoliberal institutionalism provides a useful model for understanding the challenges of international cooperation, but it contains a questionable assumption of common interest in reaching a cooperative outcome. A common interest in receiving benefits from a collective good, for example, does not presuppose a common interest in accepting the costs of supplying a collective good.

Stephen Krasner has argued that in many cases a Battle of the Sexes model is more appropriate than the Prisoner’s Dilemma, where there is a greater role for state power influencing choices among competing regulatory standards. The selection of one standard over another may not impact the absolute collective benefit, but among regulatory entrepreneurs the benefits of securing their preferred standard, or costs of failing to do so, may be considerable and is certain to affect the profitability of their participation.

States may have a common interest in receiving benefits from an international collective good, but if the supply of the good relies on hegemonic or k-group coordination (a group whose members may prefer different regulatory solutions), then divergent interests may be a better assumption than common interests. As James Morrow

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notes, “there is only one way to cooperate in prisoners’ dilemma; there are many ways to cooperate in the real world.”

James Fearon, on the other hand, has suggested that the choice between the Prisoner’s Dilemma and Battle of the Sexes is misleading. In fact, Fearon argues, international cooperation should be viewed as a two-stage game in which states (1) solve a bargaining (coordination) problem that secures individual benefits from cooperation; and (2) solve the free rider (enforcement) problem to provide stability. This logic contains the troubling implication that when states believe the eventual regulatory standard is likely to be locked-in for a long time, this will incentivize states to bargain especially hard to secure their preferences.

In other words, the path dependence set by the initial coordination around a single equilibrium point, among competing equilibria, increases competition over regulatory choices. The eventual self-enforcing agreement may be more stable once the regulatory equilibria is mutually agreed during the coordination stage, but this increased stability is contingent on a more aggressively contested bargaining (or coordination of net profits) stage.

Part 2.

The Rationalist Approach and the Two-Level Game

The rationalist approach to international environmental cooperation provides a number of insights into how states may overcome the collective action problem within an

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anarchic international system. This section reviews these incentives and constraints on international environmental cooperation from a domestic politics perspective. The rationalist domestic politics literature is crucial to understanding, in general, US environmental foreign policy, and in particular, US ratification behavior.

Seeking Profitability: Domestic Politics in International Negotiations

As international environmental treaty obligations have increasingly necessitated the broad domestic regulation of private actors, a number of scholars have sought to address the interaction of domestic and international politics as they impact US ratification decisions.

Within the international environmental politics literature, liberal theorists have highlighted the influence of domestic politics on international cooperation. For example, Marc Kilgour and Yael Wolinsky note,

International agreements typically commit a government to policy changes that impact domestic constituencies. It is hardly surprising that governments are sensitive to the domestic implications of possible international agreements, particularly those that affect the environment.45

In particular, some argue that any analysis of international politics will be incomplete without an understanding of the domestic forces that influence a state’s preferences.46

Robert Putnam’s article on ‘the logic of two-level games’ has had a major influence on our understanding of how domestic constraints impact international negotiations. Within a two-level game, he argues, a negotiator must simultaneously


consider the interests of both their domestic constituents back home who seek net benefits as well as the interests of their international negotiating opposite(s) who also seek domestic net benefits.\textsuperscript{47} If the negotiator fails to address domestic concerns of the perceived costs of participation, this increases the risk of bringing home a treaty that will not be ratified.

The versatility of the two-level game model includes the ability to cogently describe the process by which domestic actors seek to ensure that ratification of any new internationally negotiated agreement is profitable.

After US negotiators sign a treaty, the President refers the treaty to the Senate to advance the ratification process. A super-majority, or the support of two-thirds of sitting Senators, is required to provide consent to the ratification of the treaty by the Executive. Another way of looking at this is that a veto coalition need only comprise one-third of the Senate to block ratification.\textsuperscript{48} This high threshold of necessary support, or small threshold for obstruction, serves to empower veto coalitions, raising the political cost of securing votes for treaty ratification.\textsuperscript{49} Moreover, if implementing legislation is required, it is customary for Senatorial consent to the ratification of non-self-executing treaties to be conditional upon passage of legislation by both houses of Congress. While the Executive Branch may be concerned with providing incentives to secure other states’ participation, the Congressional negotiations to produce domestic legislation, by contrast, are


predominantly concerned with securing domestic net benefits, rather than international benefits.

These and the following features of the domestic politics literature highlight ways the US government seeks to ensure that ratification of new international agreements is profitable at the domestic level.

Domestic Cost-Benefit Analysis

In the United States, domestic environmental law, including implementing legislation for international environmental agreements, must overcome a cost-benefit analysis constraint. Executive Order 12291 (created by President Ronald Reagan on Feb. 17, 1981) mandates that national laws imposing annual costs of over $100 million on the American economy must provide benefits in excess of those costs. This executive order has been amended by Presidents Clinton and Obama but without fundamentally altering the cost-benefit requirement.

This concern over the cost of pollution abatement in relation to the anticipated benefits is hardly exclusive to the United States. The European Commission, for example, is obligated to undertake a similar analysis under Article 130c of the Treaty, such that “in preparing its action relating to the environment, the Community shall take account of … the potential benefits and costs of action or lack of action.”

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Detlef Sprinz and Tapani Vaahatoranta propose a parsimonious approach to frame these domestic politics cost-benefit analyses. Actions by a state to address international environmental externalities are dependent, they argue, on (1) the ecological vulnerability of the state, and (2) the low cost of mitigation, in what they call “The Interest-Based Explanation of International Environmental Policy.”

In other words, to understand ratification decisions it is necessary to consider the domestic ecological impacts from both domestic and foreign pollution. Thus, within the interest-based explanation, they posit,

countries which experience high ecological vulnerability (i.e., damages to the environment) will favor strict international environmental regulations as compared to countries which have a resilient environment.

Moreover, the optimal level of pollution control must also reflect the costs of abatement. There may, for example, be decreasing returns at some point from increasingly stringent standards. Ceteris paribus, the interest-based explanation anticipates that,

countries with low abatement costs will be more inclined to strive for stringent international rules as opposed to countries with high abatement costs.

The Politics of Re-Negotiating Domestic Regulatory Mechanisms

The imposition of costs through an international environmental agreement’s annual voluntary dues and associated funding obligations, while important, tend to be less important to US legislators than domestic regulatory costs.

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The existence of domestic legislation, and its associated regulatory mechanism, represent a negotiated equilibrium for the distribution of the costs and benefits of the regulation that provides a national net benefit. It is worth noting that the power held by the Legislative Branch may be measured in relation to their ability to efficiently allocate costs and benefits among domestic actors through legislation. Re-opening existing legislative compromises entails political costs. The imposition of a new regulatory mechanism, which is not the product of a domestically negotiated equilibrium, potentially creates much greater political costs.

As a result, all states with developed regulatory regimes will have a preference for a proposed international regime to follow the same design. In the US context, as a result, international environmental agreements that do not require changes to US law are favored. Peter Cowhey, in his work on international telecommunications, suggests, “National politicians are unlikely to accept any global regime that fails to reinforce the preferred domestic regime.”56 In Daniel Drezner’s analysis of international regulatory regimes, he echoes this point in asserting “a government’s ideal point on regulatory issues is its domestic status quo.”57 And moreover, Drezner argues that,

Any agreement that diverges from the domestic status quo comes with economic and political costs – and these costs can outweigh the expected benefits. Governments must invest in the necessary political capital to make any necessary legal and administrative reforms. These costs have the potential to be significant.58

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58 Drezner, *All Politics is Global*, 48.
The Export/Internationalization of Domestic Regulatory Mechanisms

Indeed, once a domestic regulatory standard is in place, a state may be incentivized to export the regulatory standard as the international standard to avoid comparative disadvantages and to protect the net benefits offered by the domestic regulation. In the US legal context, Harold Jacobson notes that, in the 1970’s, “as soon as U.S. legislation designed to protect and enhance the environment was in place, the United States typically proposed that multilateral treaties be negotiated to achieve the same objective.”

Elizabeth DeSombre expands this point to argue that efforts to internationalize US standards are most effective when these treaties attract ‘Baptist and Bootlegger’ coalitions (environmentalists as well as newly-regulated industry actors seeking to impose the US regulatory standard on its international competitors). These coalitions serve, DeSombre maintains, to overcome veto coalitions and ease treaty ratification.

In the case of foreign state efforts to internationalize their standards onto the United States, however, under-regulated industry actors are less likely to join environmentalists in encouraging regulation at a higher standard, constraining potential treaty ratification.

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The Impact of Problem Structure on Domestic Willingness to Pay

The most influential stakeholders on the domestic side of the negotiator’s two-level game are likely to be the industry actors who will be most affected by new implementing legislation. This is due to the fact that the benefits of new environmental regulations are likely to be diffused (geographically, demographically, and temporally) and by contrast the costs are more likely to be concentrated. However, for IEAs that impose significant costs on the US economy, Congress must also consider the electorate’s willingness to pay (or the perceived legitimacy of those costs for tax-paying American voters).

Burden sharing. At the ratification stage, the Executive (in its decision to send the treaty to the Senate for its consent and approval) and both houses of Congress (in the event implementing legislation is required) must weigh whether or not the benefits of participation meet a ‘willingness to pay’ threshold for American lawmakers and the voting public to supply a domestic collective good through domestic regulation.

This domestic cost benefit assessment is important because international collective goods are a product of, and dependent on, positive externalities from the supply of national or regional collective goods. In principle, international collective goods require that the aggregate benefits from the good’s provision exceed the aggregate costs. In practice, however, most states do not contribute or contribute minimally to the supply of the good. As a result, the k-group of states that do contribute to the provision of the good must make up the difference.

Crucially, while at a rhetorical level states speak in terms of collective benefits, k-group states are not primarily concerned with supplying an international collective good,
rather, they seek to supply stable national or regional collective goods that produce greater benefits than national or regional costs. And as a secondary concern, they hope to prevent foreign actors taking advantage of their regulatory efforts. The scale of the international spillover benefits provided by their domestic regulation, on the other hand, are a distant aspiration.

In this context, Barrett argues, “individual rationality [or profitable participation] is key because of sovereignty.” In other words, the presence of sovereign constraints suggests that, if the members of a k-group cannot generate sufficient individual benefits from producing national or regional collective goods, the international collective good is unlikely to be supplied. Barrett assumes here that states are unlikely to accept binding obligations to produce collective goods that impose net costs. As a result, Barrett continues,

When we think about the supply of global public goods we should be thinking about what is feasible given the constraints imposed by sovereignty rather than about what is ideal.

In particular, Barrett stresses that support for the supply of collective goods is likely to be strengthened, “if individual countries, and not just the world as a whole, can be shown to reap benefits that exceed the costs.”

All developed states (or at least the wealthiest developed states, including the United States) negotiating post-Cold War IEAs are vulnerable to the imposition of

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asymmetrical burden-sharing mechanisms like the UN Scale of Assessment. As Pierre Jacquet and Sarah Marniesse, observe,

Burden-sharing does not extract a contribution from each country corresponding to the benefit it gets. Rather than the true willingness to pay, therefore, a more operational criterion has come to be a negotiated mix between the willingness and capacity to pay.\(^{65}\)

However, burden-sharing arrangements need to at least minimally reflect a distribution of benefits from participation in relation to the costs. Barrett concludes, “If some countries are made to shoulder too large a burden, they may refuse to supply the [collective] good.”\(^{66}\) In other words, a one-size-fits-all burden sharing mechanism, like the UN Scale, may not be appropriate across a wide variety of problem structures.

**Asymmetrical externalities.** The electoral willingness to pay for domestic regulations that aid in the provision of international collective goods is further complicated by the relationship between (1) the source of the international pollution externalities; and (2) the capacity of heterogeneous states to supply collective goods.

As Jonathan Weiner suggests, the upstream/downstream relationship is complex, but when states generally seen as necessary to supply collective goods are also upstream states, that complexity increases. The root of this complexity is the asymmetry modeled in Figure 1.

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\(^{66}\) Barrett, “Critical Factors,” 52.
Figure 1. Sources and victims of pollution externalities

Legend: S = Sources of pollution externality. V = Victims of pollution externality (or the beneficiaries of regulation)

Depending on [the] severity of the proposed regulatory standard, non-beneficiary sources (Group S) do not gain from collective regulation. They bear net costs. (In addition, some countries in Group S&V may also bear net costs if their benefits of cooperative abatement are less than their costs of cooperation.) *These “cooperative losers” in Group S (and some in Group S&V) are worse off if they participate in the regulatory regime than if they do not.*


If a proposed international regulatory standard, intended to provide aggregate benefits from the international collective good is designed in such a way that the United States, for example, considers itself to be a cooperative loser, not only will hegemonic provision of the good not be provided, but any potential k-group will be weakened by the US absence. In other words, it may be counter-productive to design treaties that are unprofitable for those states whose participation in the supply of collective goods the international community is most reliant.

The purposeful design of self-enforcing agreements. Sovereign constraints dictate that the design of a self-enforcing agreement must coordinate net benefits for all members of the k-group, and must include stability mechanisms, such as those described by Mitchell and

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Keilbach. If the regulatory objectives of the agreement are of a significant depth (more stringent than the status quo), this is especially so. If the effectiveness of an international environmental agreement depends on the voluntary participation of the most powerful states, agreements designed to impose net costs on those states are certain to be viewed as problematic.

As a result, the provision of international collective goods will continue to depend on the willingness of states to devote national resources to national or regional collective goods that in turn provide spillover benefits for the international community.68

Profitability for k-group members is at least partly determined by the externality problem structure, specifically whether these states are primarily sources or victims of the pollution externality, which dramatically affects the cost of ratification.

Willingness to pay criteria within the two-level game demands that ratification of IEAs be perceived as profitable for the domestic audience. Hegemons or k-groups must see sufficient profitability from the supply of the good to justify the costs of securing the stability of the good in question. Stability mechanisms (to secure ongoing profitable participation), from the domestic politics perspective, are examined in greater detail in the next section.

Seeking Stability: Civil Suits and Asymmetrical Compliance Costs

One of the unique features of the American legal system is the use of civil suits to ensure domestic compliance with environmental laws. Kal Raustiala explains that since

implementing legislation, necessary for non-self-executing IEAs to be ratified by the US, is commonly enforced domestically by way of citizen tort actions, this means that even in the absence of an international compliance mechanism, the US is held to the regulatory standard of the treaty at the domestic level.\textsuperscript{69}

Similarly, Jacobson argues that as a result of civil suit enforcement the US Government may refuse to ratify treaties if it in any way questions its ability to comply with the terms of the agreement.\textsuperscript{70} This is a constraint that is in many ways unique to the United States. Jacobson continues,

Many other countries, including some members of the EU, sign and ratify treaties that contain commitments that their governments know they will have difficulty fulfilling; these commitments are regarded as targets that they will seek to achieve rather than obligations that they will have to fulfill.\textsuperscript{71}

This positive feature of a robust American legal system negatively impacts the United States when it serves to empower foreign free riders and ‘insincere ratifiers’ through a significant asymmetrical enforcement of international regulatory standards.\textsuperscript{72} Based on this positive feature of a robust US legal system, it is reasonable to suggest that US negotiators have a preference for international environmental agreements with stable self-enforcing mechanisms, but only when the benefits offered by the domestic implementing


\textsuperscript{70} Jacobson, “Unilateralism, Realism and Two-Level Games,” 425.

\textsuperscript{71} Jacobson, “Unilateralism, Realism and Two-Level Games,” 425.

\textsuperscript{72} Or ‘false positives’ described in Beth A. Simmons, \textit{Mobilizing for Human Rights: International Law in Domestic Politics} (New York: Cambridge University Press, 2009), 18. As J.W. Anderson argues, “In most other countries, courts are much less willing to give citizens standing to sue their government. [US] policymakers fear that the courts will hold them to strict adherence to a treaty’s requirements, while other countries could fall short with impunity.” See J. W. Anderson, “US has no role in UN treaty process: Senate Reluctant to Ratify,” \textit{Resources} no. 148 (Washington DC: Resources for the Future, 2002): 13.
legislation exceed the costs of participating in the international environmental agreement. In other words, US negotiators are uniquely concerned with the stability of the perceived benefits from ratification, as international agreements that are not self-enforcing are more likely to be seen as binding the US to its comparative disadvantage.

This observation appears to contradict the more common view that the US prefers the freedom of action provided by voluntary or non-binding obligations.\textsuperscript{73} It also supports the hypothesis that the US will push for voluntary or non-binding obligations if it anticipates that a treaty (and eventual domestic implementing legislation) is likely to produce net costs for the American taxpayer.

The Asymmetrical Costs of Manipulating Stability. Profitability for k-group states is also determined by the scale of value-claiming demands by other upstream and/or downstream states to ensure their profitable participation in the agreement, which add costs to k-group ratification decisions.

Part of the cost of securing a self-enforcing agreement includes manipulating the participation incentives of other states. Value-claiming (scope broadening issue-linkage) demands are met by providing positive linkage to lower the cost of ratification or by negative linkage to coerce participation by increasing the costs of non-participation.

This may include small or substantive changes to the international legal order. Provided the benefits for the United States exceed the costs, the US is less likely to oppose such changes to the international status quo.

Unfortunately, the cost of producing stable self-enforcing agreements that support US regulatory preferences increases in direct relation to the extent of regulatory

competition and breadth of participation needed to address the pollution externalities. Moreover, since the international order was designed to provide benefits for the United States, changes to the status quo may invariably involve costs (or the reduction of benefits) that make codification of these changes uniquely unprofitable for the US.

In other words, the US Senate is likely to resist treaties that they perceive to modify the status quo of the international legal order unless the modification provides benefits to the United States unavailable absent US ratification.

These features of US domestic politics seek to ensure the stability of new agreements, but also to ensure that the benefits of stability exceed the cost of securing it. If the cost of a stable agreement appears likely to present net costs to the United States, it is understandable why US negotiators would seek to steer the agreement towards a voluntary or non-binding agreement form. Or, if unable to amend the terms of the IEA to provide net benefits, ex ante, the US may refuse to ratify an agreement it negotiated and signed in good faith.

Part 3.

From Supply to Demand:

The Constructivist Approach

This section introduces and contrasts constructivism’s normative approach to the rationalist approach to international environmental cooperation. Although the differences between the two approaches are significant, elements of the constructivist approach usefully inform the rationalist approach. Other elements, however, are so contradictory
that when viewed from the rationalist perspective, their operationalization in international environmental negotiations appears likely to produce deadlock.

Constructivism in International Environmental Politics

In part because scholars drawn to international environmental law and politics are likely to have a personal interest in promoting its ability to affect behavioral change, the growth of the field in the 1990’s included an increasing incorporation of constructivist or normative approaches. In contrast to a rationalist approach to ‘the supply of’ collective goods, constructivist or normative approaches appear to focus on ‘the demand for’ international environmental benefits.

Constructivists claim that the participation of a state in an international regime can change its preferences. In particular, the interaction of actors within a normative community plays a central role in shaping the appropriateness of state policy. Within this understanding of international law and politics the stability of an IEA is reflected in the legitimacy of the collective consensus, which is produced in a number of ways.


76 Emanuel Adler, “Constructivism in International Relations,” in Handbook of International Relations, eds. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (Thousand Oaks, California: Sage, 2002), 95, 100-104.
Epistemic Communities, Normative Influence, and the Logic of Appropriateness

Scholars interested in the influence of scientific experts and other non-state actors, what Peter Haas calls “epistemic communities,” examine how science impacts the social construction of knowledge and how science and the realization of policy interface.77

The epistemic community’s primary actors are “bureaucrats, technocrats, scientists, and specialists,” experts with issue-area specializations interacting within transnational networks.78 In the course of this interaction, it is argued, shared normative beliefs from credible experts emerge that influence the direction of state policy.

A key claim of constructivism is that the social construction of a state’s identity has a causal influence on a state’s interests.79 In a state’s communication with both state and non-state actors, where shared knowledge shapes the interaction, Brunnée maintains that, “social norms emerge that help shape how actors see themselves, their world, their interests, and their powers.”80 In other words, she notes,

constructivism suggests that international legal norms and regimes have the potential to be more than merely dependant variables; rather, they have the potential to exert influence on states and their conduct.81


Social norms, according to scholars within this normative approach, generate a “logic of appropriateness” that provides behavioral expectations of normal conduct.\textsuperscript{82} States are socialized, over time, to adopt appropriate behaviors.\textsuperscript{83} For state actors that internalize these norms, Mitchell implies, “law assumes a ‘taken for granted’ character in which behaviors reflect little if any calculation.”\textsuperscript{84} Once a new IEA is adopted, according to this line of thinking, “states accept as a forgone conclusion that they should strive to meet its commitments.”\textsuperscript{85}

According to this approach, the internalization of norms creates its own self-enforcing mechanism (sometimes described as compliance pull). Scholars such as Abram and Antonia Chayes, for whom rationalist concerns about free riding are overwrought, echo Louis Henkin’s assertion that “almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.”\textsuperscript{86} From this they conclude that international law and institutions are, on balance, effective in shaping state interests and behavior.


\textsuperscript{83} Kate O’Neill, \textit{The environment and international relations} (Cambridge, United Kingdom: Cambridge University Press, 2009), 76.


\textsuperscript{85} Mitchell, \textit{International Politics}, 156.

For constructivist scholars, “international norms emerge through practice and debate and influence the policies of state leaders.” As the intent of this discourse is to produce universal agreement, it seeks to define and support the collective interests of the international community. The constructivist approach may be seen to describe, in other words, a process of majoritarian and/or collectivist soft coercion within the ongoing institutionalized negotiation of international law that influences the interests and behavior of states. While this approach does not meet the threshold of non-consensual law making, it certainly seeks to apply normative pressure to actors that resist the collective will of the international community.

This approach diverges considerably from the rationalist assumption that the consent of sovereign states to be bound by international obligations is predicated on the perception of continued individual net benefits from participation. Moreover, this normative approach to foreign policy shifts the focus of negotiations from supplying collective goods by securing individual benefits to demanding that the importance of collective benefits outweighs concern over individual costs. Under a constructivist approach to international cooperation, demands for the right to collective benefits seems to precede the coordination of states to voluntarily accept responsibility to supply those collective benefits.

Constructivism’s Alleged Non-Instrumental Normativity

Some elements of this approach offer clear intuitive appeal. The knowledge of experts is certain to inform the decisions of policymakers, for example, and the

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socializing effects of regular interaction described by constructivists are comparable to the functionalist assertions of the institutionalists who argue that positive, transparent, and reciprocal ‘tit-for-tat’ interactions serve to produce trust between states.

However, the majoritarian and/or collectivist focus of constructivism is a sufficiently radical approach to explaining a state’s foreign policy, and indeed its compliance with international law, in contrast to a rationalist (or interests-based) approach.

As a result, IEP scholars have tended to view these approaches either in opposition to each other or at least see them as occupying opposing ends of a rationalist-constructivist continuum. But as Snidal argues,

> Although the standard IR approach is to line up one theory against another so that the success of one is tied to the failure of another, that is not a necessary condition for understanding international politics.  

Indeed, despite the different assumptions employed by these two approaches, they are as likely to be complementary as they are to be competing methodological frameworks. “It is perfectly plausible, bordering on the obvious,” Snidal suggests, “that actors are motivated by both the ‘logic of consequences’ and ‘the logic of appropriateness’.”

To address this issue, in relation to the influence of epistemic communities, Sprinz and Vaahortanta employ a contextual and sequential approach. While they do not deny the influence of knowledge-based experts, they maintain that the scale of influence is determined by context. They propose,

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89 Snidal, “Rational Choice,” 111.

90 Snidal, “Rational Choice,” 111.
Since countries are often unequally affected by environmental problems, we expect that epistemic communities in ecologically vulnerable countries will exert stronger effects on governmental elites to seek international regulations as opposed to their impact in less ecologically vulnerable countries.\(^{91}\)

In other words, Sprinz and Vaahortanta conclude, ideas, values, and norms are not without meaning or impact, but it is likely their influence is secondary to other state interests or objectives. It is the sequence of their application that is the important factor.

Viewing rationalist and normative approaches on a continuum also provides a way forward for critics who challenge the benign technocratic and apolitical process of consensus building described by constructivism, which seems to overlook the instrumentality of the normative approach. It may well be in a state’s interest to employ ideas, values, and norms strategically as an instrumental tool.

According to the logic employed by Sprinz and Vaahortanta, normative rhetorical language is likely to be used instrumentally by states to couch strategic interests in universal language to persuade domestic and foreign actors.\(^{92}\) Just as the use of ‘moral’ foreign policy is unlikely to be apolitical, the use of normative foreign policy is unlikely to be non-instrumental.

The constructivist or normative approach (employed in either scholarly debate or in foreign policy practice) gives an important voice to the demand-side of the collective action problem. At the same time, by reversing the sequence to address demand before securing supply, the normative approach may short-circuit effective international problem solving by diminishing the priority of coordinating the supply of collective goods.

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\(^{91}\) Sprinz and Vaahortanta, “The Interest-Based Explanation,” 80.

\(^{92}\) See also Goldsmith and Posner, Limits, 169, 174, and 226.
As such, it is important to note that conceding that some elements of the constructivist or normative approach usefully inform the rationalist approach is very different than wholeheartedly supporting this theoretical approach, especially as it relates to the supply of collective goods.

A Rationalist Appraisal of the Normative Approach and Kaldor-Hicks Agreements

The difference between a rationalist approach to international cooperation and a normative approach may be usefully compared to the difference between Pareto-improving agreements and Kaldor-Hicks agreements. The rationalist approach emphasizes the importance of individual benefits to supply a collective good; whereas the normative approach emphasizes demands by the international community for collective benefits, even if doing so creates individual net costs. For constructivists and proponents of international Kaldor-Hicks agreements, the normative legitimacy of aggregate benefits is deemed sufficient to persuade individual actors facing net costs to re-evaluate their individual self-interests in light of the needs of the community of states.

Simplified to the extreme, the rationalist approach seeks a profitable solution to a pollution problem among those actors capable of supplying the collective good, who then seek to expand the benefits of participation beyond this core group. The normative approach, by contrast, reverses this sequence by clarifying the benefits each state wants to receive, then attempts to persuade those states capable of supplying these benefits to do so by applying the moral weight of collective benefits desired by the international community consensus of the need for those benefits. In other words, a core difference
between the two approaches may be observed in how they sequentially prioritize individual and collective interests in the negotiation setting.
Chapter III
The Theoretical Foundation of the Geopolitics of International Law

The process of defining what is described by the ‘geopolitics of international law’ begins by identifying several core assumptions within an instrumental approach to international law and politics that help to consolidate or reframe the rationalist and constructivist approaches to international environmental cooperation.

Within this instrumental approach to international law and politics, foreign policy is conditioned by domestic priorities. This conception of state interests is then elaborated to compare rationalist statecraft to normative statecraft. In so doing, the instrumental approach is employed to clarify the geopolitics of international law position on the influence of the constructivist approach on foreign policy practice.

Although the international system is anarchic, this does not mean that all states are functionally equal. There is a de facto hierarchy of states who have made asymmetrical contributions to the negotiation of international laws and institutions used to create a quasi-constitutional international order so as to structure the interactions, and ultimately behavior, of states. As the international order may distribute more benefits to some states than others, these arrangements are invariably contested by revisionist states. Frustrations emerge when dynamic changes in the international hierarchy may not be immediately reflected in the static path dependent laws and institutions that codify the international order. Any state dissatisfied with the international order may then be motivated to adopt a revisionist structural foreign policy.
Indeed, I argue that the collision of foreign policy statecraft objectives between competing states in the negotiation of international law and institutions is an important forum for modern geopolitical contestation. As I use the term, the geopolitics of international law encapsulates the geopolitical competition and geopolitical contestation that may influence international cooperation, in particular the negotiation of international law and institutions.

After establishing the theoretical foundations of this approach, the chapter concludes with a review of analogous conceptualizations of post-Cold War geopolitics of international law.

Part 1.

An Instrumental Approach to State Interests and Statecraft

As noted, this section seeks to identify several core assumptions within an instrumental approach to international law and politics that help to consolidate or reframe the rationalist and normative approaches to international environmental cooperation. This section also introduces a statecraft approach to consolidate and reframe the role of two-level games on international and domestic politics.

State Interests and the Instrumental Approach to International Law

The theoretical framework for my conceptualization of the geopolitics of international law relies on the instrumental approach to international law proposed by Jack Goldsmith and Eric Posner in *The Limits to International Law*. This scholarly approach to international law and politics emphatically describes the need for individual

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93 Goldsmith and Posner, *Limits*. 
and joint benefits discussed in the rationalist approach to international environmental cooperation, clarifies state interests considered in the domestic politics literature, and cogently addresses the (im)practical role of constructivist or normative foreign policy in international law.

In *Limits*, Goldsmith and Posner employ an instrumental approach to international law and politics, where they argue that,

> international law emerges from and is sustained by nations acting rationally to maximize their interests (i.e., their preferences over international relations outcomes), given their perception of the interests of other states, and the distribution of state power.\(^\text{94}\)

International law, Goldsmith and Posner insist, “emerges from states pursuing their interests to achieve mutually beneficial outcomes, and it is sustained to the degree to which it continues to serve those interests.”\(^\text{95}\) In other words, states are interest-driven actors that act according to a logic of consequences.\(^\text{96}\)

Taking an approach that diverges from certain realist scholars who claim international law is mostly epiphenomenal, Goldsmith and Posner argue, “international law can be binding and robust, but only when it is rational for states to comply with it.”\(^\text{97}\) They contend that, “states enter into international institutions because they gain more than they lose from doing so.”\(^\text{98}\) And conversely, they further contend, “powerful states do not join institutions that do not serve their interests.”\(^\text{99}\)

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\(^{96}\) March and Olsen, Institutional Dynamics, 23.


Foreign Policy: Conditioned by Domestic Priorities

The instrumental approach offered by *Limits* defines a state’s interest with international politics as “a state’s preference over international outcomes,” but Goldsmith and Posner make a point to avoid “strong assumptions about the content of state interests and assume that they can vary by context.”

Goldsmith and Posner further contend that foreign policy decisions (in particular compliance with international law) are conditioned by domestic priorities. In so doing, *Limits* echoes Robert Gilpin’s observation that, “Every action or decision involves a trade-off, and the effort to achieve one objective inevitably involves costs with respect to some other desired goal.” As a result, Gilpin continues,

> the state will not seek to maximize power or welfare but will endeavor to find some optimum combination of both objectives (as well as others, for that matter), and the amount sought will depend on income and cost.

Gilpin’s practical model of ‘guns or butter’ decision-making describes, in effect, a political cost-benefit assessment mechanism. As such, it is broadly analogous to how electoral and political ‘willingness to pay’ factors influence why some domestic collective goods (and subsequently international collective goods) are favored over

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others. A state’s domestic interests and its foreign policy interests will indeed vary by context.

In the context of harmonizing international regulatory standards, states are likely to have different regulatory optima. This is most easily expressed by comparing the priority given to economic development in developing countries over environmental protection, to the relative willingness of developed countries to make longer-term investments in the mitigation of future environmental threats. That said, for a variety of reasons (geographic, demographic, cultural, economic, etc.), differences in regulatory optima may also exist between relatively homogeneous developed states.

Crafting the State: The Synergy of Internal and External Statecraft

Although *Limits* avoids questions of how states form, the view that foreign policy is conditioned by domestic priorities engages not only Putnam’s two-level game, but also the Janus-faced territoriality of statecraft.¹⁰⁴ For Gilpin, the essence of the modern state is that it consists of “a set of laws, beliefs, and institutions for creating and using power.”¹⁰⁵ And that it is “consolidated and organized internally in order to increase its power externally.”¹⁰⁶ As such, statecraft engages both the internal welfare of the state and the

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external welfare of the state within the international system; statecraft, thus, is concerned simultaneously with its social security and its external security.¹⁰⁷

One role of the state is to provide national collective goods, if it is able do so more efficiently or effectively than other sub-national arrangements. To the degree that national pollution regulation, for example, provides politically acceptable aggregate net benefits, the efficiency gains from the provision of this collective good pleases the electorate but also strengthens that state relative to other states (that do not enjoy similar efficiency gains).

In other words, statecraft describes the specific acts of a national government that simultaneously seeks to strengthen the position of the state internally and externally. In a manner analogous to the process described by Charles Tilly, that “war made the state, and the state made war” there is a constant iteration between actions taken within the state to strengthen it from external threats and actions taken externally to strengthen the internal authority of the state.¹⁰⁸ Both internal statecraft and external statecraft, in other words, are tools to ‘craft the state.’

As it relates to the negotiation of IEAs, regulatory statecraft holds the potential to strengthen the role of state vis-à-vis its electorate and the community of states. Thus to paraphrase Tilly, ‘the state makes regulatory statecraft, and regulatory statecraft makes the state.’

¹⁰⁷ Micklitz and Patterson, “From the Nation State to the Market,” 61.

Distinguishing International Legal Rhetoric from Normative Commitments

Goldsmith and Posner note, “international legal rhetoric is used to mask or rationalize behavior driven by self-interested factors that have nothing to do with international law.”\(^{109}\) According to the instrumental approach adopted in *Limits*, no state publicly admits that its foreign policy is driven solely by power and interest. Instead, states proclaim that their acts are consistent with, and often motivated by, international law or morality.\(^{110}\)

The legal or moral justifications of states, “cleave to their interests, and so when interests change, so do the rationalizations.”\(^{111}\) Simultaneously, Goldsmith and Posner observe that, “states frequently accuse other states of violating international law and norms, as though to discredit them.”\(^{112}\)

It is important to emphasize, however, that applying international legal rhetoric to defend foreign policy actions is conceptually different than having a duty to appease those who propagate self-serving normative obligations, binding on others, which alter the international order.

Contrary to the constructivist claim that a logic of appropriateness guides foreign policy behavior, including compliance with international law, *Limits* challenges the assertion “that nations comply with international law for non-instrumental reasons.”\(^{113}\) Normative pressure from the international community, in other words, is not sufficient to impose binding obligations on a sovereign state.

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From this perspective, it is not unreasonable to assume that when states promote the progressive development of norms and principles, or governance models, to which they are the primary beneficiaries, on moral or ideological grounds, these normative appeals are defensibly viewed as geopolitical acts to influence the structure of the international order (regardless of their efficacy), rather than merely international legal rhetoric.

What these two versions of moral discourse (international legal rhetoric and the instrumental pursuit of normative institutions or codification of instrumental norms) have in common is that securing the individual self-interest of the norm entrepreneur appears to precede the use of normative language. Where they differ is that international legal rhetoric is more likely to be harmless, while ideological or normative foreign policy may actively be harmful to effective international problem solving.

*Limits* also challenges the cosmopolitan assertion that “states have a duty in crafting international law to act on the basis of global rather than state welfare.”114 This does not deny that international law should be designed to provide collective benefits, but that collective benefits are unlikely to be provided by international law absent individual benefits that increase state welfare. In other words, appeals to the will of the international community (represented by wide participation in an agreement, with all parties seeking global aggregate benefits) are unlikely to overwhelm the importance of an individual state’s sovereign concern for its own national self-interest. Goldsmith and Posner conclude,

Efforts to improve international cooperation must bow to the logic of state self-interest and state power, and although good procedures and other

sensible strategies might yield better outcomes, states cannot bootstrap cooperation by creating rules and calling them “law.”

The power of international law to improve international cooperation is in the codification of joint interests; the document by itself, on the other hand, has limited ability to secure international cooperation. The correlation of these two features of international law, (a) increased international benefits due to the coordination of joint interests and (b) the adoption, signing, and ratification of a document, it is noted, has resulted in observers mistakenly identifying a normative power or compliance pull from international agreements. This misunderstanding of the power of international law, I argue, pervades the design and normative analysis of the post-Cold War IEAs to be examined.

Normative Statecraft and the Use of Othering

The central threat posed by a state applying an imprudent normative foreign policy, aimed at pleasing domestic or international audiences, is that it risks sabotaging efforts to coordinate practical solutions to international problems. As Charles Freeman cautions,

A foreign policy based mainly on the impulse to propagate principles and ideas is, in fact, more disruptive of international order and more likely to generate [conflict] than one based on realistic accommodation of the interests of antagonists.

This is because ideological conviction transforms relations between states into a conflict between moral doctrines and claims, in which seeking compromise is seen as unrighteous or immoral.\(^{117}\) [Emphasis added]

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This is especially problematic when normative language is used to justify comparatively high national or regional regulatory optima, and then to internationalize these regulatory standards to states with lower regulatory optima. When the moral or ideological foundations influencing normative foreign policy prevent states from pragmatically considering the different domestic preferences of other states, the ability to coordinate the supply of collective goods is impaired. In this scenario, the importance of prudent ‘crafting of the state’ competes with the temptation to empower those inside the state in opposition to those outside it.

One of the elements of normative statecraft that most clearly engages the inside-outside conception of territoriality is the use of ‘othering.’ The use of ‘othering’ helps to frame the identity of a state in contrast to other states. As John Agnew and Stuart Corbridge describe it, “the conceptualizing of ‘us’ inside a state, necessitates the conceptualizing of ‘them’ outside the state.” The positive attributes (or identity) of those within a state are better understood, in other words, in relation to the negative attributes of the foreign other. Although this process is not necessarily used to create a stark ‘good versus evil’ dichotomy, Agnew and Corbridge argue that ‘othering’ creates, a rigid separation between those people within the territorial space pursuing ‘universal’ values (politics) and those outside practising different, and nominally inferior, values.

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As a tool of statecraft, ‘othering’ strengthens the authority of the state as a shield for the electorate from exterior threats, and strengthens the cohesive support of the electorate behind the state as it confronts those threats.

The danger of a normative or identity-based statecraft, however, is that it makes the feasibility of compromise with the ‘othering’ target much more difficult. In other words, the positional over-reliance on ‘universal’ normative standards may constrain the pragmatic give-and-take diplomacy necessary for the effective coordination of commitments to supply collective goods. 121

Part 2.

Geopolitics and International Law

As the previous sections make clear, international environmental law and politics is a broadly inter-disciplinary research program. It includes international relations, international political economy, environmental economics, international regulatory politics, international law and institutions, international environmental law, as well as foreign and domestic policy perspectives. The application of an instrumental approach to international law and politics, as well as the introduction of a statecraft approach is intended to focus elements within these perspectives. The conceptual introduction of geopolitics in this section is meant to facilitate a clearer understanding of the proposed modality of the geopolitics of international law and how it subsumes the inter-disciplinary perspectives of the international environmental law and politics research program.

121 See Freeman, *Statecraft and Diplomacy*, 13.
Defining Geopolitics and the Geopolitical Objectives of States

What conceptually differentiates foreign policy statecraft from geopolitics, according to Jakub Grygiel, is that “geopolitics is the world faced by each state. It is what is ‘outside’ the state, the environment within which, and in response to which, the state must act.”122 When the state engages in external foreign policy statecraft, it confronts the competing foreign policy objectives of other states. As such, geopolitics describes competition between states within a space where foreign policy statecraft from multiple states collides.

For the purpose of this analysis, I define geopolitics as the foreign policy practice of international relations, specifically, “the conflicting strategies of different competitors… for the control of a given space.”123

Within my conceptualization of the geopolitics of international law as applied to international environmental law, the ‘given space’ describes the initial and ongoing negotiation to secure benefits and avoid costs that accrue from specific international agreements and institutions.

The given space refers also to the territoriality of regulatory jurisdiction, such as in the establishment of the Exclusive Economic Zone (EEZ) during the UNCLOS negotiations, or the effective internationalization of a downstream state’s regulatory preference on upstream states.124 The spatial and territorial jurisdiction elements of the

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124 Litfin argues that the EEZ, as a codified element of the UNCLOS negotiations, “did not simply extend the territorial waters of the coastal states, it also instituted a form of functional sovereignty.” Karen T. Litfin, “Sovereignty in world ecopolitics,” *Mershon international studies review* 41, no. 2 (1997): 171-
geopolitics approach, in other words, make it well suited to address the competing claims that ‘foreign pollution externalities is a form of foreign intervention,’ contrasted with claims that ‘the imposition of foreign regulatory standards is also a form of foreign intervention.’

Although relative power within the hierarchy of states limits the extent to which any one state is able to achieve its foreign policy goals, historically states have shared three geopolitical objectives. These objectives are useful to explicate the meaning of ‘control’ within the definition of geopolitics. As described by Gilpin, they are: “First, the principal objective of states has, historically, been the conquest of territory in order to advance economic, security, and other interests.” In other words, “states in all ages have sought to enlarge their control over territory and, by implication, their control over the international system.”

“The second objective of states is to increase their influence over the behavior of other states.” Using the tools of statecraft and diplomacy, including, “the use of threats and coercion, the formation of alliances, and the creation of exclusive spheres of influence,” Gilpin argues, “states attempt to create an international political environment and rules of the system that will be conducive to the fulfillment of their political, economic, and ideological interests.”

172. In the EU enlargement process, for example, Southern and Eastern European states with much lower regulatory standards had to adopt and implement the entire Aquis Communitaire (EU directives and regulations) to be considered for entry to the EU.

125 Within this and the next two paragraphs, emphasis has been added.

126 Gilpin, War and Change, 24.

127 Gilpin, War and Change, 24.
According to Gilpin, “the third objective of states, and in the modern world an increasingly important objective, is to control or at least exercise influence over the world economy…” to direct flows of capital or encourage a positive trade balance. Gilpin concurs with Robert Keohane and Joseph Nye when he notes that, “the distribution of economic power and the rules governing international economic regimes have become critical aspects of the process of international political change.”

Therefore, assuming that states continue to view the geopolitical objectives of other states in competition with their own geopolitical objectives, an observer of international law and politics may distinguish a transition from a model of geopolitics engaging military alliances and territorial conquest to a conceptualization of geopolitics exercised within a rules-based order. This is not to claim that no wars have taken place since 1945, but to emphasize that the pursuit of geopolitical objectives need not be confined to the battlefield.

The International Order and Self-Binding Multilateralism

The international political order, as described by John Ikenberry, refers to “the ‘governing’ arrangements among a group of states, including its fundamental rules, principles, and institutions.” It does not refer to “all aspects of international cooperation or agreements.” Rather, it refers to “the basic rules and principles of order among the states within the system. It refers to the rules of the game.…”

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Ikenberry describes how in the post-World War II era, these governing arrangements were structured through quasi-constitutional agreements, that “specify the rules of the game—that is, the parameters within which states will compete and settle disputes over specific issues.” These post-war arrangements, in turn, provide the foundation for the international order.

Ikenberry also addresses the important question of why a hegemon would submit to a form of self-binding multilateralism by supporting the creation of international institutions that codify the ‘rules of the game’ (constraining others but also itself). And in so doing, he provides a compelling framework to explain US multilateralism at the end of World War II.

He proposes that the victor of a major war is in a position where it can choose for itself how it interacts with state actors in the international system: It can dominate ruthlessly, abandon the international community, or it can construct a constitutional order. Ikenberry argues that in seeking a more rule-based order,

the leading state is agreeing to engage in strategic restraint—it is acknowledging that there will be limits on the way in which it can exercise its power. Such an order, in effect, has “constitutional” characteristics. Limits are set on what a state within the order can do with its power advantages.

Multilateralism, in this context, he suggests, “becomes a mechanism by which a dominant state and weaker ones can reach a bargain over the character of international

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In effect, Ikenberry describes how leading states can use “institutional strategies as mechanisms to establish restraints on indiscriminate and arbitrary state power and ‘lock in’ a favorable and durable postwar order.”

The most influential of these post-1945 governing arrangements are the United Nations (especially the UN Security Council), the World Bank and the International Monetary Fund, as well as the General Agreement on Tariffs and Trade, which was later renegotiated to form the World Trade Organization. These post-war institutions, constituting the structural architecture of the international order, codified US interests and influence in global security and economic affairs for decades to follow.

The effectiveness of American post-war self-binding notwithstanding, any assumption that a hegemon will or should engage in self-binding multilateralism because it has done so in the past represents a major miscalculation underlying much of the analysis of US environmental foreign policy in the post-Cold War era.

In particular, the willingness of a powerful state to engage in self-binding multilateralism ends at the point that it is asked to ‘lock in’ a collectively beneficial but individually unprofitable revision of the international order proposed by others. Successful multilateralism, in this context, is contingent on the domestic politics perception of stable net benefits (profitability) for the hegemon, not the scale of benefits claimed by the international community.

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135 Ikenberry, *After Victory*, 4-5.
Geopolitical Competition/Contestation and Structural Foreign Policy

The creation of a rule-based order, designed to mitigate the consequences of power politics, constrains but does not eliminate the foreign policy objectives that motivate geopolitical competition and geopolitical contestation. States retain objectives to maintain/solidify and if possible increase their existing power, influence, and competitive advantages within the international system and international order.

In the context of negotiating international environmental agreements, geopolitical competition is concerned with the distribution of the benefits of cooperation available from the negotiation of a specific agreement and how these proposed regulatory obligations may impact a state’s position in the international hierarchy. It concerns whether these regulatory obligations strengthen the state vis-à-vis other states in the international system, or weaken it.

States are concerned, sequentially, with absolute gains from cooperation (whether they receive net benefits from cooperation), and then with relative gains from cooperation. That is to say, if they perceive that they are likely to receive net benefits from cooperation, they will then consider how their share of benefits compares with the benefits received by other states.136

States are not only concerned with the distribution of benefits within an individual treaty, however, but also with the relationship between the treaty and the international order. The ‘rules of the game’ codified in the international order may shape the

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136 John C. Matthews III, “Current gains and future outcomes: When cumulative relative gains matter,” *International Security* 21, no. 1 (1996): 112-146. Matthews argues that when differences in relative costs or benefits in an agreement are sufficiently impactful that they influence future negotiation rounds, relative costs or benefits become important to states, regardless of the issue-area.
distribution of benefits in the negotiation of an individual treaty, or the individual treaty may seek to alter the international order by revising the ‘rules of the game.’

Geopolitical contestation, in this context, refers to a form of foreign policy statecraft that seeks to alter the distribution of the benefits from, and as a result the structure of, the international order. Geopolitical contestation may also be directed at a single state or a group of states perceived to be receiving a disproportionate amount of the benefits available within the international order.

According to this interpretation, in the same way territory was once appropriated for the particularistic economic and political/strategic advantages it offered the victor, whatever replaces this modality (in this case, a rule-based order that encourages the pursuit of economic benefits within an international order of principles, norms, and rules) becomes the modality of geopolitical contestation, and negotiated regimes become the fora of geopolitical contestation.

As such, it is reasonable to view attempts to gain analogous economic and political advantages in the negotiation of international law and institutions, in relation to the international order, as an important form of geopolitical contestation.

Rather than describing a purely static international order, Drezner notes that treaties (negotiated long after the initial post-1945 laws and institutions) may also accommodate changes or reform of the structure of the international order, if the great powers are willing to coordinate the codification of these changes. \(^{137}\) The revisionist coordination of the US and EU to replace the GATT with the WTO is evidence of this potential. However, it is noteworthy that at the time the US anticipated the conclusion of

the Uruguay Round would increase US exports by an extra $250 billion US dollars per year in ten years.\textsuperscript{138}

As Alexander Orakhelashvili suggests, “international law has not rendered geopolitics irrelevant nor outlawed [action in pursuit of] geopolitical [objectives] as such.”\textsuperscript{139} Instead, he asserts,

\begin{quote}
international legal tools such as law-making sources and institutional mechanisms... have provided significant resource for states to advance their geopolitical [objectives] in a way considered legitimate in the international legal system; more specifically this concerns action pursuant to treaty frameworks.\textsuperscript{140} [Emphasis added]
\end{quote}

The objective of this manner of structural foreign policy, described by Stephan Keukeleire \textit{et al.}, is to,

\begin{quote}
change or strengthen [the] rules of the game, institutions, laws and habits... to promote the adoption of new organizing principles and the subsequent operationalization of these principles.\textsuperscript{141} [Emphasis added]
\end{quote}

Since the end of World War II, and accelerating after the end of the Cold War, structural foreign policy exercised in international institutions has been viewed as a low-cost and potentially profitable option to territorial expansion by force. States have increasingly sought to codify path dependent benefits in international agreements and treaty regimes/institutions that challenge the \textit{status quo} distribution of benefits.


\textsuperscript{140} Orakhelashvili, “International Law and Geopolitics,” 202-203.

There are limits, however, to what individual states or the international community can do to change the structure of the international order without hegemonic or k-group hegemonic support. The coordination of strategic alliances among like-minded states has the potential to provide some increased positive influence on more powerful states, but the primary influence held by these coalitions is exerted through negative power (to resist changes to the international order the coalition may find threatening).

From the perspective of states attempting to coordinate the supply of collective goods, the structural aspirations of weaker states seeking to shape new international laws and institutions to their benefit represents not only different state interests but also conflicting geopolitical objectives. From the perspective of revisionist states, they may be willing to obstruct or hobble international environmental problem-solving efforts precisely because they perceive that solving the problems associated with the hegemonic international order is the more important objective.

The Geopolitics of International Law

The aim of this chapter has been to distinguish and elaborate a number of theoretical approaches (considered in an ad hoc manner within the IEP literature) to identify a coherent conceptualization of the geopolitics of international law.

This proposed theoretical framework subsumes several of the core assumptions articulated in an instrumental approach to international law and politics, which serve to

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consolidate or reframe the rationalist and constructivist approaches to international environmental cooperation. Of particular importance is the assumption that,

* International law emerges from and is sustained by nations acting rationally to maximize their interests... given their perception of the interests of other states, and the distribution of state power.\(^{143}\)

The geopolitics of international law is concerned with how geopolitical competition between states and geopolitical contestation of the international order may obstruct international cooperation. The focus of the framework on inter-state competition for absolute gains and over relative gains, however, does not contradict the positions held by the instrumental approach to international law and politics that,

* International law can be binding and robust, but only when it is rational for states to comply with it.\(^{144}\)

* States enter into international institutions because they gain more than they lose from doing so.\(^{145}\)

* Powerful states do not join institutions that do not serve their interests.\(^{146}\)

Moreover, the geopolitics of international law rejects the notion of a firewall between foreign policy and domestic policy.\(^{147}\) The concept of statecraft, which elaborates this assumption, helps to clarify the relationship between the internal and external interests and objectives of the state, but also highlights how normative statecraft may negatively impact international cooperation. As such, the geopolitics of international law framework attaches particular importance to the assumptions that,


\(^{144}\) Goldsmith and Posner, Limits, 202.

\(^{145}\) Goldsmith and Posner, Limits, 223.

\(^{146}\) Goldsmith and Posner, Limits, 223.

* States do not comply with international law for non-instrumental reasons.\textsuperscript{148}

* States do not have a duty in crafting international law to act on the basis of global rather than state welfare.\textsuperscript{149}

The geopolitics of international law approach is concerned with how obstacles posed by geopolitical competition over, for example, distributive benefits from cooperation, the distribution of costs and benefits from regulatory competition, the domestic CBA of a state’s willingness to pay for collective goods, etc… all impact international cooperation.\textsuperscript{150} In this context, geopolitical competition refers to actions by states concerned with their position in the hierarchy of the international system.

According to this conceptualization of the geopolitics of international law, geopolitical competition does not dominate every international negotiation, but any analysis of the negotiation of international agreements that ignores the possible influence of geopolitical competition risks making spurious claims. This proposed framework does not seek to invalidate the axioms and assertions of the rationalist and constructivist approaches highlighted in the previous chapter, rather it argues that their utility is dependent on their ability to accommodate the possible influence of geopolitical competition and/or contestation.

The geopolitics of international law also describes the possible influence of structural statecraft on international cooperation. Structural foreign policy represents not just another form of competition between states, but a contestation of the \textit{status quo}


\textsuperscript{149} Goldsmith and Posner, \textit{Limits}, 14.

\textsuperscript{150} These examples, etc… are intended to refer, in particular, but not exclusively, to the examples of inter-state competition highlighted in Chapter II and Chapter III.
distribution of benefits within the international order. In other words, rather than simply attempting to negotiate advantageous concessions into each separate agreement, structural foreign policy attempts to incorporate those advantageous concessions into all subsequent international agreements. If successful, this (re)structuring of the international order both reflects and secures the interests and objectives of the revisionist state (or states).

Geopolitical competition may influence the negotiation of international agreements without attempting to (re)structure the international order, but geopolitical contestation is a product of geopolitical competition.

On the assumption that states are concerned with their position and influence within the international system, major disruptions in the system (like moving from a bipolar to a unipolar configuration) may increase the impulse for geopolitical competition and geopolitical contestation. This element of the geopolitics of international law reflects a mechanism realists describe as the ‘balance of power.’151 Whereas under the bipolarity of the Cold War the Soviets acted as a check on US imperial objectives, and vice-versa, the end of the Cold War left the US un-checked. In theory, the mechanistic nature of the balance of power compels even those states that had never felt threatened by the United States, to balance against the otherwise unrestrained unipolar power. This need to balance against a state that until recently had been a strategic ally, represents the systemic imperative central to realism’s balance of power.

The next two sections describe how states compete over the distribution of benefits of cooperation, but also coordinate to restrict the distribution of benefits available to states perceived to dominate either the international system or international

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order. As such, the geopolitics of international law describes the use of international law as a sword and as a shield.

Importantly, these conceptualizations of the geopolitics of international law highlight how the negotiation of international agreements does not take place in a neutral apolitical space. Indeed, the following sections emphasize that international negotiations take place in a geopolitical space, and identify how geopolitical competition and geopolitical contestation may influence the design of international agreements.

Part 3.

The Post-Cold War Geopolitics of International Law

The view that post-Cold War international law has served as a venue for geopolitical competition and contestation has several analogous conceptual precedents, namely ‘geo-economics’ and ‘lawfare,’ used by states (or soft-balancing coalitions) to bind their strategic competitors. What is notable in the post-Cold War era is that despite a preponderance of power held by the US, and indeed because of it, the US has increasingly been the target of binding, balancing, and delegitimizing strategies. Arguably, this trend is a response to the systemic imperative to balance against American post-Cold War unipolarity.\footnote{152}{152 The strategic implications of the end of the Cold War are further elaborated in the ‘Geopolitical Objectives’ sections of Chapter VI.}
Geo-economics, Lawfare and the Weaponization of Institutions

In 1990, Daniel Bell argued that, to borrow from Clausewitz, “economics is the continuation of war by other means.” Edward Luttwak expanded this to suggest, “the logic of state regulation is in part the logic of conflict.” Luttwak was persuaded that, absent the strategic constraints of the Cold War among Western allies, “Geo-economics [was] emerging in a world where there [was] no superior modality.”

Geo-economics, notably, is not the same as neo-mercantilism or a rejection of the international economic order, but the use of international law to codify an asymmetrical share of benefits available within the international order. In a world of geo-economics, victory is not defined by defeating your competitor decisively, at least in a manner analogous to demanding the surrender of a military opponent. As Schelling observes, “A ‘successful’ employees strike is not one that destroys the employer financially, it may even be one that never takes place.” A geo-economic victory is one that codifies asymmetrical flow of benefits from an international negotiation characterized by distributive conflicts between states.

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154 Edward Luttwak, “From Geopolitics to Geo-economics: Logic of Conflict, Grammar of Commerce,” in The Geopolitics Reader, eds. Gearóid Ó Tuathail, Gerard Toal, Simon Dalby, and Paul Routledge. (New York: Routledge, 1998), 125-126. This article, originally published in 1990, anticipates much of the regulatory competition of the 1990’s captured in the cases of Chapter VI, as well as the scholarly work of Chapter II, Parts 1 and 2, on how competition impacts cooperation in the two-level game.

155 Luttwak, “From Geopolitics to Geo-economics,” 128.


As this conceptualization of geo-economics relates to international environmental agreements, IEA negotiations are likely to be fraught with distributive conflicts over norms, the structure of regime governance models, environmental aid, and competition over the regulatory stringency of environmental standards, “with each side attempting to export its own preferences and force the costs of adjustment onto others.”158 Moreover, like observers of geo-economics, IEP observers are well served to view cooperation to provide collective goods as a forum for the geopolitical contestation of self-interested actors.

In 2001, Charles Dunlap Jr. contributed to our understanding of what he saw as the increasing prevalence of ‘lawfare.’ Initially defined as the “use of law as a weapon of war.”159 In his initial paper he concluded, “There is disturbing evidence that the rule of law is being hijacked into just another way of fighting, to the detriment of humanitarian values as well as the law itself.”160 Dunlap went on to expand this definition to “the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.”161 Ikenberry describes the likely motivation behind lawfare as a Lilliputian logic of binding where “the power of the dominant state is made

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less threatening to weaker states” as well as strategic competitors, “by embedding that power in rules and institutions that channel and limit the ways that power is exercised.”

Although an expansive examination of lawfare is outside the scope of this analysis, the view that law may be used as a weapon to bind the strategic behavior of states fits well with the view expressed by a number of scholars concerned by the aggressive contestation of power within international institutions. Ikenberry notes that there is “a ‘politics of institutions’ being played out between the United States and the rest of the world within the United Nations… and other postwar multilateral fora.”

Mark Leonard, in describing a weaponization of institutions, concludes that, “multilateral institutions… are becoming a battleground for geopolitical competition” to bind, or escape being bound by, other states.

Binding, Balancing, and Delegitimizing ‘Lose-Lose’ Multilateralism

All states have an incentive to seek particularistic benefits from imposing binding obligations on others, but the capacity to bind, or avoid being bound, is often a product of relative power. As such, weaker states have an incentive to form coalitions to increase their ability to promote their interests and resist the influence of more powerful states. Forming coalitions, in this context, is described as a soft balancing strategy, distinct from military alliances and other hard balancing strategies. The conceptual value of ‘soft

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balancing’ is that it expands upon a narrow neorealist interpretation that military strength is the only way to express balancing behavior. As Thazha Paul explains,

as long as the ultimate purpose of any balancing strategy is to reduce or match the capabilities of a powerful state or a threatening actor, the various means that states adopt… should be a part of our analysis to better understand today’s balancing strategies.165

An important distinction offered by Robert Art is that ‘policy bargaining’ describes, “behavior designed to obtain the best outcome for a state on a given issue or set of issues by deploying… the power assets that the state currently possesses,” whereas ‘balancing’ refers to “behavior designed to create a better range of outcomes for a state vis-à-vis another state or coalition of states by adding to the power assets at its disposal.”166

Stephen Walt refines this definition by asserting that post-Cold War soft balancing against the US represents a “conscious coordination of diplomatic action in order to obtain outcomes contrary to US preferences-outcomes that could not be gained if the balancers did not give each other some degree of mutual support.”167 Echoing the assertion that the US has been a specific target of soft balancing, Paul argues that,

In the post-Cold War era, second-tier great power states have been pursuing limited, tacit, or indirect balancing strategies largely through coalition building and diplomatic bargaining within international institutions, short of formal bilateral and multilateral military alliances.


These institutional and diplomatic strategies, which are intended to constrain U.S. power, constitute forms of soft balancing.\textsuperscript{168} Robert Pape notes that the most obvious mechanism of balancing is the economic strengthening to be found in the formation of regional trading blocs.\textsuperscript{169} The most influential of these has been the European Union. Moreover, he contends, coalitions provide the opportunity to exclude more powerful states from the benefits provided by the coalition.\textsuperscript{170}

Pape’s assertion that coalitions may employ a strategy of exclusion raises one of the perceived weaknesses or risks associated with employing a strategy of binding and balancing: that the target state may simply refuse to bind itself to rules and institutions that impose net costs.\textsuperscript{171}

However, when powerful states refuse to be bound by asymmetrical obligations they perceive to impose net costs, this presents a further opportunity (for the balancing coalition) to delegitimize their perceived lack of commitment to multilateralism, international law, and the maintenance of the international order. As long as the balancing coalition receives what are perceived to be net benefits from the binding agreement, the refusal of the target state to ratify the agreement still serves their interests. When the balancing coalition designs a treaty this way it enjoys a win-win scenario, while the United States, for example, as target state is left with a lose-lose ratification


\textsuperscript{170} Pape, "Soft Balancing," 37.

\textsuperscript{171} Ikenberry, “Strategic Reactions to American Pre-eminence,” 17.
decision. If the US ratifies the treaty, it accepts the balancing coalition’s imposition of net costs, but if it refuses to ratify, the United States is seen as rejecting multilateralism.\footnote{6}{Any further mention of the international community committing the US to ‘lose-lose’ ratification decisions are explained by this proposed mechanism.}

As the United States is predisposed to refuse the ratification of treaties that produce net costs, this perceived unilateralism serves to weaken American soft power and raises the cost of coordinating international cooperation to US benefit. The international perception of reduced legitimacy, it is argued, results in reduced US influence in international negotiations.\footnote{6}{Brunnée, “Living with an elephant,” 646.} Although ‘soft power’ and ‘legitimacy’ are notoriously difficult to measure, Walt offers a compelling reason why the US would prefer that other states view its power as legitimate,

> When people around the world believe that U.S. primacy advances broader global interests, Washington finds it easier to rally international support for its policies, leaving its opposition isolated and ineffective.

> Accordingly, the United States’ opponents [seek] to convince others that Washington is selfish, hypocritical, immoral, and unsuited for world leadership, and that its dominance harms them.\footnote{6}{Stephen M. Walt, “Taming American Power,” \textit{Foreign Affairs} 84, no. 5 (2005): 116.} This assault on U.S. legitimacy does not directly challenge U.S. power, but it encourages other people to resent and resist U.S. supremacy.\footnote{6}{Emphasis added} Delegitimization, in other words, is a strategy of resistance, whose purpose is to add costs to the foreign policy objectives of powerful states. It is intended to reduce the influence of the powerful state by necessitating greater tokens of goodwill or side-payment beneficence (i.e. added costs) to secure the acceptance of its policy preferences. If states can credibly claim that the US does not care enough about the interests of the international community to invest in the ratification of multilateral treaties, this makes it
easier to ignore US preferences. As Sabrina Safrin notes of her experience as a US Department of State lawyer participating in international negotiations related to the Biodiversity Convention,

representatives of several nations told the Author on a number of occasions that *they lacked motivation to accommodate some U.S. requests because they believed that the United States would not join the agreement regardless.*\(^\text{175}\) [Emphasis added]

Unipolarity and the Post-Cold War Geopolitics of International Law

The post-Cold War geopolitics of international law described above is distinguished by the transition from economic competition among transatlantic partners subordinated by the strategic modality of the Cold War, to hegemonic contestation of US unipolar influence. Post-Cold War hegemonic contestation is exemplified by internal balancing in Europe to form and expand the European Union, and external soft balancing coordination between the EU and the G-77, creating a *de facto* strategic partnership to bind, balance, and delegitimize the United States.

The international community, it seems, was not going to allow the United States to dictate the terms of the international order at the end of the Cold War, as it had been able to do at the end of World War II.\(^\text{176}\) Rather than pursue military alliances to balance

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\(^{176}\) In 1990, George H. W. Bush spoke of the post-Cold War opportunity to achieve the unfulfilled aims of the post-World War II international order. “We have before us the opportunity to forge for ourselves and for future generations a new world order—a world where the rule of law, not the law of the jungle, governs the conduct of nations.” The air of triumphalism evoked by this statement, reminiscent of Francis Fukuyama’s often-misinterpreted article describing the ‘End of History,’ appears to have been received by the international community as an unacceptable call for a ‘New World’ Order, dominated by the US. See George H. W. Bush, Address Before a Joint Session of Congress (September 11, 1990). Text of address reproduced in Simon Chesterman, Ian Johnstone, and David M. Malone, *Law and practice of the United Nations: documents and commentary*, 2nd ed. (New York: Oxford University Press, 2016), 18. See also Francis Fukuyama, “The end of history?” *The National Interest* 16 (1989): 3-18.
against the US, however, the geopolitics of international law serves as a useful framework to describe how, in the post-Cold War unipolar era, the international community soft balanced against the US.
Chapter IV

US Ratification CBA and the Geopolitics of International Environmental Law

This chapter begins by identifying the operational mechanisms of a post-Cold War geopolitics of international environmental law. The purpose of doing so is to further clarify the scope of the geopolitics of international law framework and provide context to the analysis of the specific case studies to follow.

The binding, balancing, and delegitimizing mechanisms of international environmental law and politics are found in the rules governing the design of the treaty institutions and their legislative mechanisms. This includes the flattening of the governance mechanisms away from the structural power models of the IMF or UNSC, and the promulgation of new international norms, which some argue have the potential to impose non-consensual obligations. Although post-Cold War efforts by the EU (in particular, Germany) and Japan to gain permanent member seats on the UNSC, and ongoing efforts by the G-77 (or developing countries) to restructure the IMF/World Bank, floundered due to the path dependent nature of these institutions, new international environmental regimes were *tabula rasa* to embed structural foreign policies.

The chapter concludes by merging the insights of an existing domestic cost-benefit framework with the geopolitics of international law framework. The purpose of merging the two frameworks is to better understand the mechanisms of geopolitical influence on the distribution of costs and benefits within an IEA, which may then influence the perceived costs and benefits of ratification at the domestic level. The
product of merging these frameworks is an analytic model intended to structure and focus
the assessment of the specific IEA cases examined in Chapter VI.

Part 1(a).

International Governance Mechanisms and Soft Balancing

This section describes the institutional development of governance mechanisms
employed by international environmental agreements, and how they may facilitate efforts
to soft balance the United States.

Institutionalization of International Environmental Law and Governance

International environmental law since 1972 has been defined by the use of
international regimes to encourage ongoing cooperation. Indeed, international
environmental law is commonly described as international environmental governance,
although arguably they are not the same thing. Brunnée suggests that the “regular
meetings of MEA parties have become the forums in which most of the international
environmental lawmaking activity now takes place.” For Baharat Desai the
development of international environmental regimes is a product of an ongoing
negotiated process of institutionalization. In describing this process working slowly and
steadily to appear less threatening to sovereign states, he asserts, “it is literally a
‘creeping’ process of institutionalization.”

177 Brunnée, “Living with the Elephant,” 636.
178 Brunnée, “All together now?” 28.
179 Bharat H. Desai, Creeping institutionalization: multilateral environmental agreements &
human security (Bonn, Germany: UNU-EHS, 2006), 42.
Desai describes the ‘Conference of the Parties’ or COP as a crucial element of the institutionalization of international environmental law. Described as the supreme decision-making organ of the convention, Desai observes that the COP provides, an overarching umbrella for the institutions of the convention. As a plenary forum for the states parties to the convention, it has the final authority in legal and institutional matters.\(^{180}\) Moreover, the COP serves as a quasi-legislative political decision making process. According to Desai, the COP “not only can interpret the authority of the convention but also give effect to the in-built law-making process.”\(^{181}\) In other words, “the entire institutional mechanism of the convention works under the supervision of the COP.”\(^{182}\) The use of COPs does not diminish the power of individual states but may reduce their ability to influence the on-going negotiation of the agreement.

The Dynamic Negotiation of Frameworks, Protocols, and Amendments

In the negotiation of international environmental agreements a ‘Framework/Protocol’ approach has been frequently employed. DeSombre describes this process as one where states, “first create framework conventions, in which states agree on principles, set up a process for decision-making and find ways to increase and make use of scientific research….”\(^{183}\) And then, “these conventions are later followed by

\(^{180}\) Desai, “Creeping institutionalization,” 40.

\(^{181}\) Desai, “Creeping institutionalization,” 41.

\(^{182}\) Desai, “Creeping institutionalization,” 41.

negotiation, within the framework they set out, of protocols in which the specific abatement measures are elaborated.”

Moreover, most adopted protocols and substantive agreements involve ‘post-agreement negotiation.’ As Bertram Spector and Anna Korula observe, these negotiations are focused on actors seeking to facilitate, “mutually beneficial and acceptable means to achieve national implementation of, and compliance with, treaty provisions.” Although there is considerable functional utility to this approach, it is not without its complexities. Spector and Korula argue, “Sustained negotiations present diplomats and policy makers with the challenge of progressively reframing the problems, adjusting strategies and perceptions, and refining solutions in post-agreement negotiations.”

The use of amendment procedures, often reflecting the inclusion of new pollutants to an Appendix or Annex of a treaty, are another form of post-agreement negotiation, but that do not necessarily require a separate multilateral instrument. What are sometimes referred to as ‘tacit acceptance procedures,’ these mechanisms introduce “a presumption that a state accepts an amendment unless it makes an explicit objection within a specific time period.” According to the description offered by the International Maritime Organization,

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the body which adopts the amendment at the same time fixes a specific
time within which the Contracting parties will have the opportunity to
notify either their acceptance or their rejection of the amendment, or to
remain silent on the subject. In case of silence the amendment is
considered to have been accepted by the party.\textsuperscript{188}

The impact of these mechanisms, DeSombre concludes, is that “agreements are
thus less the end point of a negotiation than the elaboration of the process through which
continual negotiation will take place over time.”\textsuperscript{189} In light of the likelihood that the
substantive content of an agreement may change significantly between its signing, and
the debate over ratification several years later, a possible consequence of this
phenomenon is that the meaning associated with signing an agreement has changed.
Rather than a \textit{pacta sunt servanda} commitment to the aims and objectives of the treaty,
the act of signing an agreement may be intended more as a signal that a state is still
interested in participating in the post-adoption negotiations. This divergence from custom
and the Vienna Convention, however, may be unique to international environmental law
and governance.

Not surprisingly, some argue that institutionalization is not a benign technocratic
process. David Davenport, for example, observes that soon after the United States
emerged victorious from the Cold War the rules of international law and politics began to
change, and surprisingly often against US interests.\textsuperscript{190} This ‘New Diplomacy,’ he argues,
is in part a product of the expanded membership at the UN, “with 189 nations in the
U.N., compared with 51 generally recognized states in 1945, global leadership is more


\textsuperscript{189} DeSombre, “International Environmental Cooperation,” 85.

widely dispersed.”191 If, as Maurice Bourquin once commented, “international law is a legal crystallization of international politics”, then, according to Davenport, the dynamic international politics at the end of the Cold War have facilitated the use of new diplomatic methods to inject “a new global politics into international law.”192

Kate O’Neill, for example, characterizes regimes as a forum for geopolitical contestation. In particular, she notes that,

Intra-regime struggles over key guiding principles and decision-making procedures have real impacts not only in terms of defining and solving problems, but also in reaffirming or shifting the existing balance of [negotiating] power among key players.193

To the extent that voting mechanisms favor one-state-one-vote procedures rather than weighted voting, O’Neill notes that the structure of, “These [mechanisms] are particularly cogent from a southern perspective.”194

Although it is debatable how much institutions may increase a state’s power, a better argument can be made for how institutions may be used to constrain the influence of powerful states. Indeed, Brunnée argues that dynamic, ongoing,

*multilateral negotiations provide opportunities for coalition building that enable smaller states to influence outcomes and dilute the influence of more powerful states.*195 [Emphasis added]

In response to the preponderant military and economic power of the United States, Davenport posits, “part of the agenda of the new diplomacy is to attempt to isolate

195 Brunnée, “All together now?” 29.
the United States and then to criticize it for its isolation.” Edward Luck echoes and expands on this observation by asserting,

In recent years, issue-specific coalitions of so-called like-minded governments ... [have employed] multilateral fora as places to work together to seek developing country support for their high-minded sounding agendas and to isolate the US when it appeared obstructionist on individual points.\[197\]

In this regard, the objective of isolating the United States as a soft balancing mechanism simultaneously serves as a delegitimizing mechanism.

Safrin builds on this point to describe the strategic choice by regulatory entrepreneurs (most obviously the EU) to facilitate developing country participation in coalition building, rather than American participation. She argues that Europeans, in particular, “find it politically expedient to accommodate developing countries’ demands in environmental agreements to obtain these countries’ accession to multilateral environmental treaties.”\[198\]

Safrin proposes that the reason traditional Western allies have found it easy to marginalize US interests stems in part, “from the United States’ exercise of only one vote at most multilateral treaty negotiations.”\[199\] She continues,

Rather than negotiating with the United States to see if they can accommodate its needs, nations... often formulate international norms that obtain high levels of accession by small and medium states or by states with minimal de jure or de facto compliance burdens.\[200\]

\[196\] Davenport, “New Diplomacy,” 30. [Emphasis added]


\[198\] Safrin, “The Un-Exceptionalism of US Exceptionalism,” 1347.

\[199\] Safrin, “The Un-Exceptionalism of US Exceptionalism,” 1347.

Most importantly, Safrin observes, “these nations then hope to pressure the United States into treaties to which the United States objects by decrying the United States as exceptionalist” for rejecting these normative agreements held together with instrumental norms.\(^{201}\)

**Part 1(b).**

**Normative Institutional Lawmaking as a Binding Mechanism**

One of the foundational elements of international law is that states may not be bound to international obligations without their consent, but the field of international environmental law has seen the development of a number of mechanisms employed to overcome the consent constraint. This section describes some of those mechanisms.

**Normative Institutionalism, Soft Law and Emerging Custom**

In an analysis that reflects the constructivist approach, Christopher Joyner argues that regimes can be understood “as social creatures that generate normative guidelines for their member governments.”\(^{202}\) Moreover, that,

> An environmental regime can influence government participants through socialization and role enactment. Governments learn shared values and norms, which are then perpetuated through policy actions by responsible members of the regime. The regime gains normative cohesion as moral norms based on shared values become ingrained within governments.\(^{203}\)

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\(^{201}\) Safrin, “The Un-Exceptionalism of US Exceptionalism,” 1351-1352.


\(^{203}\) Joyner, “Rethinking International Environmental Regimes,” 91.
Echoing this perspective, Brunnée suggests that environmental institutions create a normative pressure to go along with consensus. Specifically, that

the ongoing interactions and negotiations among MEA parties tend to generate patterns of expectations and normative understandings that guide and constrain subsequent policy choices and legal development within the regime.\(^{204}\)

Although this may sound like an exaggeration to American readers, Desai goes even further by claiming, “the psychological pressure is so much that hardly any of the negotiating states prefers to be seen on the wrong side of the regulatory effort as well as emerging consensus.”\(^{205}\)

Timothy Meyer observes that, borrowing from the UNGA, one of the preferred techniques of normative influence available to the treaty COPs is the production of soft law (equivalent to non-binding resolutions), “instruments that are nonbinding but have legal consequences through their interpretation or exposition of what binding legal obligations mean or how they will be interpreted and implemented.”\(^{206}\)

Desai remarks that the institutionalized process central to modern IEAs has produced a “significant corpus of ‘codified’ normative frameworks for regulating environmental behavior of the sovereign states.”\(^{207}\) These ‘codifications’ take on new meaning, however, in the context of the development of customary international law. Desai explains,

\textit{A sense of urgency is generally inherent in most of the multilateral environmental negotiations}. Unlike the traditional international law

\(^{204}\) Brunnée, “All together now?” 28-29.

\(^{205}\) Desai, “Creeping institutionalization,” 37.


\(^{207}\) Desai, “Creeping institutionalization,” 29.
making, *states cannot now afford the luxury of waiting for the emergence of a hardened customary norm through the practice of states.*

[Emphasis added]

Desai argues instead, “soft law norms are often adopted as an instant guideline for regulating states’ behavior.” And that this soft law “in many cases becomes just a prelude to the formulation of hard law in the form of a multilateral environmental agreement.” The continuing production of soft law also provides ongoing opportunities to reaffirm the importance of emerging normative principles.

This purposeful use of soft law to provide support for the development of customary international law is a technique whose legitimacy has arguably increased in the wake of the 1986 *Nicaragua Case*. Patrick Kelly notes how US votes in support of political resolutions or soft law were later used against the United States. In the *Nicaragua Case*, Kelly observes,

> the [International Court of Justice] deduced *opinio juris* on the customary obligation to refrain from the use of force from [US] consent to non-binding U.N resolutions and the American Convention on Rights and Duties of States without an examination of state practice.

This form of progressive development and/or codification of customary international law is commonly viewed as a useful clarification of general state obligations.

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208 Desai, “Creeping institutionalization,” 36.


that increase the general welfare.\textsuperscript{212} On this assumption, codification produces Pareto-improving gains for all actors in the international order.

Contrary to this interpretation, however, Meyer posits that this assumption disguises the distributive consequences of codification. For Meyer, codification is better understood not through the clarification approach but through a capture approach. He argues that increasingly, “states use treaties, and the explicit bargaining processes through which treaties are made, to shape customary rules in a way that works to their individual benefit.”\textsuperscript{213}

According to Meyer, “the codification of international custom is consistent with accounts of law formation in which repeat players ‘play for the rules’.”\textsuperscript{214} Echoing the assertion that the ongoing negotiation of international law in an institutionalized process provides a forum for geopolitical contestation, Meyer contends,

\begin{quote}
Lawmaking processes are a battleground on which international actors… compete on the basis of their political and policy interests in an attempt to define and interpret rules to advantage them in their interactions with other actors.\textsuperscript{215} [Emphasis added]
\end{quote}

\textsuperscript{212} For a fascinating look at how historical geography and the moral urge for progressive development complicate the legal practice of the codification of customary law, see David Koller, “…and New York and The Hague and Tokyo and Geneva and Nuremberg and…: The Geographies of International Law,” \textit{The European Journal of International Law} 23 no. 1 (2012): 101-105. Citing Lassa Oppenhiem, “[i]t is the task of history, not only to show how things have grown in the past, but also to extract a moral for the future out of the events of the past’ Koller argues that in modern international legal scholarship, “The line of progress is given the air of an immutable historical or moral law, reflecting the deep-rooted faith among international lawyers that not only has international law developed progressively in the past but also it should continue to do so in the future.” and as a result of blurring the line between progressive development and codification, the subjective morality of the former is disguised by the precision and objectivity of the latter.


\textsuperscript{214} Meyer, “Codifying Custom,” 21.

Codification provides a low-cost mechanism that has the potential to provide significant benefits to the norm entrepreneur. Meyer argues that the degree to which this process “allows states to influence the content of rules binding on all states” it does so “without having to negotiate a universal treaty, with all the costs and compromises such negotiations entail.”

Moreover, “by framing a treaty rule as an interpretation of an existing customary rule, codifying states can change the calculus of states inclined to object to the rule’s adoption.” This is especially salient for the United States when the proposed norm does not provide the US with net benefits, or more to the point, imposes net costs. Meyer continues,

*Instead of simply disagreeing with the proposing state, objecting states must object to the views and practices of all parties to the codifying treaty. In effect, codification creates what one might think of as a collective bargaining framework. No longer can objecting states bargain individually with states over the correct interpretation of the codified rules. Instead, objecting states must bargain against the collective weight of all codifying states.*

On the assumption that the United States is more likely to want to protect the *status quo* of the international order it has created, the codification process serves as a tool to bind, balance, isolate, delegitimize, and otherwise constrain the influence of the United States.

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Instrumental Norms

In the post-Cold War era, the two most prominently claimed emerging principles in IEAs are the ‘Precautionary Principle’ and ‘Common but Differentiated Responsibilities.’ Norm entrepreneurs from the European Union and the G-77 have been their primary advocates and the United States has been the most resistant to accepting these as broad general principles of international law or emerging custom.\(^{219}\)

**Precaution.** The United States has consistently objected to the inclusion of the precautionary principle in IEAs, and moreover, has persistently challenged claims that it is gaining customary international law status by way of repeated inclusion in IEAs.\(^{220}\)

The central criticism of the precautionary principle by the United States is that its advocates have not presented a cogent unified definition of its meaning or implications. Scholars have identified dozens of competing versions, which the US foreign policy establishment may feel produces a dangerously vague and expansive standard.\(^{221}\)

From these competing definitions, according to Weiner, three archetypal formulations emerge: (1) Uncertainty does not justify inaction; (2) Uncertainty justifies action; and (3) Uncertainty requires shifting the burden and standard of proof.

Version 1 is found in the 1992 Rio Declaration, which states, “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used

\(^{219}\) Brunnée, “All together now?” 629.

\(^{220}\) Brunnée, “All together now?” 629.

as a reason for postponing cost-effective measures to prevent environmental
degradation.”

Version 2 is a more aggressive interpretation or precaution exemplified by the
1998 Wingspread Statement, which holds, “When an activity raises threats of harm to
human health or the environment, precautionary measures should be taken even if some
cause and effect relationships are not fully established.”

Version 3 is the most aggressive standard, which puts the onus on actors to defend
their actions, even in the absence of evidence that those actions present a significantly
negative pollution externality that requires regulation. For example,

the applicant or proponent of an activity or process or chemical needs to
demonstrate that the environment and public health will be safe. The proof must
shift to the party or entity that will benefit from the activity and that is most likely
to have the information.

Weiner notes that one implication of this variation is that, “in reality, precaution
has been more a strategy than a principle.” Moreover in the context of Europeans
criticizing the US for refusing to accept a broad precautionary principle as an emerging
custom, Weiner argues that the transatlantic rhetoric over comparably high standards of
precaution may reflect “a new terrain of international rivalry after the end of the Cold

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Risk Regulation in the United States and Europe” (Pre-publication draft for a Harvard Law School
workshop, April 8, 2010), 8.

Public Health and the Environment: Implementing the Precautionary Principle (Washington DC: Island
Press, 1999), 353.

224 Carolyn Raffensperger and Joel Tickner, eds. Protecting Public Health and the Environment:

War.”

The risk for the United States in supporting the codification of a vague standard of precaution as emerging custom is that the stringency of the norm is likely to be defined at a later date in an international forum. Here, it is argued, the promulgation of instrumental norms and the governance mechanisms that reduce American influence may be used synergistically against US interests.

What is frustrating about European attempts to propagate emerging custom to guide US domestic and foreign policy is that the US has some of the strongest environmental laws on the world.\textsuperscript{227} The stringency of EU and US laws may not be perfectly symmetrical but it is fair to say that both take a precautionary approach, yet focus on different risks. In one example, Weiner notes equally precautionary but nonetheless divergent regulatory approaches,

the US tightly regulates diesel engines to reduce human exposure to fine particulate matter, while Europe promotes diesel engines to reduce carbon dioxide emissions and global warming.\textsuperscript{228}

What is noteworthy about the EU criticism of US refusal to codify a precautionary principle is that relative to the rest of the world the US is at the high end of the precautionary spectrum. If the EU truly wanted to reduce pollution impacts to promote global welfare, there exist far greater opportunities to find regulatory low-hanging fruit outside the United States. Given the choice of bringing the members of the G-7 up to the


\textsuperscript{228} Wiener, “The Real Pattern of Precaution.” 27. While corporate malfeasance should not necessarily be blamed on European policy decisions, the widespread manipulation of diesel engine emissions data by European carmakers adds further irony to European rhetoric about lax American regulatory standards. See Jack Ewing, \textit{Faster, Higher, Farther: The Volkswagen Scandal} (New York: W.W. Norton & Company, 2017).
EU regulatory standard or all states outside the G-7 up to the US regulatory standard, it is not clear that the EU would choose the latter, despite the likelihood that it would create much higher levels of global welfare. As such, in many cases, it may be reasonable to infer that the EU is more concerned with regulatory competition, than global welfare.

**Common but differentiated responsibilities.** The post-Cold War legal and political concept of CBDR asserts that international environmental obligations should “differentiate between developed and developing States to reflect their economic circumstances and history.”[229] Although the United States has agreed on numerous occasions that employing ‘differentiated responsibilities’ is a practical tool to broaden participation in IEAs, it has persistently objected to its status as a general principle of international law or as emerging custom.

Brunnée notes that the American position reflects the concern that, “legally binding common but differentiated responsibilities would significantly alter the structure and processes of international environmental law by enshrining a basic distribution of global environmental obligations between South and North.”[230] Further she argues the United States is “intent on avoiding any implication of legal responsibility for global environmental problems….”[231] Perhaps, most importantly, Brunnée observes, the United States has resisted claims that past contributions to a given environmental problem, or relative capacity to address it, predetermine MEA design such that developed countries must take the lead in assuming MEA obligations, that

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[231] Brunnée, “All together now?” 34.
developing countries’ responsibilities are always reduced, and that any action by developing countries must be financially and technically supported by developed countries.\textsuperscript{232}

Like precaution, CBDR has numerous broad definitions and promotes varying degrees of stringency. The operationalization of CBDR may include: (1) exemptions from specific obligation; (2) less stringent obligations; (3) longer periods of time to meet obligations; and/or (4) funding obligations for industrialized states.\textsuperscript{233}

One of the more controversial elements of CBDR is that it does not, by itself, define who is deserving of differentiation, nor does it clarify when a state is no longer deserving of differentiation. In this context, Duncan French argues, “that differentiation cannot simply impose additional obligations on developed States \textit{ad infinitum}.”\textsuperscript{234}

The post-Cold War confidence of the global South in pursuing the codification of CBDR reflects the perceived leverage they felt was provided them by developed country concern over global pollution. If the industrialized states wanted broad global participation, environmental imperialism was to be resisted, and indeed the developed states would have to compensate the developing world. Adil Najam highlights several expressions of this confidence before the 1992 Rio Summit, when he notes,

a Caribbean official suggested that \textit{“for the first time in more than a decade, the developing countries have an issue [the environment] where they have some real leverage,”} while India’s environment minister went even further to proclaim that \textit{“the begging bowl is [now] really in the hands of the Western world.”}\textsuperscript{235} [Emphasis added]

\textsuperscript{232} Brunnée, “All together now?” 34.
\textsuperscript{233} Palassis, “The IMOs Climate Change Challenge,” 173.
The perception of increased Southern bargaining leverage is reflected in the role reversal of funding obligations. CBDR clauses that make developing world compliance contingent on developed world-funding reverse the status quo of donor state pledges of financial support. As Mark Drumbl contends,

In practical terms, it is one thing to say that A should (or, even, shall) provide X to B; it is quite another thing to say that should A not effectively provide X to B, then B’s promises to A cease to be binding.\footnote{Mark A. Drumbl, “Northern Economic Obligation, Southern Moral Entitlement, and International Environmental Governance,” Columbia Journal of Environmental Law (2002): 369.}

The commitments of developed and developing states within the UNFCCC, for example, are described as follows:

*The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.*\footnote{UNFCCC, Article 4, Commitments, Section 7.}

Further, developing states have pursued a strategy of attempting to incorporate an \textit{ex post facto} application of CBDR norms into treaty regimes that previously had not expressly differentiated between parties. Susan Biniaz notes that,

countries will later assert that the principle of common but differentiated responsibilities dictates that compliance regimes distinguish between developed and developing countries.\footnote{Susan Biniaz, “Common but Differentiated Responsibilities,” American Society of International Law. Proceedings of the Annual Meeting (2002): 363.}

\begin{flushright}
\end{flushright}
Developing countries have gone so far as to assert that they should be exempt from paying membership fees to treaty regimes or UN entities like the United Nations Environmental Programme, that they joined with the understanding that doing so included a clear financial obligation.\textsuperscript{239}

Instrumental Norms as Structural Foreign Policy

In isolation, a reasonable argument can be made for taking a precautionary approach to environmental protection, and that pragmatic reasons support differentiation of international standards. Postponing regulation until scientists can irrefutably demonstrate causality may lead to the irreversible destruction of a specific ecosystem. Furthermore, beyond the practical utility of increasing voluntary participation through positive linkage found in the concept of CBDR, there are reasonable challenges to the equity of harming others through an application of formal equality. Anatole France captured this idea beautifully with his pithy statement, “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”\textsuperscript{240} Depending on the context, in other words, there are benefits to incorporating precaution and differentiation into international law making.

However, the effects of these norms do not exist in isolation. In its strongest form, the precautionary principle shifts the onus onto the polluter to justify its emissions, rather than the regulator justifying its regulations. As Ross claims, “The precautionary principle

\textsuperscript{239} Biniaz, “Common but Differentiated Responsibilities,” 363.

\textsuperscript{240} Anatole France, \textit{The Red Lily} (Rockville, Maryland: Wildside Press, 2007 Reprint), 75. Contains a different (clunkier) translation of this quotation: “In the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”
creates an evidentiary threshold that shifts the burden of proof to those who seek to engage in potentially harmful activity.\textsuperscript{241}

The G-77 have no objection to this fundamental reallocation of international rights and responsibilities, as long as it is clear that this will not negatively impact developing countries. This exception for developing states is accomplished by making the precautionary approach contingent on the recognition of common but differentiated responsibilities (another fundamental reallocation of international rights and responsibilities).

CBDR shifts the onus onto the developed world to provide the developing world with sufficient compliance assistance to regulate pollution. This reverses the presumption that sovereign states are responsible for their own domestic implementation of international commitments, and attempts to shield the global South from the donor state strategy of making development assistance conditional on the implementation of international commitments made by the developing world.

If the United States sees the ratification of a treaty as sufficiently profitable, the inclusion of these normative claims may be viewed as less objectionable. But if the United States questions the probability of profitable international cooperation, the \textit{a priori} existence of precaution and differentiation as binding guidelines may further constrain the possibility of net benefits for the US.

Indeed, if precaution and differentiation are both viewed as binding guidelines in all international negotiations, regardless of context, they may produce a synergistic effect that makes it impossible to produce Pareto-improving IEAs. The US, for example, may

be put in the position, not only of incurring the cost of increasing its regulatory standard in line with the most precautionary standard, but also be committed to funding compliance assistance for the developing world, regardless of the American domestic benefits of doing so.

In an article that describes how all states, rather than solely the US, demonstrate exceptionalist tendencies in international negotiations, Safrin argues CBDR and the precautionary approach are used to synergistic effect. When CBDR clauses commit developed states to fund the implementation of environmental obligations in the developing world, this provides an economic incentive to increase the stringency of standard. Safrin observes,

> the expectation that others will pay for the implementation of environmental regulations causes developing countries to propose and support unrealistic standards that countries who shoulder the responsibility for the costs of their implementation cannot afford.  

In my interpretation of this synergistic phenomenon, the precautionary Europeans who are proposing regulations at a higher level than US standards have a natural ally in developing states that are happy to agree to the EU standard as long as they do not have to pay for it, or are otherwise exempted from it. In other words, the EU may be seen to apply normative principles as a tool to internationalize their regulatory optima on their peer competitors, who are not exempted from the ‘universal’ standards, rather than seeking to increase global welfare.

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Part 1(c).

Delegitimization and the Diplomatic Strategy of Back-Footing the US

The consent constraint in international law provides sovereign states with a veto mechanism to avoid being bound to international obligations that are perceived to impinge on their national self-interest. The utility of this mechanism is in tension with the fact that its overuse allows that actor to be portrayed as obstructionist or isolationist by the international community. As a result, if a coalition of states is determined to portray a state as obstructionist or isolationist, this may be achieved by negotiating international agreements that impinge on a target state’s national self-interests. This section examines this strategy of delegitimization in relation to the policy autonomy of sovereign states.

Anchoring Multilateralism: Putting the Onus of Failure on the Defensive Positionalist

In an article titled, *Resisting the Lonely Superpower*, Eric Voeten analyzes United Nations General Assembly voting behavior to understand the apparent preference gap between the United States and the international community and to test the hypothesis that the post-1994 Congressional spike in conservatism led to the divergence. He concludes, “The preference gap between the United States and the rest of the world widened considerably and at a constant rate between 1991 and 2001. It appears that U.S. hegemony has elicited almost universal resistance.”\(^{243}\)

This leaves open the potential to “interpret these results as evidence that the widening preference gap is purely a structural phenomenon and thus largely unaffected

\(^{243}\) Voeten, *“Resisting the lonely superpower,”* 747.
by apparent temporal variations in U.S. foreign policy.”\textsuperscript{244} From this perspective, “the fact that other countries change their position, while the U.S. position remains the same is an indication of a widening gap in policy preferences…” but does not, by itself, suggest that American preferences have changed.\textsuperscript{245} Rather it raises the possibility that the perceived threat from American hegemony exists prior to actual US foreign policy behavior.

In an analogous process William Zartman and Saadia Touval call “anchoring multilateralism,” either a single state can move away from the issue \textit{status quo} and from the structural \textit{status quo} of the many states, or the many states can move away from the structural \textit{status quo} of the single state.\textsuperscript{246}

Reusing a metaphor from the introduction, in the post-Cold War era the EU and G-77 may be seen as taking a big step forward to reform the international order to their benefit through the negotiation of IEAs, to which the US objects, rather than the US taking a big step backward vis-à-vis its support for international environmental cooperation.

Whether or not these geopolitics of international law mechanisms (the new diplomacy and the weaponization of institutions; normative institutionalism, soft law and emerging custom; instrumental norms as diplomatic strategy; and anchoring multilateralism) constitute a premeditated strategy or simply a convergence of responses to systemic imperatives is difficult to ascertain. Nevertheless, the strategic consequence remains the same: The negotiating positions of the EU and G-77 put the onus of failure

\textsuperscript{244} Voeten, “Resisting the lonely superpower,” 747.

\textsuperscript{245} Voeten, “Resisting the lonely superpower,” 731.

\textsuperscript{246} Zartman and Touval, \textit{The Limits of Multilateralism}, 52.
on the US, whose fundamental negotiating position is to join treaties that provide the United States net benefits from participation. As the EU and G-77 coalitions have entrenched their normative positions, this has made practical compromises more elusive. As Zartman and Touval warn, “once established, a coalition tends to hold on to its position inflexibly because of the high costs that the formation of the coalition entailed.”

In the context of post-Cold War IEA negotiations, the EU and G-77 have taken the initiative and used norms instrumentally in an effort to change the status quo. This supports Freeman’s assertion that, “the essence of strategy is the effort to gain and retain the initiative…” as well as Fareed Zakaria’s observation that “states use the tools at their disposal to gain control over their environment.”

Contrary to the normative structural foreign policy positions of the EU and G-77, American negotiators, guided by a rational adherence to CBA considerations, are forced into a defensive position vis-à-vis their negotiating opposites. Thus, despite having some of the most stringent environmental laws in the world, the US finds itself in the position of a “defensive positionalist.” Assertive positional negotiating by the EU and G-77, in other words, increases the US tendency to adopt a defensive negotiating posture.

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US Self-Binding Multilateralism: Sovereignty as Policy Autonomy

One of the most troubling elements of post-Cold War IEP literature is that the importance accorded to the cornerstone principles of sovereignty, the need for voluntary consent to international obligations, the implicit need for all states to view participation in a treaty regime as profitable, etc… seem to be diminished or ignored by environmental scholars critical of the United States. Stephen Hopgood, for example, argues that the guiding principle of US foreign policy is the best outcome for ‘the United States’ understood as a territorial entity whose citizens’ welfare has priority over non-American nationals.²⁵¹

Hopgood clearly intends this as a criticism of US foreign policy, but ignores the fact that this approach is not so different from any other state’s interests or foreign policy objectives. After all, the very purpose of the state is to prioritize and protect the interests of its people over the interests of those beyond its borders.

Criticism of American ‘à la carte multilateralism’ or “the expectation that [the United States] can pick and choose within the body of international law those commitments it wishes to apply to itself,” or that, “more so than for any other industrialized country, the United States is willing and able to view environmental multilateralism as a tool rather than as a guiding principle” reflects a fairly accurate description of the American approach to environmental foreign policy.²⁵² But what is rarely acknowledged within these critiques is the reality that every state must decide for


itself whether or not to consent to international obligations, based on the simple rationalist criteria that doing so provides greater benefits than refusing to do so.

In Ikenberry’s description of self-binding multilateralism, described in Chapter III, Part 2, he argues that a cost-benefit calculation guides the logic of a powerful state’s willingness to agree to limit its policy autonomy through path dependent mechanisms; the powerful state must view the benefits of restraint as greater than the benefits of unrestrained behavior. In effect, he is describing a sovereignty bargain from the perspective of a hegemon that focuses primarily on the autonomy element of state sovereignty.

In this context, Ikenberry views the negotiation and ratification of international agreements by powerful states in terms of sacrificing policy autonomy in order to secure greater benefits from policy coordination. Assuming state A is able to credibly commit to constrain its autonomy, several factors shape its cost-benefit calculation:

(1) One is whether the policy constraints imposed on other states (states B, C, and D) really matter to state A. If the “unconstrained” behavior of other states is judged to have no undesirable impact on A, then A will be unwilling to give up any policy autonomy of its own.

(2) It also matters if the participating states can credibly restrict their policy autonomy. If A is not convinced that B, C, and D can actually be constrained by multilateral rules and norms, it will not be willing to sacrifice its own policy autonomy.253

Regarding the first factor, the current or anticipated scale of impact by foreign sources of pollution must exceed the cost of constraining the behavior of those foreign actors. Regarding the second factor, if ‘A’ has a robust domestic legal system that allows citizen suits to ensure it complies with implementing legislation, and the treaty in question is

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likely to impose significant costs, ‘A’ has to believe that ratifying the treaty will not bind it to a standard others, with less robust domestic legal systems, are unlikely to meet. Moreover, if the hegemon is expected to provide significant compliance assistance to address the second factor, the scale of the benefits provided the hegemon from the first factor become all the more important as it considers constraining its own policy autonomy.

Indeed, the idea that a powerful state may profit from a strategy of self-binding where it perceives net benefits from cooperation is distinct from the more problematic assertion that a hegemon has a normative or moral obligation to restrain its policy autonomy, to the benefit of its strategic competitors, even when doing so creates net costs. To justify this proposition, it is necessary for adherents of that view to reverse the logic that a hegemon is able to supply collective goods, with the view that the benefits of hegemonic power are contingent on its meeting demands for collective goods.

Nevertheless, to other states, the hegemon’s pursuit of net benefits may make it appear to be disproportionally concerned with selfishly protecting its sovereignty.

Sovereignty Bargains: Disaggregating Sovereignty Beyond Policy Autonomy

The questionable perception in much of the IEP literature that US unilateralism (to defend American sovereignty) is a uniquely self-serving form of exceptionalism may be usefully explained through a conceptual disaggregation of sovereignty. As Karen Litfin argues,

Because international environmental responses typically involve a trade-off among autonomy, control, and legitimacy, it is more accurate to say
that states engage in “sovereignty bargains” (Byers 1991) rather than ceding some monolithic principle of sovereignty. As such, for Litfin, the core conceptual elements of sovereignty are (1) Autonomy, (2) Control, and (3) Legitimacy. And although most states will be concerned with all three elements of sovereignty, based on the individual political and economic context of a state, states may value them differently. These asymmetries make sovereignty bargains possible, which, as a form of issue linkage, in turn may facilitate international cooperation. Sovereignty bargains in the negotiation of IEAs are likely to involve trading a loss of autonomy for increased control or legitimacy.

(1) Autonomy refers to the degree of independence a state possesses in international decision-making and action. As with the concept of statecraft, within Litfin’s conception of control and legitimacy these elements of sovereignty may be further disaggregated into internal and external components.

(2) Control refers to the ability of a state to produce behavioral change among its own people and, for example, to address the impact of foreign sources of pollution or regulatory intervention.

External control (closely related to autonomy) concerns the ability of the state to effectively challenge the sources of (a) foreign pollution as a form of foreign intervention, and/or (b) the imposition of international regulatory standards as a form of

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foreign intervention.\textsuperscript{257} It concerns the ability of a state to influence the behavior of other states and/or resist their influence.

Internal control, on the other hand, concerns the ability of the state to effectively regulate domestic pollution. Despite concern over external control issues, many developing states have neither the capacity, nor in many cases the will, to implement international regulatory standards. Developing states have demonstrated that they are willing to cede autonomy in exchange for material resources and technology, as well as increased technical, legislative, and/or regulatory expertise.\textsuperscript{258} Importantly, internal control is not only the concern of developing states. Effective statecraft relies on strong internal institutions with which to implement regulatory standards. The development of the EU as a regulatory power, for example, has relied on the willingness of the member states to delegate policy autonomy to a supranational institution. This delegation has increased internal control of the EU, which has facilitated the removal of intra-EC non-tariff barriers and the harmonization of environmental regulatory standards.

(3) Legitimacy refers to the recognition by actors inside and outside the state that it has the authority to make and enforce internal and external rules.\textsuperscript{259}

External legitimacy concerns primarily, (a) recognition from other states that your state has standing in international law, and/or (b) recognition from other states that your state is actively engaged in international cooperation and, for the most part, acts in good faith.

\textsuperscript{257} Liftin, “Sovereignty in World Ecopolitics,” 184.

\textsuperscript{258} Hochstetler, Clark, And Friedman, “Claims and bargains at the UN,” 610.

\textsuperscript{259} Liftin, “Sovereignty in World Ecopolitics,” 169, and Hochstetler, Clark, And Friedman, “Claims and bargains at the UN,” 593.
Internal legitimacy, on the other hand, relates to whether or not the populace/electorate recognize the authority of the state to regulate their behavior. One element of internal legitimacy (closely related to internal control) relates to the capacity of the state to negotiate politically acceptable compromises between sub-national (or in the case of the EU, member state) stakeholders. As Jesse Ribot argues,

Even when states express a will and have the finances to implement a given set of policies, there is no guarantee that they will be able to do so. \( \ldots \text{the ability of the state to execute its will depends on how policies redistribute or limit resources and resource access.} \) [Emphasis added]

It is noteworthy, however, that Litfin’s conception of internal legitimacy is not simply analogous to internal control, as she contends that the authority of the modern state “rests not merely on coercion, but on legitimacy.”

This view is likely to be especially important within the EU, as the ‘sovereign’ member states negotiate the delegation of environmental law making and enforcement power to the institutions of the European Union. The legitimacy of those EU institutions will reflect a number of questions, for example: Is there a democratic deficit between the objectives of the European Commission and EU citizens? Does the Commission represent the interests of southern European states as well as it does the interests of northern European states?

Litfin’s conception of sovereignty bargains, where policy autonomy is traded for increased control or legitimacy benefits, complements our understanding of two-level games and statecraft, as well as value-claiming issue-linkage, as it usefully expands Ikenberry’s focus on autonomy.

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Most importantly, however, as sovereignty bargains relate to a cost benefit analysis of US ratification in relation to its negotiating partners, it is not clear that the United States perceives much in the way of internal control or internal legitimacy benefits to be gained from post-Cold War IEAs. On the other hand, the EU and most developing states are more likely to view these IEAs as a significant source of internal control and legitimacy benefits. As such, the EU and G-77 are more likely to see benefits from multilateralism for multilateralism’s sake, whereas the United States is more likely to be more concerned with securing a self-enforcing agreement to address the environmental problem at hand.

In other words, the concept of sovereignty bargains helps us understand why the US is less willing to sacrifice its policy autonomy; it receives comparatively less benefits from doing so.

In the context of US ratification decisions for multilateral treaties that impose net costs on the United States, Charles Krauthammer cautions against the use of self-binding multilateralism which seeks external legitimacy from the international community, as doing so is likely to serve as an precedent for obstructing the pursuit of American interests. Krauthammer insists,

> One does not go it alone or dictate terms on every issue. But appeasing multilateralism does not assuage it; appeasement merely legitimizes it. Repeated acquiescence to provisions that America deems injurious reinforces the notion that legitimacy derives from international consensus, thus undermining America’s future freedom of action.…

Perhaps more importantly, if the United States legitimizes normative multilateralism by ratifying Kaldor-Hicks agreements imposing net costs on American

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taxpayers, it may imperil a return to the negotiation of new self-enforcing international environmental agreements seemingly unavailable between 1989 and 2012.

Kaldor-Hicks agreements reflecting the added costs of geopolitical competition and geopolitical contestation, which primarily benefit states other than the US, have the potential to derail efforts to coordinate the supply of collective goods by excluding the state whose participation is necessary for their supply.

Part 2.

Expanding Davenport’s Analytic Framework

This section seeks to merge the geopolitics of international law approach with the insights of an analytic framework designed to examine the domestic costs and benefits of US leadership in the negotiation of international environmental agreements.

An Economic Theory of US Leadership

Although her work focuses on US leadership in IEA negotiations in relation to the effectiveness of those regimes, rather than analyzing specific US IEA ratification decisions, in my view, Deborah Davenport’s book titled, *Global Environmental Negotiations and US Interests*, provides the most comprehensive analytic framework to examine US ratification decisions.\(^{263}\)

\(^{263}\) Davenport, *Global Environmental Negotiations*. 
In her economic theory of leadership, Davenport proposes that “the willingness of the United States to lead negotiations to an effective agreement depends on its explicit or implicit perception of the costs of agreement.”\textsuperscript{264} Crucially, she argues,

\begin{quote}
Although both [a state’s] will and capability are affected by the costs of action, they differ in that will depends not just on having enough resources to undertake an action but also on deriving a benefit from the action that is greater than its cost.\textsuperscript{265} [Emphasis added]
\end{quote}

Taking a rational choice approach, Davenport adopts the position that “the only framework that can accommodate… the difficulty in obtaining cooperation on a global commons problem… is one based on an analysis of relative perceived costs and benefits of an effective solution.”\textsuperscript{266} Moreover, Davenport notes that the implications of different problem structure asymmetries as well as distributive concerns are likely to explain ratification behavior.\textsuperscript{267}

Rather than consider simply (a) the ecological vulnerability of the state, and (b) the cost of mitigation, Davenport expands on Sprinz and Vaahortanta’s more parsimonious interest-based model to useful effect. Davenport proposes a more robust analytic framework to disaggregate the problem structure of IEA negotiations, which considers six variables:

The first variable, environmental benefits, is broadly analogous to domestic ecological vulnerability.

\begin{quote}
\begin{itemize}
\item \textsuperscript{264} Davenport, \textit{Global Environmental Negotiations}, 31-35.
\item \textsuperscript{265} Davenport, \textit{Global Environmental Negotiations}, 31-35.
\item \textsuperscript{266} Davenport, \textit{Global Environmental Negotiations}, 6.
\item \textsuperscript{267} Davenport, \textit{Global Environmental Negotiations}, 11.
\end{itemize}
\end{quote}
The second variable, avoidance of economic costs, incorporates DeSombré’s incentive to internationalize domestic regulations (but unlike DeSombré focuses on foreign state efforts to internationalize their regulations on the US).

The third variable, positive economic benefits, incorporates Kenneth Oye and James Maxwell’s argument that states seek particularistic benefit from international regulations (these concerns were minimized or missed by Sprinz and Vaahortanta’s 1994 article).

The fourth variable, cost of halting activities, is similar to Sprinz and Vaahortanta’s ‘cost of mitigation’ but also recognizes that states may face asymmetrical costs from a universal regulatory standard based on unique country-specific patterns of consumption or development. As DeSombré argues, it is important “to determine who is hurt most by the problem and who is hurt most by the solutions” as these factors will affect ratification decisions.

The fifth variable, cost of substitutes, which is closely related to the fourth, concerns the difference in cost between the previous source of pollution and its substitute. If the substitute is a new proprietary product, produced exclusively by industries in select developed countries, the fifth is also linked to the third.

And lastly, the sixth variable, cost of manipulation, incorporates the assertions by Mitchell and Keilbach, as well as Barrett, that issue linkage may be used to produce profitable and stable self-enforcing agreements. However, like Barrett, Davenport also

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269 See Weiner, “Global Environmental Regulation,” 699, on the externality problem structure described in Chapter II, part 2.

warns that there is a limit to the extent the United States is willing to support linkage proposals (as these efforts to stabilize an agreement may render ratification unprofitable for the US).  

The Cost of Manipulating Stability

The first five variables of her analytic framework primarily concern the US perception of profitability of participation, leadership, and/or ratification. In the sixth, Davenport addresses stability concerns, related to both problem structure asymmetries and distributive concerns, and crucially, where the US perception of profitability (or willingness to pay) may shift due to an excess of what James Sebenius describes as “value-claiming issue-linkage.” In effect, Davenport describes a process where other states make demands to secure their own ratification, but in the process exceed the costs the US is willing to pay for the benefits it receives from ratification. Specifically, Davenport cautions,

value-claiming may push the prospective costs of manipulation up so much that the cost-benefit equation for the United States shifts, even in situations in which US calculations otherwise favor an effective agreement.  

Davenport’s insight into this threat from value-claiming issue-linkage, which is the crucial element of her framework I apply systematically to the cases via the analytic model, is exacerbated if the United States perceives itself to already be facing net costs

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271 See Barrett, “Critical Factors,” 52. “If some countries are made to shoulder too large a burden, they may refuse to supply the [collective] good.”


273 Davenport, Global Environmental Negotiations, 33-34.
from participating in an IEA. In such cases, value-claiming linkage by other states will only serve to further reduce incentives for US ratification.274

Systemic Imperatives and the Geopolitics of International Law

Although Davenport profitably notes the influence of value-claiming linkage, the existence of transatlantic regulatory competition, and the prevalence of North-South contestation, as a result of her focus on US leadership on regime effectiveness, rather than the geopolitics of US ratification per se, she minimizes the systemic impact of the end of the Cold War and the balancing imperative initiated by post-Cold War unipolarity. Moreover, Davenport does not consider, beyond a brief mention, efforts to apply structural foreign policy to the negotiation of international law seeking to secure benefits beyond the issue area of the IEA in question.

As such, Davenport does not systematically investigate why the international community might be willing to permit post-Cold War value-claiming issue-linkage to overwhelm the perceived net benefits available to the US from negotiation. Or alternatively, why the international community might be willing to impose net costs on the US in post-Cold War IEAs. This is the phenomenon I conceptualize as negotiating Kaldor-Hicks agreements rather than Pareto-improving agreements.275 I argue that

274 Similarly, in 2002, Drumbl predicted, “Should the costs of developed nation participation in international environmental agreements become perceived as too onerous, [this] may create a new impasse whereby the developed world becomes reluctant to sign international environmental treaties or these treaties, even if signed, lack the political will to become ratified domestically in developed nations.” By contrast, I concur with Davenport that by 2002, for the US, this has already taken place. Drumbl’s more prescient comment that “This might presage the demise of the post-Cold War era's flurry of precautionary environmental multilateralism that embedded norms of cost-sharing into the structure of negotiations.” is, I argue, in the process of taking place. See Drumbl, “Northern Economic Obligation,” 381 and 382.

275 Meyer also employs this device as a conceptual description. Where we differ is that, although I employ the term ‘Pareto-improving agreements,’ I am in fact referring to the more stringent standard of
introducing the geopolitics of international law framework into Davenport’s analytic framework fills this gap (strengthening her already robust analytic framework).

Adapting Davenport’s analytic framework in this manner expands the hypothesis that the US has not ratified post-Cold War IEAs because they have presented net costs, to a hypothesis that addresses why post-Cold War IEAs have presented net costs to the United States.

The incorporation of the geopolitics of international law framework to analyzing the role of international law as a tool of statecraft, and its negotiation as a forum for geopolitical contestation, introduces a new modality to assess the costs and benefits of ratification decisions. I argue that this is a modality that has been under-observed in the IEP analysis of US environmental foreign policy.

After providing a theoretical foundation for the geopolitics of international law framework, I have highlighted operational mechanisms at work in a post-Cold War geopolitics of international law and post-Cold War geopolitics of international environmental law and politics. My intention here has been to consolidate a number of ad hoc observations into a coherent framework for analysis.

As such, the aim of incorporating the geopolitics of international law framework is to facilitate an understanding of how the geopolitics of international environmental law operates, and to explicate how and why these operational mechanisms may be combined to impose prohibitively high ratification costs on the United States.

Part 3.

The Analytic Model

The design of the analytic model is a product of merging the geopolitics of international law framework with the insights of Davenport’s domestic cost-benefit framework. The purpose of the analytic model is to structure the comparison of the eight IEA cases and illuminate the broader geopolitical context within which any individual negotiation takes place.

In other words, the model is intended to capture (1) if US ratification decisions reflect consistent rational cost-benefit assessments; (2) if the perception of net costs from ratification represents the increased imposition of foreign costs; and (3) if the US perception of net costs is significantly influenced by geopolitical objectives of states intentionally responding to systemic imperatives. The analytic model is expressed in the form of questions to structure and focus each case. They are:

[1] Assessing the influence of problem structure on international environmental cooperation: Employing axioms from the rationalist approaches to IEP, how does problem structure (especially externality, burden sharing and compliance cost asymmetries addressed in Chapter II) impact the costs and benefits of participation incentives for specific international agreements seeking to coordinate the supply of a collective good?

[2] Assessing the influence of geopolitics on international environmental cooperation: How do regulatory competition, normative statecraft, and structural foreign policies (encompassed in my conceptualization of geopolitical competition and
geopolitical contestation, and potentially employed as a response to strategic imperatives, addressed in Chapter III) impact the costs of international environmental cooperation?

[3] Assessing the perceived domestic costs and benefits of international environmental cooperation: How do the operational mechanisms of the geopolitics of international environmental law (anticipated by Chapter III and addressed in Part 1 of Chapter IV) influence the perceived domestic costs and benefits of the US ratification of individual IEAs (addressed in Chapter II, Part 2 and Chapter IV, Part 2)?

In the following chapter this analytic model is incorporated into the methodological framework for comparing the different international environmental agreements.
Chapter V
Methodological Framework

In this chapter, I explain how my specific hypotheses relate to my aims and objectives, justify my selection of cases, summarize how the analytic narratives approach is intended to structure my research strategy, and describe how I intend to focus the presentation of my comparative case studies using the analytic model. I also note the limitations of my research design and strategy, and how I attempt to mitigate those limitations.

Part 1.
Research Design

This section reviews the aims and objectives of my research, brings greater specificity to my general hypotheses, and addresses the cases under analysis.

Aims and Objectives

The primary aim of this thesis is to provide a coherent explication of the perceived costs and benefits of IEA ratification from the point of view of the United States, in an effort to explain US ratification behavior. It is well recognized that these costs and benefits vary according to the problem structure of the pollution externality, but I assert they are also a product of systemic imperatives that produce sub-optimal coordination among states.
My general research objective is to clarify the impact of geopolitical competition and contestation on the negotiated coordination of states to supply international collective goods.

The general hypothesis of this thesis is that the United States has maintained a broadly consistent approach to the ratification of international environmental agreements, and that due to systemic imperatives to balance against the otherwise uncontested unipolar power, the international community had an incentive to impose costs on US foreign policy. As a result, I argue, post-Cold War international environmental treaties were structured in such a way that they added international costs sufficient to make US ratification unlikely. If this interpretation is consistent with the historical evidence, it suggests a move by the international community from seeking to negotiate Pareto-improving agreements (that are designed to avoid individual net costs) to producing Kaldor-Hicks agreements that allow for the imposition of net costs for individual states as long as the agreement produces greater collective benefits than collective costs. The willingness of the international community to impose net costs on arguably the most important actor in the international order, I argue, is best explained as a form of geopolitical contestation.

The core objective of this thesis, then, is to determine the validity of these assertions, their relationship to the post-Cold War pattern of US environmental foreign policy, and their implications for inter-state coordination to supply international collective goods.
Employing a Two-Level Game Counter-Factual

In the introduction I note that a persistent theme described in the international environmental politics literature is that isolationist or unilateralist preferences held by actors in American domestic politics are responsible for the shift in US post-Cold War IEA ratification decisions. In effect, it is commonly claimed that post-Cold War GOP intransigence added sufficient costs to prevent US ratification of post-Cold War IEAs.

I argue, contrary to this view, that the CBA criteria for US ratification decisions has been broadly consistent from 1972-2012 and that an increase in international costs has been sufficient to make post-Cold War IEAs un-ratifiable for the US.

The methodological problem posed by the knowledge that US ratification decisions are likely to be informed by consideration of both international and domestic forces, however, is how do you disentangle causality within the two-level game?

My solution is to adopt a counter-factual model/argument that assumes a contentious hypothetical: beyond the established consistent CBA criteria for US ratification, there are no costs from domestic intransigence.

Within the counter-factual, as in my general hypothesis, the hypothesized ‘consistent CBA criterion’ for US ratification acts as a control against which international costs are measured. In theory, the ‘consistent CBA criterion’ could be used as a control to measure domestic costs of intransigence, but within the counter-factual it does not.

The reasoning is as follows: If international costs are perceived as sufficient to impede ratification by creating net costs, they will have done so absent the presence of domestic intransigence. Only when international costs do not appear sufficient to exceed
the ‘consistent CBA criterion’ for US ratification would the costs of domestic intransigence be relevant in explaining a case of US non-ratification.

This approach does not deny that there is an abundance of resistance to the ratification of post-Cold War IEAs within American domestic politics (much of which is odiously partisan and dogmatic). Instead it takes the position that, in the hypothetical absence of this intransigence, in a scenario where concern for the supply of international environmental collective goods was politically neutral in the United States, the net costs presented by the post-Cold War IEAs would still be sufficient for US ratification decisions to remain the same.

Hypotheses

The specific hypotheses in this section build on the general hypotheses of Chapter I, and are linked to the questions of the analytic model meant to structure the cases.

**Hypothesis 1 (H₁).** The primary criteria determining US ratification of IEAs is whether or not doing so provides net benefits, and the domestic constraints on this US environmental treaty ratification assessment mechanism were largely consistent from 1972-2012.

This claim seeks to test the consistency of US environmental foreign policy constraints at the domestic level.

**Null-Hypothesis 1 (NH₁).** (a) US environmental foreign policy behavior has been largely inconsistent and no discernable pattern constraining that behavior during the Cold War or post-Cold War is apparent; or (b) the effect of dynamic domestic constraints has produced a demonstrable impact on US IEA ratification decisions.
Hypothesis 2 (H₂). Non-ratification of the four post-Cold War international environmental treaties reflects greater ratification costs for the United States, than the available benefits. The scale of international costs, in excess of the limits imposed by US environmental treaty ratification constraints, was sufficient to impose net costs on US ratification decisions.

Conditional on support for the inherent claim of H₁, this claim seeks to expand our analysis of factors impacting the ‘costs’ of US treaty ratification. The source of these ‘costs’ may be solely domestic, or solely international, or a combination of domestic and international. I argue that international costs, by themselves, were sufficient to make the post-Cold War IEAs un-ratifiable by the US.

Null-Hypothesis 2 (NH₂). In addition to the confirmation of NH₁; (a) ratifications costs do not appear to have increased for the US; and/or (b) to the extent that ratification costs have increased for the US, international costs do not exceed the benefits of ratification.

Modeling the zone of possible agreement. To provide some conceptual clarity to my hypotheses, I borrow from Robert Putnam’s win-set model. In this adapted version of his model, seen below in Figures 2 and 3, a state (e.g. the United States represented by X) seeks to maximize individual gains from a negotiated treaty, in relation to its negotiating opposite (e.g. the international community represented by Y) within a zone of possible agreement.

The purpose of introducing this model is to illustrate that the net costs threshold for the United States, as a determining criterion for ratification, may be impacted by both domestic and international costs. Moreover, this model helps illustrate that while domestic intransigence may push the United States out of the zone of possible agreement
necessary to ratify a treaty, it is equally possible that excessive value-claiming demands by the international community may force the United States out of the zone of possible agreement.

\[ X \ldots \ldots \ldots Y \]

\[ Y_3 \quad X_1 \quad X_2 \quad Y_2 \quad Y_1 \quad X_3 \]

Figure 2. The zone of possible agreement

Legend:

At this stage, any agreement between X₁ and Y₁ could be ratified by both parties. If the win-set of Y were contracted to, say, Y₂, outcomes between Y₁ and Y₂ would no longer be feasible, and would thus be truncated in Y’s favor. However, if Y, emboldened by this success, were to reduce its win-set still further to Y₃, the negotiators would suddenly find themselves deadlocked, for the win-sets no longer overlap at all.²⁷⁶


Hypothesis 3 (H₃). At the end of the Cold War, systemic changes (from bipolarity to unipolarity) increased incentives for the international community to pursue treaties where the legislative implementation of the treaty obligations produced domestic net costs for the United States, in effect reflecting a Y₃ policy position, while simultaneously describing US behavior as moving to X₃.²⁷⁷

This geopolitical competition and contestation by the EU and G-77 produced Kaldor-Hicks agreements that imposed net costs on the United States.

Conditional on support for the inherent claims of H₁ and H₂, this claim seeks to test the proposition that systemic factors contributed to counter-hegemonic resistance to the United States is (a) present in the negotiation of post-Cold War international


²⁷⁷ Offering a ‘lose-lose’ ratification decision to the Unites States.
environmental agreements; (b) that these efforts to address the systemic status quo overwhelmed efforts to coordinate coalitions to supply collective goods; and (c) this behavior manifests itself in geopolitical competition with, and contestation of, the United States through international institutional legal mechanisms, which produced Kaldor-Hicks agreements that imposed net costs on the United States.

**Null-Hypothesis 3** (NH₃). In addition to the confirmation of NH₁ and NH₂, which supports the claim that US domestic politics moved the US negotiating position to X₃; (a) there were either no systemic changes or they were entirely epiphenomenal to the negotiation of post-Cold War international environmental treaties; (b) there is no evidence of concern over American hegemony/unipolarity within the international community, nor evidence of resistance to it, in the post-Cold War negotiation of international environmental agreements; and (c) there is no evidence to suggest that the international community supported the creation of Kaldor-Hicks agreements that imposed net costs on the United States, so any allegations of strategic efforts to do so cannot be substantiated.

**Case Selection**

My primary research interest is in analyzing international cooperation to address international pollution externalities through the negotiation of international treaties. The eight cases I have identified constitute the core international pollution treaties and can justifiably be described as the entire population of cases within the parameters I set out below.
International environmental politics (as a subset of international relations), like international environmental law (as a subset of public international law), remains a large field of study. Paul Harris, for example, describes environmental foreign policy as “those activities of governments that relate to the environment in some way.”278 The International Environmental Agreements Database Project contains over 1190 multilateral agreements and defines an international environmental agreement as “an intergovernmental document intended as legally binding with a primary stated purpose of preventing or managing human impacts on natural resources.”279 These are useful general definitions but they create a wide population of tangentially related cases. From this large population of potential cases, my primary goal is to limit the likelihood of attempting to make ‘apples and oranges’ comparisons. This process of refining the available cases also allows me to specify ‘international treaties whose focus is to regulate international pollution’ with greater precision and provide greater clarity to the reader regarding my choices.

As such, to narrow the field, I have excluded all treaties adopted prior to 1972 and after 2012; as well as (1) natural resources/habitat management treaties; (2) wildlife conservation treaties; (3) civil liability treaties; (4) nuclear weapons test and nuclear power safety treaties; and (5) regional treaty regimes.280

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278 In actual fact, he uses the term “the practice of global environmental politics” but we appear to share the same meaning. Paul G. Harris, Routledge handbook of global environmental politics (New York: Routledge, 2013), 5.


280 These choices are documented in Appendix I.
While it is certainly true that the United States has refused or failed to ratify post-Cold War treaties in all excluded categories, it is notable that the US Senate has also chosen to ratify a number of these broadly defined ‘international environmental agreements’ in all categories during the same period. As such, it is important to note that the exclusion of these potential cases does not represent an effort by the thesis author to avoid hard cases. In fact, in all categories, US ratification of post-Cold War IEAs supports the assertion that the American environmental foreign policy record does not reflect a wholesale rejection of post-Cold War environmental multilateralism.\(^{281}\)

The central objective of the eight remaining international environmental agreements is to regulate international air pollution, pollution at sea, or the international impact of hazardous wastes and toxic chemicals.\(^{282}\) These include four treaties adopted during the Cold War (prior to 1989) and ratified by the United States; and four treaties adopted post-Cold War (after 1988) that were not ratified by the United States (Table 2).

Table 2. The eight major international pollution treaties from 1972 to 2012

**Cold War Treaties**

- The London Dumping Convention 1972 [Ratified]
- The MARPOL 73/78 Convention [Ratified]
- The Convention on Long-Range Transboundary Air Pollution 1979 [Acceptance]
- The Montreal Protocol 1987 [Ratified]

**Post-Cold War Treaties**

- The Basel Convention 1989 [Not Ratified]
- The Kyoto Protocol 1997 [Not Ratified]
- The Rotterdam Convention 1998 [Not Ratified]
- The Stockholm Convention 2001 [Not Ratified]

Source: Thesis author

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\(^{281}\) This point is expanded in Appendix I.

\(^{282}\) The full names of these treaties are available in Appendix I.
In addition to these eight treaties, the four Cold War treaty regimes have produced seventeen protocols and amendments that were signed by the United States and open for ratification after 1988 (Table 3). During the post-Cold War period, the United States ratified or signaled acceptance to thirteen of these agreements.

Table 3. The development of the four Cold War treaty regimes from 1989 to 2012

<table>
<thead>
<tr>
<th>Convention</th>
<th>Protocols/Amendments</th>
</tr>
</thead>
<tbody>
<tr>
<td>The MARPOL 73/78 Convention</td>
<td><strong>Annex III Prevention of Pollution by Harmful Substances (1978)</strong> [Ratified]</td>
</tr>
<tr>
<td></td>
<td><strong>Annex IV Prevention of Pollution by Sewage from Ships (1978)</strong> [Not Ratified]</td>
</tr>
<tr>
<td></td>
<td><strong>Annex VI Prevention of Air Pollution from Ships (1997)</strong> [Ratified]</td>
</tr>
<tr>
<td></td>
<td><strong>MARPOL Protocol of 1997</strong> [Ratified]</td>
</tr>
<tr>
<td></td>
<td><strong>Aarhus Protocol on Heavy Metals (1998)</strong> [Acceptance]</td>
</tr>
<tr>
<td></td>
<td><strong>Gothenburg Protocol (1999)</strong> [Acceptance]</td>
</tr>
<tr>
<td></td>
<td><strong>Copenhagen Amendment (1992)</strong> [Ratified]</td>
</tr>
<tr>
<td></td>
<td><strong>Montreal Amendment (1997)</strong> [Ratified]</td>
</tr>
<tr>
<td></td>
<td><strong>Beijing Amendment (1999)</strong> [Ratified]</td>
</tr>
</tbody>
</table>

Source: Thesis author

The 1989-1994 establishment of the Global Environment Facility is included as a sub-case to provide context to the negotiation of the amendments of the Montreal Protocol, the negotiation of the UNFCCC, and amendments of the Stockholm

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283 The full names of these annexes, protocols and amendments are available in Appendix I.
Convention, as well as, more broadly, how its creation reflects the geopolitics of international law.

In summary, regarding the cases under analysis, there are eight treaties. These constitute the core of international pollution treaties from the broader international environmental law corpus. These treaties also represent treaty regimes that have produced annexes, protocols, and amendments. Whereas the original eight treaties split neatly between four Cold War treaties and four post-Cold War treaties, the post-Cold War era also includes seventeen annexes, protocols, and amendments that have been available for ratification post-1988.

Part 2.

Research Strategy

This section explains my methodological choice of case studies as a research strategy, describes my theoretical focus, and the methods I employ to structure and present my analysis.

Qualitative, Explanatory, Rationalist (QER) Case Studies

I employ what Ronald Mitchell and Thomas Bernauer describe as a qualitative, explanatory, rationalist (QER) methodology. My work is qualitative in the sense that it employs narrative case studies and does not include quantitative tools such as statistical analysis.

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While the narrative approach associated with case studies employs fundamentally
descriptive elements, their use is to serve my primary objective, which is explanatory.
The potential to provide a predictive model or a normative prescription is, at best, a
secondary goal.

Finally, to the degree to which international relations and international
environmental politics literatures exist on a constructivist-rationalist continuum, I employ
a rationalist approach.285 Specifically, I apply rational choice theory to my analysis. I do
not claim to rigidly adhere to all of the axioms of rational choice theory, but rather to use
it “pragmatically as a tool to organize [my] ideas and intuitions and to clarify
assumptions.”286 For example, I refer to the US government as a more or less unitary
actor, despite the fact that the negotiation and ratification processes involve both
representatives of the Executive Branch and the Legislative Branch. Furthermore, I refer
to the G-77 and the EC/EU as more or less unitary actors, despite the fact that these
coalitions are comprised of a large number of sovereign states. There are, of course,
instances in the case studies where the members of these coalitions act independently of
their respective coalition, but there are also numerous instances where the G-77 or
EC/EU not only speak with one voice but that voice represents the interests of the
coalition, rather than simply an aggregation of its members interests. I will identify in the
case studies which actors are in play.

In addressing this common form of theoretical sleight-of-hand, regarding whether
or not the state is a unitary actor, Thompson suggests,

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In practice, the unitary-actor assumption usually combines an element of methodological convenience with some belief that it is an empirically accurate portrayal of state behavior.\footnote{287}{Thompson, “Applying Rational Choice Theory,” S291.}

On the other hand, responding to this sort of challenge, Snidal argues,

\begin{quote}
While treating states as aggregate actors with well-defined preferences is often a troublesome assumption for rational choice analysis, enriching the assumption provides a useful window for analyzing preference change. In IR, this has occurred as part of an effort to create a richer understanding of ‘state’ motivations by unpacking them into their domestic components, both theoretically and empirically....\footnote{288}{Snidal, “Rational Choice,” 119.}
\end{quote}

Thus, although this decision is open to challenge, I view my departure from (or enrichment of) a strict interpretation of the unitary actor assumption to be justified as a reasonable simplification of reality.

Returning to my broader research strategy, I propose that there are numerous comparative advantages to employing a case study method. According to Andrew Bennett, these include,

\begin{quote}
examining intervening variables to make inferences on which causal mechanisms may have been at work, developing historical explanations or particular cases, attaining high levels of construct validity, and using contingent generalizations to model complex relationships such as path dependency and multiple interaction effects.\footnote{289}{Andrew Bennett, “Case Study Methods: Design, Use, and Comparative Advantages,” in Models, Numbers, and Cases: Methods for Studying International Relation, eds. Detlef F. Sprinz and Yael Wolinsky-Nahmias (Ann Arbor, Michigan: University of Michigan Press, 2004), 19.}
\end{quote}

In other words, the case study approach is particularly well suited to the complex interactions of many heterogeneous states, in multiple configurations, addressing tangentially connected subject matter, over a 40 year period, compared to a statistical methodology. As Bennett argues,
by treating cases as configurations of variables, rather than seeking partial correlations among specified variables, case studies can capture complex interactions effects and model path-dependent relationships.”

On the other hand, “the ability to address complexity comes at a price,” Bennett cautions, “as the more contingent and fine-grained a typological theory, the less parsimonious it becomes and the fewer the cases to which it applies.” As the focus of my thesis is on the negotiation of international pollution treaties, rather than international law and politics in general, this seems to be an acceptable compromise.

As Alexander George and Andrew Bennett argue, “case studies remain much stronger at assessing whether and how a variable mattered to the outcome than at assessing how much it mattered.” In view of the trade-offs, they note, “case study researchers generally sacrifice the parsimony and broad applicability of their theories” in favor of generalizations that apply to “well-defined types or sub-types of cases with a high degree of explanatory richness.”

In this context, my analysis is more concerned with, “finding conditions under which specified outcomes occur, and the mechanisms through which they occur, rather than the frequency with which those conditions and their outcomes arise.”

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290 Bennett, “Case Study Methods,” 39.

291 Bennett, “Case Study Methods,” 39.


293 George and Bennett, *Case Studies and Theory Development*, 31.

294 George and Bennett, *Case Studies and Theory Development*, 31.
Rational Choice Theory and Analytic Narratives

As noted, I employ a general version of rational choice theory to guide my analysis, which in its most basic form assumes that actors “engage in purposive, means-ends calculation in order to attain their goals—that is, they select actions so as to maximize their utility.” Rational choice requires an understanding of the constraints faced by the relevant goal-seeking actors, which condition the goals they pursue and their likely ability to meet those goals. Moreover, it is a common assumption for scholars within the rational choice approach to international law that actors behave instrumentally and strategically.

A clear benefit for my analysis, offered by the rational choice approach, is the flexibility with which it specifies the objectives of goal-seeking actors. As Snidal notes, “goals are not restricted to self-regarding or material interests but could include other-regarding and normative or ideational ‘goals’.”

In 1998 article, Robert Bates et al. described what they saw as an emerging methodological approach to the application of rational choice and game theories to small-case studies. Termed, analytic narratives, Bates et al. introduce this method as follows:

We call our approach analytic narratives because it combines analytic tools that are commonly employed in economics and political science with the narrative form, which is more commonly employed in history. Our approach is narrative; it pays close attention to context. It is analytic in

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that it extracts explicit lines of reasoning, which facilitates both exposition and explanations.

Snidal describes this approach as a self-conscious attempt to structure case studies in such a way that “the analytic side encourages generalization while the narrative side encourages closer contextual specification.” The structure imposed by the analytic narratives, it is argued, offers “a method for moving from the context-rich world of events and cases to explanations that are rigorous, illuminating and insightful....”

Using rational choice as a guide, the analytics of analytic narratives seek to establish, “the actual and principal players, their goals, and their preferences while also illuminating the effective rules of the game, constraints, and incentives.” The narrative, on the other hand, “is the story being told but as a detailed and textured account of context and process, with concern for both sequence and temporality.”

The synergistic benefit of the analytic narratives, Bates et al. claim, is an enhanced ability to “locate and explore particular mechanisms that shape the interplay between strategic actors and that thereby generate outcomes.” A clear understanding of the institutional context captured by the narrative approach allows analytical narratives to “focus on the mechanisms that translate macro-historical forces into specific political

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300 Snidal, “Rational Choice,” 114.

301 Bates et al., *Analytic Narratives*, 236.


outcomes.” Accordingly, the intention of the ‘Geopolitical Objectives’ sections (of Chapter VI) is to provide a macro-historical context for the analysis of the specific use (in the cases of Chapter VI) of the operational mechanisms of the geopolitics of international environmental law (identified generally in Chapters III and IV) and their influence on US ratification behavior.

The Structure of Case Comparison

There is a useful theoretical and practical nexus of the model-based process of analytic narratives and the survey-based process of structured and focused comparison. In the former, the use of an analytic model to structure the narrative allows for functionally equivalent elements from each case to be compared. As Tim Buthe explains,

the model allows the analyst to overcome the problem of deciding what matters for the narrative … the problem that leads to the ad hoc-ness of many inductive historical explanations.

As Kevin Clark and David Primo argue, in this context, “Models play an organizational or structural role [to] provide a framework wherein information may be defined, collected and ordered” to strengthen the generalizability of comparative case study analysis.

In the latter, structured and focused comparison, this method borrows from a survey-based methodology of asking all respondents (or in this interpretation of each...
case) a standardized set of questions. As George and Bennett insist, “unless one asks the same questions of each case, the results cannot be compared, cumulated, and systematically analyzed.” This process structures the cases, but most importantly, also calls for scholars to focus their cases on the theoretical perspective and research objectives of the study. An emphasis on focus is not meant to prevent the author from exploring unique elements within each case but to affirm attention to testing and/or developing the theoretical structures of the cases.

The analytic model. To test my hypotheses, I employ the analytic model described in Chapter IV to structure my examination and presentation of the cases. The design of the analytic model is a product of merging the geopolitics of international law framework with the insights of Davenport’s domestic cost-benefit framework. The purpose of the analytic model is to structure the comparison of the eight IEA cases and illuminate the broader geopolitical context within which any individual negotiation takes place.

In other words, the model is intended to capture (1) if US ratification decisions reflect consistent rational cost-benefit assessments; (2) if the perception of net costs from ratification represents the increased imposition of foreign costs; and (3) if the US perception of net costs is significantly influenced by geopolitical objectives of states intentionally responding to systemic imperatives. The analytic model is expressed in the form of questions to structure and focus each case. They are:

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308 George and Bennett, *Case Studies and Theory Development*, 69.
309 George and Bennett, *Case Studies and Theory Development*, 86.
310 George and Bennett, *Case Studies and Theory Development*, 71.
311 George and Bennett, *Case Studies and Theory Development*, 86.
[1] Assessing the influence of problem structure on international environmental cooperation: Employing axioms from the rationalist approaches to IEP, how does problem structure (especially externality, burden sharing and compliance cost asymmetries addressed in Chapter II) impact the costs and benefits of participation incentives for specific international agreements seeking to coordinate the supply of a collective good?

[2] Assessing the influence of geopolitics on international environmental cooperation: How do regulatory competition, normative statecraft, and structural foreign policies (encompassed in my conceptualization of geopolitical competition and geopolitical contestation, and potentially employed as a response to strategic imperatives, addressed in Chapter III) impact the costs of international environmental cooperation?

[3] Assessing the perceived domestic costs and benefits of international environmental cooperation: How do the operational mechanisms of the geopolitics of international environmental law (anticipated by Chapter III and addressed in Part 1 of Chapter IV) influence the perceived domestic costs and benefits of the US ratification of individual IEAs (addressed in Chapter II, Part 2 and Chapter IV, Part 2)?

Case presentation. The object of the cases studies is to facilitate a comparison of US ratification decisions for treaties adopted during the Cold War era and those adopted in the post-Cold War era.

A logical approach to presenting these cases is simply to do so in chronological order, however, this is complicated by the fact that environmental treaty regimes are not static. Indeed, each treaty regime under analysis has developed over time through a dynamic governance process that has produced new agreements, protocols, and
amendments. As such, a linear year-by-year presentation of all on-going negotiations would quickly become incoherent.

Thus to address the dynamic nature of the Cold War era treaty regimes, which have adopted new agreements, protocols, and/or amendments, the eight treaty regimes have been separated into four groups:

* Group 1: The four Cold War era treaties (ratified by the US)
* Group 2: The annexes, protocols, and amendments of the four Cold War era treaties (ratified by the United States after 1988)
* Group 3: The annexes, protocols, and amendments of the four Cold War era treaties (not ratified by the United States after 1988)
* Group 4: The four post-Cold War era treaties (not ratified by the US)

This format, I argue, facilitates the comparison of the hypothesized similarities between Group 1 and Group 2, and those between Group 3 and Group 4. Moreover, this structure serves to illuminate the hypothesized differences between these two sub-groupings: Group 1+2 (IEAs ratified by the US), and Group 3+4 (IEAs not ratified by the US).

Whereas Part 1 of Chapter IV identified the operational mechanisms of the geopolitics of international environmental law, Chapter VI describes their use in specific treaty negotiations, within the broader macro-historical context of geopolitical competition and contestation. To address the dynamic geopolitical/macro-historical context within which these treaties are negotiated and US ratification decisions take place, the observable strategic interests and geopolitical objectives of the EC/EU and G-77, during and after the Cold War, are summarized at the beginning of Parts 1 and 2 of
Chapter VI. After an introduction to these ‘Geopolitical Objectives’ sections, the presentation of the cases proceeds as follows:

* Part 1. The Cold War era (1972-1988)

Legitimacy and control: Geopolitical Objectives of the Cold War era

Analysis of the four Cold War era treaties (ratified by the US)

* Part 2. The post-Cold War era (1989-2012)

Paradigm-shifts: Geopolitical Objectives of the post-Cold War era

Analysis of the annexes, protocols, and amendments of the four Cold War era treaties (ratified by the United States after 1988)

* Part 3. Analysis of the annexes, protocols, and amendments of the four Cold War era treaties (not ratified by the United States after 1988)

* Part 4. Analysis of the four post-Cold War era treaties (not ratified by the US)

Accordingly, I propose that this format will facilitate the comparison of the hypothesized similarities of IEAs Part 1 and Part 2, and those between the IEAs of Part 3 and Part 4, as well as the hypothesized differences between these two sub-groupings.

Part 3.

Research Limitations

This section notes the research limitations associated with my research design and research strategy, how I address these limitations, and how they may nevertheless affect my summary of results and conclusions.
Case Selection

One limitation of my research is the number of cases under analysis. In order to get stronger support for my hypotheses, I have elected to address the most prominent international pollution treaties of the past half-century. These treaties seek to regulate international pollution externalities by reaching into each state’s domestic regulatory apparatus. This choice allows me to address one of the inherent limitations of case studies, what George and Bennett describe as “their relative inability to render judgments on the frequency or representativeness of particular cases,” by analyzing the entire class of major pollution treaties.312

While eight cases may seem like a small number compared to what might commonly be employed in a statistical methodology, the fact that each has been undergoing ongoing (re)negotiation and amendment, greatly broadens the depth of each case. In fact, the way I have structured the presentation of the case studies, my small-n case comparison could be described as a medium-n case comparison. As such, the choice to review ‘eight’ cases means that the depth of the case studies will be limited accordingly, for example, not all of the sub-cases of the treaty regimes are analyzed. I do not anticipate that this will distract from the validity of my results, but it does mean that space was not available, for example, to systematically compare and contrast a comprehensive selection of competing theories to explain US ratification behavior, which would have increased opportunities for falsification.

312 George and Bennett, Case Studies and Theory Development, 22.
Rationality and Falsification

I have taken particular care to be cognizant of the warning by Alexander Thompson that “virtually any behavior can be explained within a rational choice framework – that is, a rationalist explanation can be constructed post hoc to fit events.” And of Amyarta Sen, who cautions that, “it is possible to define a person’s interests in such a way that no matter what he does he can be seen to be furthering his own interests in every isolated act of choice.”

Thompson and Sen’s warnings notwithstanding, it should be acknowledged that the analytics of the analytic narratives approach are intended to bring greater rigor to historical narratives (which is perhaps the inevitable approach for a study of the macro-historical development of international environmental law and politics, and the dynamism of specific IEAs over a 40-year period). As Bates et al. assert, “Once made explicit and recast as a model, the interpretation of the narrative can be subject to skeptical appraisal. Rendering appraisals explicit allows us to put them at risk.” Bates et al. go on to suggest the following criteria for skeptical appraisal: Do the assumptions fit the facts, as they are known? Do conclusions follow from premises? Do its implications find confirmation in the data? How well does theory stand up by comparison with other explanations? How general is the explanation? Does it apply to other cases?

As such, while I aim to provide empirical support for my arguments, I have also endeavored to produce a research design that is vulnerable to falsification and seeks to

315 Bates et al., Analytic Narratives, 14.
316 Bates et al., Analytic Narratives, 14-18.
address evidence that rules out or at least weakens the validity of alternative arguments. My proposed null hypotheses reflect one way to address this, and further counter-arguments will be addressed in the cases and the summary of findings.

Qualitative Case Studies

My goal is to make a plausible case that we have been looking at the evidence available in the IEP literature through the wrong frame, not that the evidence itself is inaccurate. This relates specifically to my assertion that observers of US non-ratification of post-Cold War IEAs have mistakenly construed this as evidence that the US has taken a big step back from its commitment to using international law as an environmental foreign policy problem-solving tool. As such, weakening the plausibility of the current frame and confirming the plausibility of my own model are two sides of the same coin. However, I am keenly aware that even if I can provide a more plausible interpretation of American post-Cold War environmental foreign policy, doing so does not eliminate all other explanations.

A particular limitation of case studies is that they can make only tentative conclusions on how a particular variable affects the outcome in a particular case or how much they generally contribute to the outcomes in a class or type of cases. As George and Bennett caution,

It is often not possible to resolve whether a causal condition identified as contributing to the explanation of a case is a necessary condition for that case, for the type of case that it represents, or for the outcome in general.

It is often more appropriate to settle for a defensible claim that the presence of a variable “favors” an outcome, or is what historians often

term a “contributing cause,” which may or may not be a necessary condition.\textsuperscript{318}

Regarding the limitations of my methodological choices, I make no claim that I will be able to conclusively ‘prove’ my assertion that US ratification decisions were ‘caused’ by EU and G-77 soft-balancing behavior. Nor do I make any specific claim of generalizability to all US ratification behavior. I aspire, rather, to find a sufficient amount of relevant supporting evidence to either refute or support my hypotheses and null-hypotheses, and do so in a systematic manner easily replicable by others.\textsuperscript{319} I acknowledge that any effort to address the interests, preferences, and behavior of states is likely to be fraught with potential for other, and many times ‘invisible,’ intervening variables. Nevertheless, by proceeding in this course of study with an ever-present awareness of the danger of making spurious claims, I am confident that I will not overreach in my conclusions.

Readers should further note, however, even if my analysis does provide a more plausible explanatory mechanism, they should view the product of my work as a preliminary correlation that will benefit from case studies of greater depth, systematically coded for quantitative testing at a later date.

\textsuperscript{318} George and Bennett, \textit{Case Studies and Theory Development}, 26-27.

\textsuperscript{319} The reader will note my extensive use of footnotes, for example, to aid in verifying the presence and credibility of my sources. Copies of the source material are on file with the thesis author. Any questions regarding sources or reports of errata may be directed to murraycarroll@fas.harvard.edu.
Chapter VI
The Cases:
The Eight Major International Pollution IEAs from 1972-2012

The presentation of the cases is preceded by a brief introduction to the geopolitical objectives sections, which are intended to frame the macro-historical and strategic context within which the eight major international pollution IEAs were negotiated.

The purpose of these ‘Geopolitical Objectives’ sections is to highlight the presence and prevalence of geopolitical competition and contestation objectives employed by the developing world, represented by the G-77, and Europe (the EC/EU), represented by the Commission, that may compete with the presumed objective of IEAs: to protect the global environment.320 These additional geopolitical objectives widen the scope of an agreement beyond the primary objective to reduce global pollution, which may have a positive effect by broadening participation, but may also serve to deadlock the negotiation of a self-enforcing agreement.

320 To address the confusing titles given to the actor representing ‘Europe’ (differentiated from the sovereign member states representing themselves) in international negotiations, this actor is referred to as the European Community (EC) from 1972 to 1992. The European Union (EU) was formally created on 1 January 1993 upon the entry into force of the 1992 Treaty of Maastricht. The EU is comprised of the existing European Community (Pillar I) along with two new intergovernmental pillars: the Common Foreign and Security Policy (Pillar II) and Justice and Home Affairs (Pillar III). Due to the fact that international environmental treaty negotiations take place under the competence of Pillar I, the use of the term ‘European Union’ is commonly treated as functionally synonymous to the ‘European Community.’ For the sake of simplicity, after 1992, the European Community (EC) and the European Union (EU) are used interchangeably. Since the 2009 entry into force of the Lisbon Treaty (which extinguished the legal personality of the European Community) the use of ‘EC’ is no longer appropriate.
Moreover, these sections provide a context for how the United States may perceive the demands made by the G-77 and EC/EU in the negotiation of IEAs intended to coordinate the supply of collective goods. In particular, the US may perceive these extraneous claims as not only providing the United States with no direct benefits but also likely reducing benefits it receives from the *status quo* international order.

The core objectives of all environmental foreign policy actors are, first, in the negotiation of IEAs, *ceteris paribus*, all states seek to reduce foreign pollution externalities. And second, in the negotiation of IEAs, *ceteris paribus*, all states seek to limit their own domestic costs from international regulatory commitments, especially when they perceive those domestic implementation costs to outweigh the benefits. The ability of states to secure these objectives relies on their external control (or ability to influence and resist the influence of other states) within the context of the negotiation.

There are a number of geopolitical objectives linked to the negotiation of international environmental agreements. States may seek to ‘lock-in’ perceived increases in their influence, and/or an increased allocation of benefits they feel entitled to receive from the international order. Recalling Litfin’s conception of sovereignty (disaggregated into autonomy, control, and legitimacy), we may observe value-claiming issue-linkage, which may be interpreted as a form of geopolitical competition or geopolitical contestation, as being motivated by a desire to secure increased on-going benefits from international cooperation.\(^{321}\)

Geopolitical contestation, in this context, explicitly challenges the *status quo* distribution of rights and responsibilities within the international order by demanding that some states should be allocated increased rights and that other states should be allocated

increased responsibilities. These redistributions of rights and responsibilities are intended
to represent a revision of the rules of the game, and thus a (re)structuring of the
international order. Geopolitical contestation seeks increased external control for that
state or coalition of states, often at the zero-sum game expense of other states.

By enhancing a state’s external control, these ‘rights’ may increase that state’s
internal control (as more predictable sources of international revenue may strengthen the
national institutional capacity of that state).

Increased external control may also increase the ability of a state to
internationalize its domestic regulations, which may in turn increase the internal
legitimacy of that state. In a regional organization, increased internal legitimacy may also
facilitate increased internal control, as the continued delegation of a member state’s
policy autonomy to that regional organization (for it to strengthen regional internal
control mechanisms) relies on the internal legitimacy of the regional organization.

Actors may also use the negotiation of IEAs to increase their external legitimacy.
This may include advocating for the recognition of international legal standing for
regional organizations, previously only available to states.

Consistent use of normative foreign policy statecraft in the negotiation of IEAs
may also be employed to reinforce a positive identity for a state or organization, which
may serve to increase the internal legitimacy of that state or organization. Alternatively,
the consistent use of normative foreign policy may be directed to craft a negative identity
to describe a peer competitor, which seeks to reduce the external legitimacy of the
competitor state.
When sovereignty bargains are employed to increase relative external control and legitimacy they represent another modality for geopolitical contestation. This contestation of international rights and responsibilities may commonly describe a zero-sum game where new rights gained by some states correlate closely to the new responsibilities and revoked rights imposed on other states. Or indeed that the importance placed on securing increased external control by some states may be a response to their perception that other states have a disproportionate amount of external control in the international order.

Part 1.

The Cold War Era

(1972-1988)

This section begins by describing elements of the strategic and macro-historical context within which the four Cold War international environmental agreements were negotiated, then presents the cases describing their negotiation.

Part 1(a).

Legitimacy and Control:

Geopolitical Objectives of the Cold War Era

The following historical narrative describes an American perception of the geopolitical objectives pursued by the developing world members of the G-77 and the member states of the European Community during the Cold War era, as they relate to the negotiation of international environmental agreements.
The G-77’s New International Economic Order

All states seek to solidify or enhance their external control (influence or resistance to influence) in the negotiation of international agreements and institutions.

Developing states, as a result of stunted economic development, lack strong political institutions, and thus suffer from reduced internal control. Simultaneously, these internal control deficits are likely to be accompanied by external control deficits. Individually, developing states lack the economic or political power to influence, or resist the influence of, more powerful state actors. Even more than simply suffering from economic poverty, developing states are said to suffer from a poverty of influence on world politics.322

During the Cold War, developing states formed coalitions to better represent their interests in international negotiation fora. These coalitions, in particular the G-77, have sought to capture increased economic benefits from the negotiation of specific individual agreements, but also to (re)structure the international order to address what Krasner describes as their weakness (lack of internal control) and vulnerability (lack of external control) of developing states.323 In this way, Krasner argues, the G-77 have not solely been concerned with securing economic benefits, but have sought to use their voting power to (re)structure the international order.324 The perceived unity of the G-77 in this endeavor was a direct result of the recognition that the international order, which they collectively view as unjustly enriching the industrial world, needed to be (re)structured,


323 Krasner, Structural Conflict, 27.

324 Krasner, Structural Conflict, 245-246.
and that this would only be achieved through pressure applied by a counter-hegemonic coalition of developing states.\(^{325}\)

To describe the strategic behavior of the developing world in international negotiating fora, Krasner employs the terms relational power and meta-power in a manner roughly analogous to my use of the terms geopolitical competition and geopolitical contestation. Relational power, in this context, refers to “efforts to maximize the values within a given set of institutional structures to change other players’ behavior.”\(^{326}\) The logic of coalitions is that the increased influence offered by a unified voting bloc may be leveraged to facilitate an increased allocation of benefits from cooperation. If those extra profits were used to strengthen the domestic political and economic institutions of the member states of the coalition, this enhanced domestic capacity could then be used to further strengthen the external control (influence) of the coalition.

Meta-power refers to “those efforts to change the institutions themselves, i.e. to change the rules of the game.”\(^{327}\) Here, states seek to “transform unilateral claims into universally legitimated sovereign rights.”\(^{328}\) According to Krasner, The Third World has pursued a meta-political strategy designed to alter principles, norms, rules, and decision-making procedures, as well as relational power strategy solely related to distributional issues.\(^{329}\)


\(^{327}\) Krasner, *Structural Conflict*, 14.

\(^{328}\) Krasner, *Structural Conflict*, 242.

\(^{329}\) Krasner, *Structural Conflict*, 175.
In other words, the New International Economic Order of the developing world may be described as a meta-power strategy where a reallocation of rights and responsibilities is achieved by altering the principles, norms, rules and decision-making procedures that structure international cooperation.

Specifically, Krasner claims that the G-77 has consistently relied on and advanced international governance mechanisms and “principles and norms that would legitimate more authoritative as opposed to more market-oriented modes of allocation.”

Authoritative regimes, for the developing world, are seen as providing a larger and more predictable flow of economic benefits. For the G-77, in other words, the purpose of securing increased external control in the negotiation of new international regimes was to secure stable economic flows for its members to enhance their domestic political and economic development.

The 1972 United Nations Conference on the Human Environment (UNCHE) was initiated to raise awareness of the need to view international pollution as a global threat requiring a collective response from all states. From the beginning of preparatory negotiations in advance of the Conference, however, developing states worked to link the protection of the global environment with their individual economic development. Developing states were concerned by the potential eco-imperialist imposition of environmental commitments designed to hinder their economic development. Moreover, they had no interest in assuming the costs of addressing global problems for which they perceived the industrialized world to be historically responsible. International environmental law was viewed by the South as a mechanism employed by the North to

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330 Krasner, Structural Conflict, 5.
pull up the economic development ladder behind it.\textsuperscript{331} As this was a UN conference, developing countries in the UNGA worked to reframe environmental protection and the objectives of the UNCHE.\textsuperscript{332} As Paolo Galizzi and Alena Herklotz assert,

The developing countries leveraged the Northern desire for their participation in the international environmental regime to bargain for acknowledgement and financial and technical support for their economic growth and development.\textsuperscript{333}

In relation to the development of international environmental law, Galizzi and Herklotz observe, “this tactic has been resurrected at nearly every subsequent international environmental gathering to influence the commitments and concessions agreed.”\textsuperscript{334}

What the initiators of a Conference meant to protect the global environment did not fully anticipate was the role the UNCHE would play in fueling the emergence of the New International Economic Order movement of the 1970’s and early 1980’s. As Najam describes it,

UNCHE was one of the first major global forums (outside of the UNCTAD – the United Nations Conference on Trade and Development) where the South consciously negotiated as a unified collective and adopted many of the very same substantive arguments and negotiation strategies which were soon to become the hallmark of its call for a New International Economic Order.\textsuperscript{335}

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\textsuperscript{332} Williams, “Third World Coalition,” 20, argues in 1993 that, “a remarkable degree of consistency is apparent in the aspirations and demands voiced by the developing countries on environmental issues since 1971.”
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\textsuperscript{334} Galizzi and Herklotz, “Environment and Development,” 73.
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\textsuperscript{335} Najam, “From contestation to participation to engagement,” 307.
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The objectives of the New International Economic Order demanded by the G-77 are encapsulated in the 1974 Declaration on the Establishment of a New International Economic Order, and 1974 Charter of Economic Rights and Duties of States. These non-binding, but forcefully expressed declaration of demands, may be summarized by five core objectives: (1) The right of preferential treatment for developing countries; (2) The right of permanent sovereignty over natural resources for developing countries; (3) The right of all states to benefit from science and technology, necessitating the provision by industrialized states of access to modern technology with which to enhance the infrastructure of developing states; (4) The right of developing countries to development assistance, and in particular that the official development aid provided by industrialized countries be increased to 0.7% of their GDP; and (5) The right of equal participation of developing countries in the relevant decision-making processes of all international institutions, but especially international financial institutions.

The United Nations General Assembly (UNGA) vote on the Declaration on the Establishment of a NIEO was not formally recorded but the UNGA voting record on the Charter of Economic Rights and Duties of States, despite it being non-binding, was as follows: the United States, Canada, Israel, Japan, as well as Belgium, Denmark, Federal Republic of Germany, Luxembourg, and the United Kingdom voted against the Charter, while Austria, France, Ireland, Italy, Netherlands, Norway, and Spain abstained from voting.\(^3\) The likely reason for this display of Northern unity is that these states saw very little to gain in return for accepting the responsibility to secure the rights claimed by the developing world.

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The negotiation of a legally binding United Nations Convention on the Law of the Sea (UNCLOS), whose adoption was of considerable importance to the industrialized world, on the other hand, gave the G-77 much better leverage to extract concessions for the developing world.

Initially, the primary focus of developing states had been to legitimize their unilateral claim that coastal states had the right to extend their sovereign jurisdiction over the natural resources off their coasts to a 200-mile Exclusive Economic Zone (EEZ). Once this allocation was more or less secured within the UNCLOS negotiations, the G-77 focused their attention to claiming a sovereign right to their share of the global commons resources beyond the EEZ. This authoritative distributive mechanism was to be secured via the creation of an institution called the International Seabed Authority.

For states with the technical capabilities to access and mine the ocean floor for manganese nodules (and other natural resources found on or below the seabed), beyond their 200-mile EEZ, the existing free-use or open-access regime was favored. But this market-based regime (which might otherwise be described as a *res nullius* or a ‘first come, first served’ regime) put developing states, almost universally lacking those technical capabilities, at a significant disadvantage. The solution, as far as the developing world was concerned, was a proposal by Malta reframing the resources of the ocean as the common heritage of mankind. Under a regime based on this conception of common heritage, “the use of common spaces would be regulated by an international organization for the benefit of the whole world community.”

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Perhaps not surprisingly, the United States strenuously objected to those mechanisms that provided for the automatic and unconditional transfer of resources to developing countries.\(^{339}\) Incurring the costs associated with securing the rights claimed by the South would once again be the responsibility of the US and other industrialized states. And moreover, the United States objected to an amendment mechanism that provided no veto to industrialized countries over future amendments designed to create obligations even on those parties that did not consent to be bound by them.\(^{340}\)

Because the G-77 had very little ‘no agreement costs’ from scuttling/deadlocking the UNCLOS negotiations, they held firm to their proposed International Seabed Authority regime. Zartman opines that this G-77 defiance,

> had more to do with whether the developed states could be persuaded or coerced into accepting a different approach to North-South economic relations than it did with whether the new seabed mining industry needed to be managed.\(^{341}\)

Industrialized states, including especially the United States, balked at this formulation and refused to ratify the 1982 UNCLOS agreement. In a prescient comment made in 1985, on the implications of G-77 structural foreign policy, Krasner argues that,

> The greater the success of the Third World in changing regimes against Northern preferences, the more likely the North is to rupture existing practices by withdrawing support.\(^{342}\)

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\(^{339}\) Jacobson, “Unilateralism, Realism and Two-Level Games,” 428.


In other words, the excessive use of meta-power (or geopolitical contestation) strategies by the G-77 may add such significant costs to industrialized states that they refuse to ratify Kaldor-Hicks agreements.

The European Community’s Pursuit of REIO Recognition

For most of the Cold War era, European state actors negotiated primarily on their own behalf as independent sovereign states. Divisions between Europe’s major powers (the UK, Germany, and France) as well as between Europe’s more and less developed states (northern Europe v. southern Europe) meant many member states favored the need for unanimous consent to pass European environmental regulations.\textsuperscript{343}

As a result, the resistance of powerful European states to delegate their foreign and domestic policy autonomy to European institutions hampered the integration of Europe.\textsuperscript{344} And as Eugenio Cusamano argues, “Lacking any power in the environmental domain, the European Economic Community initially did little to homogenise the European countries’ positions.”\textsuperscript{345} As a direct result, this has also meant that during the negotiation of Cold War era IEAs, Europe was not able to maximize the collective bargaining benefits it could otherwise have employed to influence or resist the influence of other states.

\textsuperscript{343} Anthony R. Zito, “The European Union as an environmental leader in a global environment,” *Globalizations* 2, no. 3 (2005): 368, on North-South tensions within the EC. In this context, Northern and Western European states are more or less synonymous, just as Southern and Eastern states are more or less synonymous.


Henry Kissinger, speaking on the topic of European institutional weakness as the then US Secretary of State, is reported to have once remarked, “Who do I call if I want to speak to Europe?” Whether or not he was actually the source of this apocryphal statement, it has frequently been relied upon by European leaders who support the increased political and economic integration of the member states. Even more controversially at the time, although its impact is largely forgotten, Kissinger declared 1973 to be the Year of Europe (without consulting with the Europeans). It has been claimed that this “unleashed a soul-searching enterprise” that led to a meeting of the then nine member states of the European Community in Copenhagen.\(^{346}\) This high-level meeting in December of 1973 produced a ‘Declaration on the European Identity.’\(^{347}\)

The 1973 Declaration on the European Identity, in retrospect, provides a remarkably clear vision of the importance placed on the need for a coherent European identity and how it was assumed this would correlate with increased foreign policy influence. A few select excerpts from this declaratory document exemplify this vision:

* [The Member States of the EC] wish to ensure that the cherished values of their legal, political and moral order are respected….\(^{348}\)

* Europe must unite and speak increasingly with one voice if it wants to make itself heard and play its proper role in the world.\(^{349}\)

* [The Member States of the EC] intend to play an active role in world affairs….\(^{350}\)


\(^{348}\) Section 1.1 of the Declaration on the European Identity.

\(^{349}\) Section 1.6 of the Declaration on the European Identity.
* In future when [the Member States of the EC] negotiate collectively with other countries, the institutions and procedures chosen should enable the distinct character of the European entity to be respected.\textsuperscript{351}

* In bilateral contacts with other countries, the Member States of the Community will increasingly act on the basis of agreed common positions.\textsuperscript{352}

* In their external relations, [the Member States of the EC] propose to undertake the definition of their identity in relation to other countries or groups of countries. They believe that in so doing they will strengthen their own cohesion and contribute to the framing of a genuinely European foreign policy.\textsuperscript{353}

This largely forgotten document is especially prescient in that it more or less perfectly anticipates key features of the internal and external statecraft pursued by the European Union at the end of the Cold War. That said, at the time, it was a mostly aspirational document that by itself did little to (re)structure the international order.

As such, the central acknowledged but unresolved challenge to its external legitimacy was that ‘Europe’ was not a state, and thus could not be recognized as possessing the international legal personality of a state. Another mechanism was required for a European institution to participate fully in international negotiations, along side the member states.

Whereas the EC, represented by the Commission, had exclusive competence to negotiate for the member states in the GATT trade negotiations, it had much reduced competence for the negotiation of IEAs. Nevertheless, having recently begun to adopt

\textsuperscript{350} Section 2.9 of the Declaration on the European Identity.
\textsuperscript{351} Section 2.9(b) of the Declaration on the European Identity.
\textsuperscript{352} Section 2.9(b) of the Declaration on the European Identity.
\textsuperscript{353} Section 3.22 of the Declaration on the European Identity.
intra-EC air pollution legislation, the EC could claim shared competence with the member states in matters of transboundary air pollution.

As such, in the negotiation of the 1979 Long-Range Transboundary Air Pollution (LRTAP) Convention, the Commission argued successfully that the EC should be recognized as a Regional Economic Integration Organization (REIO). In practice this meant that the EC could become a party to an agreement, even if none of its member states choose to do so, with the caveat that the REIO could not exercise its right to vote at the same time as its own member states. Although this may sound like a minor concession to the EC, it proved to be much more than a symbolic victory for Europe.

What is truly extraordinary about the acceptance of REIOs in IEAs is that, beginning with the Vienna Convention and subsequent Montreal Protocol, they have been accorded the ability to form compliance ‘bubbles.’ This is described in Article 13(2) of the Vienna Convention, which states, “the organization and its Member States shall decide on their respective responsibilities for the performance of their obligations under the convention or protocol.” This makes it much easier for Europe to address internal northern Europe-southern Europe conflicts over divergent regulatory optima, and thus to adopt more ambitious policy positions than merely the lowest-common denominator position within Europe.

The EC has been unable to achieve automatic rights of participation in all international organizations, including the International Maritime Organization (IMO), but the successful adoption of the REIO concept in the negotiation of numerous IEAs

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represents an audacious structural foreign policy revision of the international order’s definition of an international actor.

Moreover, the EC (and eventually the EU) remains the only extant example of a REIO recognized by the international community, and as such no other state benefits from this extraordinary and exceptional jurisdictional allocation.

The REIO mechanism, in other words, was designed to improve the external legitimacy, and as a result, the external control of the EC in international negotiations with other states. The ability to create compliance bubbles also serves primarily to enhance the internal control and legitimacy of European institutions as it gives them a perfect vehicle to manage the internal distribution of responsibilities among member states with different regulatory optima.

It is noteworthy that neither of these benefits offered exclusively for Europe are intended to increase the effective coordination of global collective goods. While this form of structural foreign policy is perhaps not as self-serving as the claims of the G-77’s NIEO, it nevertheless shares in common with the G-77 the pursuit of a geopolitical objective extraneous to the presumed objective of protecting the global environment.

Part 1(b).

Analysis of the Four Cold War Era Treaties

(Ratified by the United States)

This section analyzes the international environmental agreements, negotiated and adopted during the Cold War, that were ratified by the United States. They include: The 1972 London Dumping Convention; The MARPOL 73/78 Convention; The 1979 Long-
Range Transboundary Air Pollution (LRTAP) Convention; and The 1987 Montreal Protocol.

The 1972 London Dumping Convention

The 1972 London Dumping Convention (LDC), negotiated by member states of the International Maritime Organization (IMO), seeks to regulate the intentional dumping of a list of traditional domestic wastes, with specific attention paid to the dumping of industrial, chemical, and nuclear materials in the ocean.

For countries that possess significant coastal territory and a small number of neighbors with whom they share a coastal border, like the United States, ocean dumping is primarily viewed as a domestic pollution problem. When numerous states in close proximity to each other share a body of water, on the other hand, ocean dumping is more likely to be considered a form of transboundary pollution. Additionally, in those cases with a relatively confined body of water, it may be that the limits of its carrying capacity are more readily viewed as finite, in which case it will need to be managed as a common pool resource. To varying degrees, these latter categories represent the European view of ocean dumping.

The 1972 Oslo Convention, protecting Europe’s North and Baltic Seas, and US domestic regulations addressing ocean dumping both preceded and influenced negotiation of the LDC. In this context, the negotiation of the LDC was concerned primarily with harmonizing these standards in a global treaty and was thus dominated by Western interests and influence.
Although the LDC was negotiated in part in anticipation of the 1972 UNCHE Conference (reflecting the interests of North and South), ocean dumping was a less significant issue for the developing state members of the IMO. As Allen Doud (the then US negotiator at the IMO) describes it,

> the credibility of developing country positions [in the preliminary negotiations] was deeply undermined. This was due to the fact that, privately, *their delegations were saying that they really had little or no interest in becoming party to the Convention; and, moreover, that they saw advantages to the industrialized countries of Western Europe, North America and the Pacific becoming bound by such a Convention as soon as possible with the developing countries outside it.*

The logic underlying the LDC was that almost any waste could be dumped in the ocean with the presumption that over time it would be broken down with limited harm to ocean ecosystems, but that some waste should be restricted due to its inherent toxicity. The LDC used a listing system for waste that could not be dumped and for waste that could only be dumped with a permit.

While this short summary portrays the LDC as a permissive regime, it was also uniquely dynamic. To avoid the long delays in ratification experienced at the IMO, the LDC included a tacit acceptance mechanism, whereby states that failed to formally opt-out of an amendment within one hundred days of its adoption would be recognized as having accepted a binding legal obligation.

The treaties negotiated under the IMO, which is an international organization primarily concerned with facilitating the international trade of goods transported by sea, have historically embraced trade principles like ‘equal treatment’ or ‘non-discrimination.’ This concept of universal or equal application of the rules is clearly reflected in the LDC.

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although some limited leniency is granted to developing states. That said, the IMO has a tradition of not formally mandating compliance assistance assessments or making provisions for differentiation in the implementation of treaty commitments.

The adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), in particular Article 210, significantly widened the applicability of the LDC to impose regulatory commitments on nonparticipants. Referencing the substantive elements of Article 210, Veronica Frank notes,

National laws and regulations cannot be “less effective [...] than global rules and standards” (Article 210(6)). These global rules and standards are generally considered to be those laid down in the LDC, which seems to reflect customary international law. In regulating ocean dumping, therefore, all parties have to conform, as a minimum, to the provisions of the LDC regardless of their individual participation in that Convention.  

[Emphasis added]

The dynamic development of the Ocean Dumping regime, including the concept of tacit acceptance and the jurisdictional impacts imposed by UNCLOS were not seen as threatening to the United States, which had taken a strong leadership role in the LDC negotiations. As David Victor remarks,

the 1972 London Dumping Convention… was spearheaded by the United States because by the early 1970s the US had already passed national legislation to halt such dumping. For the US... the treaty yielded symbolic benefits while requiring no marginal change in behavior.  

[Emphasis added]

In conclusion, the core reason for US ratification of this IEA is that it allowed the US to export/internationalize its new domestic legislation to the global level. In this

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357 Veronica Frank, *The European community and marine environmental protection in the international law of the sea: Implementing global obligations at the regional level* (Boston, MA: Brill, 2007), 291.

regard, it imposed no new costs on the United States and although it is not clear that it reduced foreign pollution externalities experienced by Americans, the LDC did serve to clarify rules for potential foreign dumpers near or in US waters. Due to the similarities, at the time, between US regulatory standards and that of northern European states, the LDC case represents a relatively conflict-free harmonization of standards. That said, in this first case, there is already evidence of developing states seeking to gain some comparative advantage by allowing developed states to bind themselves to regulations the South had no intention of adopting themselves.

Lastly, while developing state disassociation from the environmental objectives of the treaty presage geopolitical competition and contestation with the IMO regime, the fact that from the beginning the US has viewed ocean dumping as a mostly domestic issue, while Europeans have viewed it much more in relation to regional or common pool resource issues foreshadows increased transatlantic disagreement.

The MARPOL 73/78 Convention

In contrast to the LDC, which seeks to regulate the intentional dumping of waste at sea, the MARPOL regime (short for Marine Pollution) seeks to regulate maritime pollution that may take place during the transportation of goods by sea. MARPOL regulates a number of forms of pollution from ships including oil, chemicals, waste, sewage, and bulk packaging, but the regime (and this case) is focused primarily on oil pollution.359

359 Annex IV, and Annex VI (of the 1997 MARPOL Protocol), will be addressed in later cases. Regrettably, space does not permit a thorough examination of Annex II and V, ratified by the US in 1980 and 1987 respectively, nor Annex III, which was ratified in 1991.
Oil tanker accidents in the 1960’s and 1970’s raised public awareness of the need to regulate the shipping industry to reduce the risk of oil pollution at sea. While these incidents are vivid and salient for the general public, in fact, a far greater source of oil pollution takes place in the standard operations of tankers transporting oil by sea. As Mitchell describes it,

> Historically, these procedures have put close to a million tons of oil into the oceans every year. They represent 60 to 70 percent of all ship-generated oil pollution, with accidents and non-tankers representing the rest.\(^{360}\)

As a result, the negotiation of the MARPOL regime focused on the intentional release of oil at sea (although reference to mandating the use of double-hulls relate to attempts to prevent the catastrophic release of oil cargo in the event of accidents). The two primary ship operations that pollute the oceans are ballasting and cargo tank washings. Ballasting, as Andrew Griffin explains, occurs after an oil tanker has delivered its cargo to the importing state:

> A crew fills up to one-third of the cargo tanks with seawater to compensate for weight lost from the delivered payload. With this replacement water as ballast, the ship displaces sufficient water to be maneuverable during its trip back to the loading port.\(^{361}\)

The problem with using seawater to fill the empty tanks as ballast is that it mixes with the oil residue creating a diluted but still toxic slurry of oily water. This oily ballast water is then discharged at sea before arriving in port to allow the tanks to be refilled with another shipment of oil.


The second source of operational pollution, tank washings, seeks to remove the build-up of sludge to maximize the amount of new oil able to be loaded into the tanker. These oily washings are then discharged at sea any time before a new cargo is loaded upon return to port. In order to mitigate these discharges, tanker captains employed a system called load-on-top (LOT). As Mitchell describes it,

> Tanker captains were expected to reduce their total discharges by consolidating ballast and tank-cleaning slops in a single tank, letting gravity separate the oil from the water, discharging the clean water from beneath the oil, and then loading the next cargo on top of the oil that remained.

The problem with the LOT system is that it required a skilled and conscientious crew, and since the tanker captains knew they were mostly un-monitored, the decision to just dump the untreated ballast or washings at sea was left to their discretion.

Before MARPOL, intentional oil pollution at sea was regulated using discharge standards. Coastal states seeking to penalize ship owners and captains for intentional marine pollution were limited, however, by evidentiary and jurisdictional obstacles. Put simply, it was difficult to prove in court that a specific ship was responsible for a specific incident of negligent discharge. Aerial surveillance and new technologies made this process easier but were expensive. The total cost of successfully prosecuting a case

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362 Griffin, “MARPOL 73/78,” 492.


tended to be much higher than the fines assessed to the guilty party, if fines were assessed at all.\textsuperscript{365}

This weak enforcement was a product of the customary jurisdictional deference to flag states.\textsuperscript{366} And as Mitchell argues,

Flag states have generally been less than aggressive in following up on evidence referred to them. Flag states often lack the ability to prosecute, since tankers flying their flag may rarely enter their ports. They also have few incentives to prosecute because vigorous enforcement on their part would induce owners to take their registrations, and the large associated fees, to a less scrupulous state.\textsuperscript{367}

Discharge standards, in other words, did not provide compelling incentives for enforcement. Flag states, which had the authority to prosecute non-compliance, lacked the incentives to do so. And coastal states, which had the incentive to prosecute the negligent pollution of their shores, had limited ability to do so.\textsuperscript{368}

To address this problem, a technical solution aggressively promoted by the United States during the 1973 negotiations of the MARPOL Convention, was to require ships to install segregated-ballast-tanks (SBTs). These tanks are designed to only carry ballast water. Since the ballast water and oil residues never mix, SBTs eliminate the pollution associated with ballast discharges.\textsuperscript{369} Due to the cost associated with installing this equipment in new ships and retrofitting older tankers, however, this was fiercely


\textsuperscript{366} Mitchell, “Regime design matters,” 449-450

\textsuperscript{367} Mitchell, “Regime design matters,” 449-450.

\textsuperscript{368} Mitchell, “Regime design matters,” 450.

\textsuperscript{369} Griffin, “MARPOL 73/78,” 493.
resisted.\textsuperscript{370} For the 1973 MARPOL, only new tankers of the largest size were required to use SBTs, and implementation was delayed to suit the shipping industry. Few states ratified the agreement, and pollution continued unabated.

In 1977, the United States pushed to renegotiate the MARPOL 73 Convention, leading to the adoption of what became known as MARPOL 73/78. US negotiators continued to argue against LOT and the discharge standard, and for SBTs, but this time a competing equipment standard was also proposed. Shipping industry advocates argued that crude-oil-washing (COW) systems, which had been developed by the oil industry, should be viewed as an effective and less expensive alternative to SBTs. As Matson describes it,

\begin{quote}
Instead of using water, the COW system sprays heated oil onto the tank walls. The sprayed oil dissolves the remaining sediment into useable oil, which can be pumped out with the regular cargo. Not only does this system decrease the amount of oil residue left in tanks, but it also eliminates the need for dedicated slop tanks.\textsuperscript{371}
\end{quote}

Like the SBT system for ballast discharges, COW eliminates the need to discharge oily washings into the oceans. The compromise of MARPOL 73/78 was that ship owners could choose which standard they preferred for smaller tankers, rather than being forced to accept the universal SBT standard the US preferred, but the end result was that equipment standards had now replaced discharge standards for the shipping industry.

This was enforced using a certification system to designate that tankers had adopted functioning SBT and/or COW systems. Without certification, tanker owners

\textsuperscript{370} Griffin, “MARPOL 73/78,” 503.

could not purchase insurance for their vessels. In this way, the certification system
provided tanker owners much greater incentive to comply with the new standards.
Moreover, MARPOL 73/78 empowered port states to inspect vessels entering their ports
to determine whether ships had been certified, or were otherwise in violation of the
equipment standards. Port states were even empowered to inspect ships that were not
parties to MARPOL 73/78 Convention.\(^{372}\) As Mitchell notes,

> the equipment subregime obligated port states either to detain tankers with
false pollution prevention certificates or inadequate equipment or to bar
them from port. As administrative sanctions, these responses skirted both
flag state and port state legal systems - and the associated sensitivities
regarding legal sovereignty.\(^{373}\)

This eliminated the high evidentiary costs associated with the discharge standard, as the
evidence (the presence or absence of the required equipment) stays with the ship as it
enters port.\(^{374}\) Moreover, the equipment standard simultaneously removed the
jurisdictional obstacle, as port states were now able to enforce their own national
equipment requirements as a condition of the use of their ports.\(^{375}\) As Alan Tan asserts,

> This is entirely consistent with the sovereign right of states to apply
stricter national laws and to impose conditions for entry into ports. A port
need only give due publicity to such conditions and notify IMO of their
existence.\(^{376}\)

The equipment standards and port inspection criteria (with possibility of
detention) of MARPOL 73/78 were, at the time, a major jurisdictional victory for port
states. Nevertheless, port states did not begin detaining ships until (1) this jurisdictional

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\(^{372}\) Tan, *Vessel-Source Marine Pollution*, 218.

\(^{373}\) Mitchell, “Regime design matters,” 451.

\(^{374}\) Tan, *Vessel-Source Marine Pollution*, 221.

\(^{375}\) Tan, *Vessel-Source Marine Pollution*, 218.

\(^{376}\) Tan, *Vessel-Source Marine Pollution*, 218.
shift was confirmed and further codified in Articles 218 and 220 of UNCLOS, and (2) Annex I of MARPOL 73/78 entered into force in October of 1983. As Mitchell argues, “without MARPOL, [port state] detentions would have constituted a major infringement of flag state sovereignty.”

Equipment standards, in other words, gave enforcement powers to those with the incentive to enforce them, port states. And since detaining a ship is relatively cost-free for the port state, equipment standards could impose considerable opportunity costs on tanker owners unable to release their ships without first retrofitting their vessels.

In addition to the ballast/washings equipment standard in MARPOL 73/78, the United States was successful in mandating the use of double-hulls for new oil tankers and a schedule to phase existing tankers into compliance. The purpose of this requirement was to reduce the likelihood of massive oil spill accidents that had produced considerable domestic outcry. This proposal by US delegates had previously been rejected in the 1973 MARPOL negotiations.

In conclusion, the relevance of US leadership during the development of the regime, and subsequent US ratification of the MARPOL 73/78 Convention is explained by several factors. First, the US had created domestic legislation that produced effective guidelines for US-flagged ships, but was insufficient to inhibit foreign sources of pollution (from foreign-flagged tankers). As such, the US was downstream of pollution externalities it could not control, and thus felt it was necessary to export/internationalize

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existing domestic legislation to the global level. Second, the US engaged in structural foreign policy to support a shift in the historic customary deference to flag states towards port states. The persistent defense of equipment standards and flexibility in the face of the competing COW standard by the United States was instrumental in facilitating this structural foreign policy achievement. Third, the move from discharge to equipment standards not only reduced foreign pollution, but also did so at a reduced cost for the United States. In effect, ship owners were incentivized to install the equipment (they did not want their ships to be detained or excluded from the US market), which eliminated the evidentiary costs for coastal or port states associated with linking specific ships to specific discharges. Fourth, and lastly, US pressure to create a self-enforcing regime has served to reduce pollution not only along American coasts, but also for coastal states around the world. In other words, the spillover effect of US leadership to create a domestic collective good contributed to the supply of a global collective good.

The 1979 Long-Range Transboundary Air Pollution (LRTAP) Convention

The term ‘transboundary pollution’ is commonly used to describe a bi-lateral transfer of pollution in one direction from an upstream state (polluter) to a downstream state (victim). This theoretical model is useful, but in practice, transboundary air pollution is much more complex. The transboundary pollution addressed by the 1979 Long-Range Transboundary Air Pollution (LRTAP) Convention focused, at least initially, on sulfur and nitrogen dioxide emissions that are transported in the atmosphere over great distances, and which slowly and invisibly destroy forests, agricultural, and marine ecosystems through a process of acidification. Moreover, it is often not possible
to distinguish the individual source of pollution, which often reflects a combination of both domestic and foreign sources. This makes establishing responsibility for damage difficult, especially since it accumulates over time. It is also fair to say that the greater the number of neighboring states, the more complex addressing transboundary pollution becomes.

A case in point, in the European context, is that transboundary pollution has been viewed primarily as a regional problem rather than simply a bi-lateral one. Since energy and transportation industries (both crucial for a state’s economic prosperity), are the primary sources of sulfur and nitrogen dioxides, once it was agreed that pollution was producing a significant threat, regional regulation proposals inevitably sparked competition and conflict between European states.  

Curiously, the negotiation of the LRTAP Convention was the product of waning East-West détente in the late 1970’s. The Soviets, who with the Nordic states proposed the regime through the United Nations Economic Commission for Europe (UNECE), identified the environment as a subject for diplomacy likely to produce less conflict than security, human rights, or economic issue areas.  

The EC and its member states, however, were initially unconvinced of the need to mitigate transboundary acid rain pollution. They used this indifference to demand that the European Community be granted standing to sign and ratify the agreement. Initially, the Soviets refused, but after the meeting was adjourned and all further negotiations were

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suspended, the Soviets agreed to allow Regional Economic Integration Organizations (REIOs) to join the LRTAP.\textsuperscript{382}

In addition to this structural foreign policy coup for the EC, it was decided that the LRTAP would be designed as a framework convention, to which protocols could be added in the future. In other words, since this treaty contained no binding emission reduction commitments, the EC received the increased external legitimacy of REIO recognition at a very low cost.

Part of the reason for an agreement that contained no substantive obligations was that most of the Western states did not believe that the Soviets and the Eastern bloc states would comply with emission reduction obligations.\textsuperscript{383} Instead the LRTAP mandated continued scientific cooperation and diplomatic discussion.

The continuous development of the regime through protocols ever since, accordingly, is a product of the increasing scientific evidence that transboundary pollution was having a serious impact in Europe. Those states downstream of a greater proportion of pollution than they themselves were creating, the Nordic states in particular, persistently claimed that they were the victims of significant foreign interference. Norwegian diplomats openly described British pollution as being a

\textsuperscript{382} Pamela S. Chasek, \textit{Earth negotiations: Analyzing thirty years of environmental diplomacy} (Tokyo, Japan: United Nations University Press, 2001), 84-85. The REIO concept was employed so as the benefits of this concession would not be restricted only to the EC.

“provocation against international society.”\textsuperscript{384} Marc Levy exposes the level of Nordic hostility to these professed violations to their sovereignty, when he recounts,

Swedish and Norwegian officials branded the United Kingdom \textit{an irresponsible renegade} guilty of damaging Scandinavian resources. In one heated moment Norwegian environment minister Thorbjørn Berntsen publicly called his British counterpart, John Gummer, \textit{a shitbag}.\textsuperscript{385} [Emphasis added]

Although these sorts of emotional appeals by downstream states brought more attention to the problem of transboundary pollution, they had less impact on changing behavior. Reacting to Nordic hostility, heavily industrialized states like West Germany and Great Britain, defended their sovereign right to pollute, and resisted foreign interference demands that they \textit{should} alter their domestic regulatory policies.\textsuperscript{386} The West Germany and Great Britain position on state sovereignty was clearly displayed by their initial reliance on the ‘tall smokestack’ strategy that made it easier for domestic emissions to be transported outside their own borders; after that, they seemed to be claiming, it was somebody else’s problem.\textsuperscript{387}

In both cases, Germany first, then Great Britain, these positions only changed once they began to understand the impacts of pollution they were inflicting on themselves. The pollution impact in West Germany’s forests became known as ‘Forest Death’ as scientists found that the rate of acidification between 1982 and 1985 had grown

\textsuperscript{384} Marvin S. Soroos, \textit{The endangered atmosphere: preserving a global commons} (Columbia, South Carolina: University of South Carolina Press, 1997), 120.


\textsuperscript{386} Liftin, “Sovereignty in World Ecopolitics,” 186.

from 8 percent to over 50 percent.\textsuperscript{388} For the UK it was much the same.\textsuperscript{389} In 1988, studies showed that less than half of British forests could be considered healthy, which engaged the interests of wealthy landowners, rather than simply young urban environmentalists.\textsuperscript{390} Once persuaded of the severity of the domestic impact, domestic legislation followed. Jorgen Wettestad argues,

\begin{quote}
In a situation without the LRTAP, significant initial reductions would probably have taken place anyway due to other economic and political processes and domestic political pressure motivated by environmental damage.\textsuperscript{391}
\end{quote}

More to the point, once Germany (by 1983) and the United Kingdom (by 1988) were convinced of the need to act, emissions abatement in Europe was primarily influenced by EC regulation, rather than by the LRTAP.\textsuperscript{392} The Nordic states had very little sway at the EC level, but due to the size of their economies, Germany and Great Britain could be much more persuasive.

From the point of view of the geopolitics of international law, the participation of the Soviets in the initiation of the LRTAP, and thereafter, is particularly fascinating. As previously noted, the Soviets had instigated negotiations through the UNECE so they could use ‘the environment’ as a relatively neutral topic of concern between East and

\begin{flushright}
\textsuperscript{388} Rubin, “Acid Rain,” 637.
\textsuperscript{389} Within the text of this thesis, for the sake of simplicity, the author treats the terms “Great Britain” and “United Kingdom (UK)” as functionally analogous.
\textsuperscript{392} Lidskog and Sundqvist, “Transboundary air pollution,” 10.
\end{flushright}
West that could generate goodwill in the spirit of détente. Three notable events followed from this approach.

First, the LRTAP was adopted and signed in November of 1979. Despite being watered-down by the Western powers, this was something to celebrate for the Soviets seeking to prolong détente. However, in December of 1979, the Soviets invaded Afghanistan destroying whatever détente with the West that remained and re-launched a renewed phase of the Cold War (that ultimately contributed to the demise of the Soviet Union).³⁹³

Second, and confirming that the Soviets viewed the LRTAP as a foreign policy tool rather than an important mechanism of international environmental cooperation, was their insistence, in the negotiation of the first Protocols, to focus on transboundary fluxes.³⁹⁴ As Marvin Soroos describes it,

The Soviets maintained that pollutants that were emitted and deposited within a country were an internal matter, but they would be receptive to making a comparable percentage reduction in their exports of “transboundary fluxes.” This option of limited transboundary fluxes as opposed to total emissions was important to the Soviet Union because only 1.5 percent of its emissions drifted westward over European countries.³⁹⁵ [Emphasis added]

Don Munton et al. elaborate,


³⁹⁵ Soroos, Endangered Atmosphere, 128.
Only the “European” part of the country, west of the Urals, is bound by LRTAP rules; thus, for LRTAP regime purposes, what happened environmentally east of the Urals is irrelevant to the treaty.\textsuperscript{396}

As such, in order to meet the 30 percent abatement commitment of the 1985 Sulfur Protocol, all the Soviets had to do is move some high polluting industry eastward beyond the Urals.\textsuperscript{397} For the planned-economy of the Soviet Union, un-concerned by potential complaints over economic adjustment costs faced by Soviet citizens, this was a remarkably easy internal policy adjustment. As a result, international compliance costs were greatly reduced, allowing the Soviets to claim important ‘environmental’ and ‘international cooperation’ credentials.

Third, as the Soviets had blown the détente gambit by invading Afghanistan, they used the LRTAP to portray themselves and the rest of the Eastern bloc as responsible members of the international community, while at the same time describing prominent Western states (in particular, Great Britain and the United States) as anti-environmental and anti-multilateralism rogue states.\textsuperscript{398}

Lastly, it is worth noting that since the fall of the Berlin Wall in 1989, the Russian Federation, which replaced the Soviet Union, has not ratified any of the post-Cold War protocols of the LRTAP.

In conclusion, the extent of US and Canadian participation in the LRTAP will be elaborated in Part 2, but for now it suffices to say that US participation in the regime, primarily as an observer, was almost entirely cost-free.

\textsuperscript{396} Munton \textit{et al.}, “Acid Rain in Europe and North America,” 169.

\textsuperscript{397} Munton \textit{et al.}, “Acid Rain in Europe and North America,” 189.

\textsuperscript{398} Munton \textit{et al.}, “Acid Rain in Europe and North America,” 207.
The relevance of the LRTAP as a case study is that, first, (as will be corroborated in Part 2 of this chapter) it provides useful insight into how the bi-lateral transboundary air pollution regime between the US and Canada developed, and second, how the Soviet use of an IEA primarily as a foreign policy tool, rather than a mechanism to protect its own domestic environment, set a fascinating precedent (especially in Europe).

Participation in the LRTAP by Europe’s largest polluting states (West Germany and Great Britain) depended on the realization that domestic environmental damage from local and foreign pollution was creating costs that were likely to outweigh the advantages offered by the unregulated status quo. Once it was in the interest of these major European powers to change the status quo, it changed. The perfectly justified emotional appeals from the downwind Nordic states brought attention to the issue, but had little direct impact. This conclusion adds support to the claim that international collective goods are produced through the supply of domestic collective goods. Absent initial demand for a domestic collective good, that state’s electorate is unlikely to be willing to pay for an international collective good. Solutions to international environmental problems, in other words, are achieved from the supply of, rather than the demand for, international collective goods.

The Soviet use of the LRTAP as a foreign policy tool is a clear confirmation of the fact that observers and analysts of international environmental politics should not assume that international environmental leadership or the promotion of ambitious regulatory standards represents altruistic or even simply benevolent efforts to protect the global environment.
The 1987 Montreal Protocol

In the 1970’s, scientific evidence began highlighting the risk of significant damage to the ozone layer from a group of consumer and industrial chemicals called chlorofluorocarbons (CFCs).\textsuperscript{399} This caused considerable public concern in the US because the ozone layer shields humans from solar radiation responsible for causing skin cancer. In response to public concern, the United States began to regulate the use of CFCs. In the 1977 revisions of the Clean Air Act, the EPA was empowered to regulate CFCs, which they did initially by banning their use in aerosol cans. After the US had begun regulating these ozone-depleting substances (ODS) at the domestic level, they sought to export/internationalize these regulations at the global level.

As with the regulation of transboundary pollution, the Europeans were initially less inclined, and potentially unable politically, to do the same at the European Community level. France and Great Britain were particularly skeptical of US concern over the ozone layer, as the US had previously used this threat to sideline their proposal to build a fleet of supersonic transports (like the Concorde) for the US market.\textsuperscript{400}

As a result, by the early 1980’s, the Europeans insisted that the 1985 Vienna Convention, negotiated through the United Nations Environment Programme (UNEP), be nothing more than a framework convention. As Sebastian Oberthür notes, the mandate for negotiating the Vienna Convention given by the EU Council in 1982 explicitly prohibited EU negotiators from going beyond


what had already been agreed upon internally i.e. a freeze of CFC production capacity.\textsuperscript{401} [Emphasis added]

The negotiation of the 1987 Montreal Protocol, to follow from the Vienna Convention framework, was from the beginning dominated by geo-economic and geopolitical considerations. The most important of these was the battle over global market-share for sales of ozone-depleting substances and their potential replacements, especially in the open market of the developing world.

In the 1974, the United States had been responsible for nearly 45 percent of global CFC production.\textsuperscript{402} The combined output of the EC countries accounted for 38 percent.\textsuperscript{403}

The unilateral US regulation of CFCs initiated a drop in global market share held by US chemical corporations. As a result, by 1985, US production had slipped from 45 percent to 28 percent.\textsuperscript{404} In 1988, by contrast, the EC countries were responsible for two thirds of global CFC production.\textsuperscript{405}

U.S. production, at that time, was almost entirely consumed in the United States.\textsuperscript{406} European states, on the other hand, were exporting one-third of their CFC


\textsuperscript{403} Hashim, “Free Riders,” 97.

\textsuperscript{404} Hashim, “Free Riders,” 97.


\textsuperscript{406} Dearing, “Montreal Protocol.”
production, and hoped to expand and protect their market-share in the developing world.  

As a result, during the Montreal Protocol negotiations, the greatest source of disagreement was whether to base the targets on the consumption or production of the chemicals. Due to its interest in expanding exports, the EC proposed a production-based regulatory regime. The US, on the other hand, argued for a consumption-based one. The reasoning for the two diverging proposals was that if a production-based system were chosen, the EC would have had a virtual monopoly on CFC production in the developing world.

Ultimately, this issue was settled by way of a regulatory compromise called ‘the formula.’ The negotiating states agreed that developed countries would freeze their consumption (defined as ‘production plus imports minus exports’) of the major CFCs at 1986 levels by 1990 and then reduce consumption in stages to 50 percent by 1999. To explain the virtue of the formula, Jamison Koehler and Scott A. Hajost of the USEPA have argued, by allowing parties to subtract exports from the consumption equation, the formula ensures that non-producing nations continue to have access to the controlled chemicals until substitute chemicals are available, thereby removing production and consumption limits, the formula implicitly

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410 Dearing, “Montreal Protocol.”

recognizes the interests of a much wider range of Parties - producers and users of the chemicals alike - in the protection of the ozone layer.\(^{412}\)

As they had done at the LRTAP negotiations, the EC had argued that it should be given REIO status, first at the Vienna Convention, which served as a framework convention for the negotiation of the Montreal Protocol, then again at Montreal. As Markus Jachtenfuchs notes,

\[\text{since the negotiating mandate made this a pre-condition for signature of the [Vienna] Convention by the EU, the EU’s major counterpart in the negotiations, the US, was left with little choice if it wanted a Convention at all.}^{413}\]

More importantly, however, at Montreal the EC claimed that it would be unable to restrict intra-European imports and exports as doing so would contravene the EC provisions on the free movement of goods. The compromise offered by the EC was that, if all EC member states became parties to the Protocol, they should be treated individually for the purposes of production but be treated as one entity with respect to consumption.\(^{414}\) This would provide the member states the maximal amount of flexibility needed to meet their international commitments by allowing the phasing out of consumption at different rates.\(^{415}\) In other words, the EC sought to expand REIO recognition status into an EC Compliance Bubble.

Numerous observers of the EC in the negotiation of the Montreal Protocol have noted the significant disunity European delegates displayed. John Vogler, for example, notes, “A common conclusion is that, far from being an autonomous actor, Europe

\(^{412}\) Cited by Dearing, “Montreal Protocol.”


\(^{414}\) Oberthür, “The EU as International Actor,” 647.

represents a ‘convoy moving at the speed of the slowest vessel’.  
Richard Benedick, who was the chief US negotiator, argues that internal struggles over legal competence between the Commission and the member states seemed more important than coordinating the joint protection of the ozone layer.  

Ironically, it may have been exactly that disinterested chaotic approach that led the Americans to agree to the expanded privileges claimed by REIO recognition. The US had initially resisted this European structural foreign policy linkage claim as it provided the EC with significant flexibility, approaching provisional free riding. Ultimately the US relented, and agreed to this major concession to the EC for the good of the wider regime. As Nadra Hashim describes the purpose of the US agreeing to the EC Bubble, “the substantive outcome was that… the US State Department compelled EC countries to commit to controlling the types of CFCs they export to the developing world.” The EC Bubble served as a sort of side payment, from the US, which facilitated EC compliance with the Protocol by giving them some time to, “export CFC products already in the pipeline, discouraging both EC and [developing country] defection, without resorting to the threat of embargo.” This flexibility concession also allowed the US to demand a 50 percent reduction target; the EC would otherwise have been unwilling to accept.

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418 Hashim, “Free Riders,” 98.


The leadership role taken by the United States in the negotiation of the Montreal Protocol and its swift ratification were motivated by two central elements. First, the US government wanted to support the American DuPont company, who by 1987 had designed, or were on the verge of designing, a replacement for ozone-depleting CFCs. Phasing out the production and consumption of CFCs before European industry had designed their own substitutes would give the US chemical industry an advantage in the new global marketplace and restore the market share taken by the European Community. Second and more importantly, there was, at the time, persuasive evidence supporting the conclusion that the domestic cost-benefit calculus justified coordinating a global phase-out of ozone-depleting chemicals.  

In 1987 and 1988, EPA assessments projected a positive cost-benefit analysis from domestic CFC emissions abatement, but showed even better results from global cooperation. In these EPA reports, benefits and costs were only calculated for the United States, but for other developed states in the Northern hemisphere the benefits would have been roughly analogous. Barrett describes how the benefits detailed in these reports would amount to trillions of dollars in net benefits for the United States:

*The study found that by 2065 implementation of the Montreal Protocol would avoid more than 245 million US cancer cases and more than 5 million early deaths. Costs for cancer illness were taken to be costs of treatment, and costs for cancer deaths were taken to be the value of a statistical life, estimated by the USEPA at $3 million.*

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The costs of abatement relied on the availability of replacement products, not just in the American market but globally, which was to a significant degree a problem solved by supporting the DuPont Corporation’s marketing of its new chemical formulations.\footnote{423} Thus the costs of abatement had to address the acceptability of the difference in cost for the replacement products, which would reflect the costs or researching and developing these new products.\footnote{424}

Barrett concludes that the remarkable CBA calculus displayed by the EPA’s reports was persuasive in securing US ratification and ambitious implementation of commitments to phase out ozone-depleting substances. Barrett argues,

> The basic economics of stratospheric ozone policy thus imply that for the United States (and probably for every other industrial country), the benefits of adopting the Montreal Protocol exceed the costs by a wide margin.\footnote{425}

Based on Barrett’s analysis and presentation of the EPA’s assessment, shown in Table 4, Cass Sunstein argues emphatically that, “American enthusiasm for the Montreal Protocol and for aggressive regulatory steps [to phase-out ozone depleting substances] can be understood only in this light.”\footnote{426}

\footnote{423} Barrett, “Montreal versus Kyoto,” 216.


\footnote{425} Barrett, “Montreal versus Kyoto,” 201.

Table 4. The US costs and benefits of ratifying the Montreal Protocol

<table>
<thead>
<tr>
<th>Benefits and Costs to the U.S (billions of U.S. dollars)</th>
<th>No controls</th>
<th>Montreal Protocol</th>
<th>Unilateral Implementation of the Protocol by the US</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefits</td>
<td>–</td>
<td>3,575</td>
<td>1,373</td>
</tr>
<tr>
<td>Costs</td>
<td>–</td>
<td>21</td>
<td>21</td>
</tr>
<tr>
<td>Net Benefits</td>
<td>–</td>
<td>3,554</td>
<td>1,352</td>
</tr>
</tbody>
</table>


Source: Barrett, *Environment and Statecraft*, 228.427

To secure these benefits for the United States and other developed countries, it was crucial to prevent free riding and trade leakage by non-participants. To do this the Montreal Protocol prohibited the import and export of ozone depleting substances with states that had not ratified the Protocol. This trade ban included products that contained these controlled substances, and although it was later dropped due to the infeasibility of implementation, the Protocol initially called for the trade ban to extend to products produced using banned substances (process standards).428 According to Bryan Green,

> These strict measures served to provide states with the incentive to join the Montreal Protocol rather than abstain from it in an attempt to gain a competitive advantage. *Protecting the economic and competitive interests of the parties to the Montreal Protocol was essential to gain widespread support and membership.*429 [Emphasis added]

In other words, a robust enforcement mechanism was justified to create a sufficiently stable regime to protect the individual benefits for developed states, including the United

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States, offered by the Montreal Protocol’s regulatory mechanism coordinating the phase-out of ozone depleting substances. Trade sanctions provided powerful incentives for states to participate in the regime and comply with its commitments.⁴³⁰

In conclusion, the most crucial element of this case is that US ratification was justified by compelling estimates that doing so would secure net benefits for the United States. The costs associated with bringing participants on board, for the US, were outweighed by the reduction in foreign pollution externalities impacting US citizens. The US could unilaterally regulate CFCs, but it needed global coordination to ensure ongoing benefits.

While the CBA element was decisive it is important not to let that diminish other relevant elements of the negotiation, which addressed the broader problem structure. Ozone depletion is a common pool resource problem, due to the finite carrying capacity of the ozone layer. Moreover, the release of ODS anywhere in the world creates global damage. In other words, the US was downstream of the effects produced by continued ODS usage anywhere in the world. In order to address the problem effectively, the US needed to enlist the largest producers of CFCs (i.e. the EC), in such a way that they could meet their commitments as flexibly as possible in the transition period as they developed their own replacement substances.

In this regard, the US worked to create a k-group of the most significant consumers and producers (at the time) and worked to coordinate a self-enforcing agreement that provided net benefits to these actors. The inclusion of trade sanctions, for example, would never have been seen as credible without the support of the major Western powers that would benefit from the enforcement of the regime.

The provision allowing for an EC Bubble was an expensive structural foreign policy side-payment/concession, but it was necessary to secure a k-group that would soon need to coordinate to increase developing state participation in the treaty regime. The role of developing states in the Montreal Protocol regime is addressed in Part 2.

Part 2.

The Post-Cold War Era

(1989-2012)

This section begins by describing elements of the macro-historical context within which the scope of the Cold War IEAs were expanded, then presents the cases describing their negotiation.

Part 2(a).

Paradigm-Shifts:

Geopolitical Objectives of the Post-Cold War Era

The following historical narrative describes an American perception of the geopolitical objectives pursued by the developing world members of the G-77 and the member states of the European Community/European Union during the post-Cold War era, as they relate to the negotiation of international environmental agreements.

The G-77’s New International ‘Environmental’ Order

Twenty years after the 1972 UNCHE, North and South met in Rio for the 1992 UNCED. The name change from UN Conference on the Human Environment to the UN
Conference on Environment and Development is illustrative of broader efforts to capture and reframe the field of international environmental law. The concerns and demands of the developing world, represented by the G-77, remained virtually unchanged in the post-Cold War era, although they were creatively reframed under the emerging concept of sustainable development.

Sustainable development was conceptually derived from the ‘right to development’ set out in the Declaration on the Right to Development, adopted by the United Nations General Assembly in 1986, ostensibly to support the emerging field of international development law. The right to development was merged with the environmental protection-focused definition of sustainable development produced by the 1987 United Nations-initiated World Commission on Environment and Development (i.e., the Brundtland Commission).\textsuperscript{431}

Although the fault lines at the 1992 UNCED remained the same as they were at the 1972 UNCHE, it was hoped that sustainable development, this hybrid concept that merged environmental protection with economic development, would facilitate a ‘Rio Bargain.’ The North hoped the South would take more seriously their role in addressing international pollution, and the South hoped the North would take more seriously their role in facilitating economic development in the developing world.

At Rio, the Brazilian delegate managed to convince participants to replace the established term ‘international environmental law’ with ‘international law in the field of

sustainable development’ in all the conference documents.\footnote{432} This new international law of sustainable development was meant to recognize a paradigm shift to a ‘New International ‘Environmental’ Order’ that would serve as a vehicle for legitimizing the economic development priorities of the South.\footnote{433}

Not unlike UNCHE in 1972, the developing world viewed UNCED primarily as an economic conference rather than an environmental conference.\footnote{434} Gareth Porter and Janet Welsh Brown argue that,

many developing countries, particularly the more radical members of the Group of 77, have viewed global environmental negotiations as the best, if not the only, opportunities to advance a broader agenda of change in the structure of North-South economic relationships.\footnote{435}

In other words, at Rio, the G-77 presented a rebranded NIEO to the international community and used international environmental law, and northern interest in protecting the global environment, to do it.

Much of the reason for the optimism from the developing world at Rio was they felt they finally had a significant source of leverage over the North; the South had the ‘power to destroy’ the global environment through their increasing industrialization. As DeSombre describes it,

Developing countries can threaten to take no action to address an environmental problem; [as] \textit{doing nothing to improve an environmental}...
problem is in practice a threat to destroy the resource.  

For common pool resource goods issues like a thinning of the ozone layer or climate change, which present significant but mainly medium-to-long-term costs, non-participation by the developing world was viewed as a credible threat.

Developing countries wasted little time before they sought to profit from this perceived leverage. In the preparatory negotiation in advance of UNCED in Rio, India and China called for the creation of a ‘Green Fund’ that was intended to extract restitution for Northern exploitation of global resources. Contributions were to be assessed based on historical responsibility for damage to the global environment, and Southern governments would control the use of this fund. Had this proposal been successful, it would have fundamentally altered the distribution of benefits from, and control of, the international order.

In response to the unanimous rejection of this demand by the proposed donors, the industrialized states that viewed this as a form of environmental blackmail, these demands were eventually revised downward. Nevertheless, these demands are suggestive of pre-Rio optimism by the G-77, and willingness to claim authoritative allocative benefits from international environmental negotiations.

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William K. Reilly, the then Administrator of the US Environmental Protection Agency, seeking to reduce what the US Government saw as continued unrealistic expectations, expressed concerns about “a certain amount of posturing by developing countries to try to get us to contribute more funds [when, in fact.] those contributions are not in the cards.”

As Najam notes, however, while “the South was frustrated that the North viewed demands for Southern ‘rights’ and ‘compensation’ as a distraction and extortion,” this didn’t stop Southern delegates from coming to Rio with the intention to “maximize aid flows and technology transfer as far as possible.” The South renewed calls for industrialized states to increase official development aid to 0.7 percent of their GDP, and the non-binding Agenda 21, which proposed to implement sustainable development initiatives at the global level, called for $600 billion (US dollars) to be directed annually to developing countries. Needless to say, these non-binding commitments were not met.

The G-77 was successful in influencing the design of the Global Environment Facility, which will be explored in a later section, and had a great deal of influence on the negotiation of the United Nation Framework Convention on Climate Change (UNFCCC), also adopted at Rio in 1992, which is addressed in Part 4.


Nevertheless, the non-binding principles of the Rio Declaration, described at the time by a Canadian delegate as possessing a “naïve aspirational quality,” have been used to support calls for an emerging ‘environmental customary international law’ with mixed result.\(^{444}\) Subsequent to UNCED, international environmental law has continued to be co-opted by the language of sustainable development, but the new title of ‘international sustainable development law’ never caught on.

Interestingly, perhaps the most notable historical consequence from the UNCED/Rio Summit has been the increasingly frayed transatlantic relationship. The Rio Summit was widely seen as a public relations disaster for the United States.\(^{445}\) The Bush administration and the US Congress, just like virtually the entire developing world, approached Rio primarily with economic rather than environmental concerns. The Bush administration persistently maintained, for example, “the American life-style is not up for negotiation.”\(^{446}\) The Senate Foreign Relations Committee made a point to declare prior to the Conference that “the President should not support any action or undertake any commitment,” in any of the various binding or non-binding instruments negotiated at Rio, “which he believes would have an adverse effect on the competitiveness of American industry or that could result in a net long-term loss of American jobs.”\(^{447}\)

Since the leverage held by the South depended on the willingness of the North to protect the global environment at all costs, the US government was castigated by the

\(^{444}\) Najam, “The south,” 457.


\(^{446}\) Najam, “The south,” 453.

\(^{447}\) Brunnée, “Living with an elephant,” 639.
developing world – joined by Green states from the industrialized world – for being an anti-environmentalist. While this was an understandable tactical reaction from the international community, it ignored the fact that at the time the US had, what most of its detractors would privately concede was, the most advanced environmental laws and robust regulatory framework in the world. During his official speech before the assembled world leaders in Rio, Bush advanced this position by stating, “America’s position on environmental protection is second to none, so I did not come here to apologize.”

This did little, however, to mitigate the alleged American embrace of anti-environmentalism. The developing world was further incensed by the interpretive statements the US attached to the Rio Declaration addressing developing world claims to a right to development, the recognition of common but differentiated responsibilities (providing exemptions for the global South), and the donor state responsibility to fund the international pursuit of sustainable development.

When asked about his perceived abdication of environmental leadership at Rio, Bush is reported to have said, “I am president of the United States, not president of the

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449 The United States recorded an interpretive statement Principle 3 of the Rio Declaration, as follows:

*The United States does not, by joining consensus on the Rio Declaration, change its long-standing opposition to the so-called "right to development." Development is not a right. On the contrary, development is a goal we all hold, which depends for its realization in large part on the promotion and protection of the human rights set out in the Universal Declaration of Human Rights.*

The United States recorded a further interpretative statement on Principle 7, which read as follows:

*The United States understands and accepts that Principle 7 highlights the special leadership role of the developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities.*

*The United States does not accept any interpretation of Principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries.*
world, and I’ll do what is best to defend U.S. interests.\textsuperscript{450} What is so shocking about this statement is how honestly it reflects the pragmatism that is more commonly hidden behind rhetorical statements by diplomats confirming their support for the collective will of the international community.

In contrast to the US leaving Rio with reduced external legitimacy, the EC (on the verge of formally becoming the European Union) left Rio with an improved international reputation. The EC was able to hide behind US intransigence, which provided them with considerable shelter from onerous commitments, while at the same time promoting an ambitious sustainable development agenda that had emerged in the wake of the Single European Act of 1986.\textsuperscript{451} In contrast to Bush’s comments motivated by national economic self-interest, for example, Jacques Delors, President of the European Commission, made statements proclaiming that the “rebirth of North-South dialogue is absolutely urgent.”\textsuperscript{452} In other words, the EC/EU used this opportunity at Rio to stake out a leadership role for itself, distinct from the US, and since then has consistently sought to negotiate IEAs in competition with US interests, while at the same time courting the support of the developing world.\textsuperscript{453}


\textsuperscript{452} Najam, “The south,” 446.

\textsuperscript{453} Daniel R. Kelemen, “Globalizing European Union Environmental Policy” (paper presented at The European Union Studies Association, 11th Biennial International Conference, Marina Del Rey, California, April 23-25, 2009), 18.
Europe’s historic institutional weakness and resulting vulnerability to external influence are similar to deficits faced by the developing world, but are also different in important ways.

Like developing countries in relation to the international system, historically the European Community has had relatively weak institutions, but unlike the members of the G-77 this internal control deficit reflected the unwillingness of developed states to delegate their decision-making authority to supranational European institutions.

Again like developing countries, there was an incentive for Europe to reduce its vulnerability to the imposition of foreign regulatory standards by forming a more influential coalition of member states, but again this objective was constrained not by fiscal deficits but by internal legitimacy deficits. Here internal legitimacy deficits were both a product and a source of the unwillingness of member states to delegate their decision-making authority.

As a result, increased external control for the member states relied on increased external control for the European institutions representing the common interests of Europe. If Europe wanted to increase its external control (its influence on world affairs) it would need to: (1) Be recognized as an international actor worthy of legal standing in international negotiations (External legitimacy via REIO recognition); (2) Have sufficient support of the member states, European industry and European citizens to pursue increased political and economic integration (Internal legitimacy for member states to delegate autonomy to EU); and (3) Be capable of adopting a common position to
influence international negotiations (Internal control via delegation of competence, employed externally).

Prior to the early-to-mid-1980’s, however, mistrust among the member states had obstructed the implementation of calls to increase European political and economic integration. Although the Commission nevertheless sought REIO recognition to represent European interests in all post-1979 pollution IEAs, it knew that this by itself was insufficient to exert increased external influence.

As it happens, by the mid-1980’s, the member states were increasingly incentivized to delegate much of their regulatory policy autonomy to the institutions of the European Community in an attempt to improve their collective economic competitiveness. On-going economic competition from the United States and, in particular, increased competition from Japan, strengthened incentives for member states to coordinate on economic matters. Further, as Randall Stone suggests,

Preferences over the European economic model had significantly converged, since Mitterrand had embraced a strategy of European integration based on deregulation and free movement of goods and capital, which mirrored the more conservative preferences of Helmut Kohl and Thatcher.

As with “most of the milestones of European integrations,” the Single European Act of 1986, which would initiate the completion of the Single market, Stone continues, “arose as efforts to coordinate domestic policies in order to maximize European bargaining leverage in world politics.”

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455 Stone, *Controlling Institutions*, 106.

456 Stone, *Controlling Institutions*, 105. [Emphasis added]
Lastly, the delegation of member state autonomy to increase the internal control of the emerging European Union was not seen as only a mid-to-long term investment in increased European economic power and political influence, but also one that offered immediate benefits. The Cecchini report, for example, concluded that the implementation of the Single European Act would provide “a substantial one-time boost to European output between 2.5% and 6.5% above what would otherwise have been achieved....”\textsuperscript{457}

Internal Statecraft and the Evolution of European Regulatory Policy

Prior to the 1986 Single European Act (SEA), European environmental policy reflected an ad hoc approach limited to lowest common denominator ambition to be expected from a decision making process that required unanimity among member states. The adoption of the SEA, on the other hand, marked the beginning of what Henrik Selin and Stacy VanDeveer describe as “a more comprehensive and ambitious approach to adopting more expansive and stringent environmental standards and laws.”\textsuperscript{458}

To the extent that member state environmental regulatory standards diverged, they had the ability to affect the integration of the Single Market.\textsuperscript{459} According to this


\textsuperscript{459}Within the text of this thesis, for the sake of simplicity, the author treats the European Common Market, Single Market, and Internal Market of the EC/EU as functionally synonymous.
logic, European regulatory standards harmonized at the Community level were necessary to increase political and economic integration.  

This new approach to environmental regulations relied on two primary mechanisms: reformed governance (voting) mechanisms; and the invocation of principles and norms intended to represent the European identity.

**Environmental governance mechanisms of EU integration.** European institutions acquired increased legislative powers to complete the Single Market and pursue economic and political gains resulting from deeper integration.  

According to Keohane and Nye, the SEA “called for a genuine internal market by the end of 1992, and sharply improved the coherence and speed of EC decision making by providing for qualified majority voting on issues concerning the internal market.”

By increasing the scope of the ‘issues concerning the internal market’ to environmental regulatory harmonization, and as a result replacing unanimity voting, the Council’s legislative authority grew substantially.

The introduction of qualified majority voting (QMV) in the Council meant that most environmental measures were no longer negotiated under the threat of an individual member state veto. This decision-making mechanism (QMV) was crucial for

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overcoming the objections of environmental protection laggards, but particularly those member states in southern Europe.465

When discussing environmental regulations, the EU’s Council of Ministers, representing the executives of the member states, is composed of member state environment ministers. As Daniel Kelemen notes, the ability of environment ministers to, “deliberate amongst themselves – insulated from the critical eyes of ministers of economics and industry – emboldened them to agree on more ambitious policies.”466 Similarly, Selin and VanDeveer have observed that the move from unanimity voting to QMV helped powerful green states to overcome opposition from laggards and to push for more ambitious policies.467

The SEA also mandated increased influence in the EU’s legislative process for the European Parliament, whose purpose is to represent the interests of European citizens. The European Parliament (EP) was eager to establish its democratic legitimacy with European citizens who regarded environmental protection as a salient policy concern. As such, this increased influence contributed to ensuring that environmental regulations were set at a high standard.468

This increased regulatory authority, shaped by the need for increased integration, sent a clear message that member state interests would sometimes need to be subordinated to the overriding common interests of the European Union and its citizens. In this regard, QMV combined with the EP’s encouragement gave European

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466 Kelemen, “Globalizing Environmental Policy.” 12.
environmental policymaking a distinctly supranational quality, and legitimated the use of international Kaldor-Hicks agreements.\textsuperscript{469}

The European Commission (representing the common interests of the European Community) is the EU’s executive arm.\textsuperscript{470} It proposes legislation and has the authority to challenge member state non-compliance with EU regulations before the European Court of Justice.\textsuperscript{471} As a consequence, the power of the Commission over the member states increases as the number and scope of regulations increases. In fact, Andrew Moravscik has asserted that the commission was responsible for quietly slipping environmental provisions, to increase the scope of its own regulatory mandate, into the SEA and subsequent revisions of the European Treaties.\textsuperscript{472}

With this in mind, the Commission’s promotion of the normative concept of sustainable development, proposed by the 1987 Brundtland Commission, should come as no surprise.\textsuperscript{473} By linking environmental protection with economic development, the Commission had found an ideal norm to legitimate its regulatory ambitions.

In this context, the fact that the Commission also enjoys the exclusive right to initiate legislation is increasingly important. By replacing unanimity for QMV in the Council, the possibility of coordination on policy increased dramatically, and as a result, Stone argues,\textsuperscript{473}


\textsuperscript{473} Brown, “Ecologically Rational?” 118.
the Commission’s proposal power became substantively important, because it became possible to make a range of proposals that would pass with the support of different coalitions.\footnote{Stone,\textit{Controlling Institutions}, 111.}

In this way, the right to initiate legislation empowers the Commission to decide the direction of EU regulatory policy. Notwithstanding the law-making role of the Council and Parliament, the Commission may be seen as the European institution best able to direct internal statecraft within the European Community, and external statecraft that seeks to benefit the European Community. Accordingly, the more internal control and internal legitimacy the Commission could generate, the more able it would be to exert external influence.

As Giandomenico Majone and others have asserted, the EU is primarily a regulatory state.\footnote{Giandomenico Majone, “From the positive to the regulatory state: causes and consequences of changes in the mode of governance,”\textit{Journal of public policy} 17, no. 2 (1997): 146-149, and David Vogel, “The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe,”\textit{British Journal of Political Science} 33, no. 4 (2003): 574.} The production and enforcement of rules is the Union’s central source of power and influence over the member states.\footnote{Vogel, “The Hare and the Tortoise Revisited,” 574.}

This influence has been achieved in spite of the fact that the Union has a limited budget with which to project internal control.\footnote{Bradford, “The Brussels Effect,” 43. The EU’s budget only amounts to roughly 1 percent of the GDP of the member states.} The expansion of the Commission’s regulatory authority, however, was achieved at relatively low costs for the Commission, precisely because, as Anu Bradford observes, “regulations are not constrained by
budgetary appropriations and are hence not dependent on the tax revenues available to
the Community institutions.\textsuperscript{478}

Moreover, Bradford asserts, “the only way for the Commission to exert influence
[within Europe] without extensive financial resources [was] to engage in regulatory
activity.”\textsuperscript{479} In this way, the increased regulatory scope claimed by the Commission to
harmonize European environmental norms and standards serves to, as Zaki Laidl
suggests, “establish its own legitimacy and its own control over member states.”\textsuperscript{480}

**Environmental norms and principles of EU integration.** The adoption of national
environmental regulations by the member states in the 1970s and 1980s, that could be
used to justify intra-European non-tariff barriers, and thus threaten the single market,
were seen by the Commission as a central justification for increased regulatory
harmonization.\textsuperscript{481} But the economic efficiency of the Single Market was not the only
objective promoted by the Commission to increase political and economic integration.
The continued prosperity of European corporations vis-à-vis US and Japanese
competitors was simply not a sufficiently salient or legitimate concern for most European
citizens. Indeed, Kelemen has argued that,

> With many on the political left arguing at the time that the EU merely
served the interests of international business, attacking national
environmental standards as non-tariff barriers would have been politically
disastrous for the EU.\textsuperscript{482}

\textsuperscript{478} Bradford, “The Brussels Effect,” 43.

\textsuperscript{479} Bradford, “The Brussels Effect,” 43.

\textsuperscript{480} Zaki Laidi, “The Normative Empire: the unintended consequences of European Power,” Les
Cahiers europeen de Science Po, 05, Paris: Centre d’études europeennes at Science Po (2007), accessed July
12, 2017, https://hal-sciencespo.archives-ouvertes.fr/hal-00972756.


\textsuperscript{482} Kelemen, “Globalizing Environmental Policy.” 11.
If the European Union were to continue to claim to be representing the broader interests and concerns of Europeans, the legitimacy of those claims would also rely on the ability of the Commission to protect the health of European citizens and the European environment. As a result, Kelemen continues,

the EU sought to protect the single market by harmonizing environmental standards at high levels of protection. *This approach appealed to the European Commission... because they saw that championing a strong environmental policy would increase the EU’s popularity and legitimacy in the eyes of European citizens, demonstrating that the EU did not simply serve business interests but public interests as well.*

Thus, it is important to emphasize that the EU was incentivized to commit to high standards for European environmental policy, so as to legitimize political and economic integration benefits of the Single Market. The harmonization of regulatory standards using environmental norms and principles, in other words, was not designed primarily in aid of helping to supply global collective goods or to protect the global environment.

The problem for the Commission was that while QMV was effective for weakening the veto power of laggards it also had the potential to alienate those member states that were unhappy with the domestic redistribution of resources resulting from the proposed regulation. As Anthony Zito notes,

Over EC environmental history there has developed a tension felt particularly by the ‘Southern’ states: namely that the substantial EC legislation reflects a ‘Northern’ outlook towards goals and standards and not Southern priorities.

483 Vogel, “The Hare and the Tortoise Revisited,” 574, 575.
484 Kelemen, “Globalizing Environmental Policy.” 11.
486 Zito, “In a Global Environment,” 368.
487 Zito, “In a Global Environment,” 368.
To smooth over differences in regulatory optima between greener northern member states and grayer southern member states, the EU relied heavily on norms and principles linking environmental protection and a commitment to multilateralism with the European identity. In this regard, the inclusion in the SEA of a specific section for ‘the environment’ has been described as representing “the constitutionalization of EC environmental policy.” Following from the SEA, the Treaty of Maastricht of 1992 identified four guiding principles:

* The Integration Principle states, “environmental protection requirements must be integrated into the definition and implementation of other Community policies.”

* The Protection Principle requires that the Community “aim at a high level of protection” in its environmental policies.

* The Precautionary Principle compels the Community to act “before it is too late” when there is a strong suspicion that an activity will be environmentally harmful.

* The Principle of Sustainable Development states that the Community will encourage “sustainable and non-inflationary growth respecting the environment.”

While he does not view these principles as a sham, Ian Manners argues that the EU’s promotion of norms such as sustainable development is done to primarily legitimate

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490 The Treaty of Maastricht, Article 130(r)(2).

491 The Treaty of Maastricht, Article 130(r)(2).

492 The Treaty of Maastricht, Article 2.
itself with skeptical European citizens. But when viewed in combination, these four normative principles may be further interpreted as a normative mechanism to influence recalcitrant member states that may have been resistant to the Community’s regulatory ambitions.

In this context, it is important to emphasize the nexus between cultivating a shared European identity and the Commission’s twin objectives of integration and representing Europe’s common interests in external relations. A coherent and strongly supported European identity facilitates the delegation of autonomy to the Union by the member states, which increases the Union’s internal control, and if the foreign policy of the Union strengthens the European identity, it increases the internal legitimacy of the Union vis-à-vis the member states and European citizens.

Recalling the aims and objectives of the 1973 Declaration on the European Identity, the absence of a coherent European identity, on the other hand, may be seen as either exemplifying, or indeed being responsible for, the weakness of European institutions and of the European coalition in international negotiations, prior to the adoption of the SEA.

As a result of this presumed nexus, the Commission’s twin objectives of increased integration and representing the common interests of the European Community were intertwined with the cultivation of a shared European identity. As will be discussed below, this confluence of objectives lead to the use of normative foreign policy.

External Environmental Statecraft: Crafting a European Identity

European foreign policy literature has increasingly observed that the EU has asserted leadership on questions of global environmental governance in an effort to carve out an identity and a profile for itself as a ‘normative’ or ‘civilian’ power on the world stage.\textsuperscript{494} Central in this literature is Ian Manners, who has articulated the concept of normative power.

Crucial to Manners’ conceptual understanding of Normative Power Europe (NPE) is the role, he argues, Europe can and should take in “defining what’s normal.”\textsuperscript{495} As Manners suggests, “an international norm is probably best understood as being a shorthand way of expressing what passes for ‘normal’ in international relations…”\textsuperscript{496} And as a result, he continues, “normative power, as understood here, is therefore the ability to shape or change what passes for normal in international relations....”\textsuperscript{497}

Manners observes that the European Union has consistently promoted its commitment to multilateralism and norms including sustainable development.\textsuperscript{498} Other scholars, including John Vogler and Hannes Stephan, have suggested that the Union’s commitment to multilateralism is central in explaining its consistent support for IEAs.\textsuperscript{499}

\textsuperscript{494} Kelemen, “Globalizing Environmental Policy.” 7.

\textsuperscript{495} Manners, “Normative Power Europe,” 252.

\textsuperscript{496} Ian Manners, “Normative Power Europe: The International Role of the EU,” (paper presented at the Biennial Conference of the European Community Studies Association, Madison, Wisconsin, May 31, 2001), 10. [Emphasis added]

\textsuperscript{497} Manners, “The International Role of the EU.” 10. [Emphasis added]


\textsuperscript{499} Kelemen, “Globalizing Environmental Policy.” 8.
Indeed, it is argued, the importance placed on multilateralism and sustainability by the EU has been self-consciously promoted so as to craft the emerging European identity.\textsuperscript{500} Daniel Kelemen and David Vogel note that the European Union has both, “consistently backed multilateral environmental treaties” and has persistently sought to “establish a reputation as a leader in multilateral environmental governance.”\textsuperscript{501} According to Jorgensen, the simple explanation for this correlation is that, for the European Union, multilateralism and sustainable development are both “a means and an end” to legitimize European political and economic integration.\textsuperscript{502}

Europe’s commitment to multilateralism and sustainable development, in other words, serves to encourage the on-going integration of the European Union, to provide increased internal legitimacy, which serves to increase the Community’s internal control over the member states, but also to project influence on the world stage (to exert external control on world affairs).

Although its use is not unique to Europe, European integration since the end of World War II has relied heavily on ‘othering’ as a tool of statecraft. During the Cold War, Europe relied primarily on what Thomas Diez calls “temporal othering.” This term reflects the idea that “Europe’s other [was] Europe’s own past.”\textsuperscript{503} European political and economic integration was defended on the grounds that it was necessary to avoid a return

\textsuperscript{500} Vogler and Stephan, “Leadership in the making?” 389.

\textsuperscript{501} Kelemen and Vogel, “Trading Places,” 11.


to Europe’s war-torn past. Diez goes on to argue that this evolved into “the representation of post-war Western Europe as a new Europe that has overcome the menace of war.”\textsuperscript{504} European success in creating a Kantian paradise in a Hobbesian world made them uniquely civilized, and thus positive role models for the world.\textsuperscript{505}

Diez argues, however, that temporal othering is no longer the dominant form of othering used to propel European integration. Specifically, Diez asserts,

\begin{quote}
What we have been witnessing since the 1990s with the Maastricht Treaty and the end of the Cold War is a move… to the increasingly widespread construction of ‘Europe’ through practices of othering, in which identity, politics and geography are intimately linked with each other, and which can therefore be called ‘geopolitical’ othering.\textsuperscript{506}
\end{quote}

This conception of ‘geopolitical othering’ as a tool of statecraft to increase European political and economic integration is especially useful when examining the impact of Normative Power Europe. Diez begins by highlighting the fact that NPE “\textit{constructs an identity of the EU against an image of others in the ‘outside world’}.\textsuperscript{507}” The positive features of the European identity, then, are strengthened in relation to crafting a negative perception of foreign states that do not welcome the imposition of Europe’s civilized regulatory standards and norms. Moreover, Diez continues,

\begin{quote}
the discourse of the EU as a normative power constructs a particular self of the EU (and it is indeed perhaps the only form of identity that most of the diverse set of actors within the EU can agree on), while it \textit{attempts to}
\end{quote}

\textsuperscript{504} Diez, “The Return of Geopolitics,” 325.


\textsuperscript{506} Diez, “The Return of Geopolitics,” 331.

change others through the spread of particular norms.\textsuperscript{508} [Emphasis added]

In other words, if the European Union is able to persuade other states to internalize European standards and norms, it legitimates the European identity. On the other hand, if developed states, but particularly the United States, reject European standards and norms, it reinforces the importance of the Union in defending the common interests of the Community from geopolitical others (specifically environmental laggards), threatening the European identity and its legitimacy.

Like Diez, Sibylle Scheipers and Daniella Sicurelli argue that the EU environmental foreign policy has been employed to create a distinctive European identity, “shaped in sharp demarcation against the US as the ‘other’.\textsuperscript{509} This ‘othering’ process, they claim, is exhibited using four thematic assertions:

Firstly and most importantly, the EU asserts that the principles that it aims to institutionalize, [including] the precautionary principle in environmental policy, … [are] universal in reach and validity.

Secondly, the configuration of the EU vis-à-vis the US is depicted as the relationship of vanguard and laggard. The EU represents itself as playing the leading role in political issues with a global reach such as global warming and human rights.

Thirdly, the EU stresses that the means and instruments that it utilizes in achieving its objectives are superior to those of the US, because the EU restricts itself to non-military, diplomatic and multilateral measures.

Finally, the European elites and officials represent the EU as strongly committed to international law and therefore as a major sponsor of justice and order in international relations.\textsuperscript{510}

\textsuperscript{508} Diez, “Constructing the Self and Changing Others,” 614.


\textsuperscript{510} Scheipers and Sicurelli, “Normative Power Europe,” 453.
With the European identity tied to the importance of multilateralism and sustainable development, central to NPE, Brunnée observes,

[this has] enabled the EU to cast itself in opposition to perceived U.S. hegemony and, potentially, to further strengthen its policy position by tapping into broader international aversion to U.S. power politics.\textsuperscript{511} [Emphasis added]

Setting aside, for the moment, the substantive external impact of this form of identity foreign policy, it is also clearly designed to have an internal impact. As Heisenberg argues,

By promoting European ideas and ideals at the global level, the EU not only creates alternatives to U.S. policies, but also forges a “European” identity, distinct from a U.S. (or any other developed country) identity.\textsuperscript{512}

Thus, external normative or identity foreign policy may be seen to serve as a tool of internal statecraft intended to craft and reinforce a coherent European identity and increase the internal legitimacy of the European institutions defending the common interests of the European Community. And as a result, it is difficult to defend the claim that European normative/identity foreign policy is primarily motivated by concern for the protection of the global environment.

The reason the European Union is seen primarily as a regulatory state is in large part due to the Community’s limited legal competence to act on behalf of its member states in security-related matters or, for example, in the imposition of economic sanctions.\textsuperscript{513} Contrary to the EU’s legal authority in matters of trade and regulatory

\textsuperscript{511} Brunnée, “All together now?” 42.

\textsuperscript{512} Heisenberg, “The Agenda of Globalization,” 34.

\textsuperscript{513} Bradford, “The Brussels Effect,” 42.
matters impinging on the Single Market, Community decision-making in these issue areas continues to require the unanimous consent of the member states.\footnote{Bradford, “The Brussels Effect,” 42.}

The role of the European Commission, as the executive branch of the Union and institution tasked with representing the common interest of the European Community in external affairs, therefore, is limited in its ability to influence world affairs. The reason the EU’s foreign policy relies so heavily on regulatory statecraft, Bradford asserts, is simply that “any entity that is willing to shape the international order must do so with the means available to it.”\footnote{Bradford, “The Brussels Effect,” 42.} Specifically, Bradford argues,

> In the absence of military power or unconstrained economic power, the EU can exercise genuine unilateral power \textit{only by fixing the standards of behavior for the rest of the world.}\footnote{Bradford, “The Brussels Effect,” 39.} [Emphasis added] In other words, the Commission has been forced to compensate “for the lack of power it otherwise has in external affairs through extensive use of its regulatory powers.”\footnote{Bradford, “The Brussels Effect,” 42.} That said, the EU has been remarkably effective in consolidating internal control and representing itself as the unified voice of the member states. In this respect, Vogler argues,

> For the United States, the EU rather than the Member States has become the principal partner, and indeed antagonist, not only on international trade but also on international environmental issues.\footnote{Vogler, “The European Union as an actor,” 43.}

There is a compelling argument to be made that Europe’s external environmental foreign policy is a product of the increased coherence of its internal environmental

\begin{thebibliography}{9}
\bibitem{Bradford1} Bradford, “The Brussels Effect,” 42.
\bibitem{Bradford2} Bradford, “The Brussels Effect,” 42.
\bibitem{Bradford4} Bradford, “The Brussels Effect,” 42.
\bibitem{Vogler} Vogler, “The European Union as an actor,” 43.
\end{thebibliography}
There is an equally compelling argument that the Commission has played a central role crafting a regulatory state able to influence world affairs. The two core objectives of the Commission, after all, may be summarized as: (1) The integration of Europe through the Single Market (internal statecraft); and (2) The representation of the common interests of the European Community, independently of the member states, in external relations (external statecraft).

Initially, regulatory harmonization to protect the Single Market was the best available avenue for the Commission to maximize its own influence, solidify internal control, and enhance its own internal legitimacy within the EU. But as environmental regulations were harmonized at a high Europe-wide level, this emerging body of laws brought Europe and the member states in conflict with what they now perceived to be an under-regulated international community.

In retrospect, it is perhaps unsurprising that the Commission has used the mechanisms it employed to increase internal political and economic integration to expand the Community role in external affairs and seek international prestige. Concern over intra-European regulatory competition had been replaced with concern for external regulatory competition with non-Europeans. Once European regulations were set at a high level, this provided the Commission the incentive and electoral support to engage in external regulatory statecraft in two ways: (1) Export European standards (to seek a level-playing field for European industry); and (2) And export European standards using European norms and principles in the negotiation of IEAs (the same norms it had used to influence European member state laggards).

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519 Vogler, “External Environmental Policy,” 70.

520 Zito, “In a Global Environment,” 367.
Rather than describe its environmental foreign policy as a tool to impose costs on economic competitors (to address self-imposed comparative disadvantages), however, Normative Power Europe sought instead to represent itself as an environmental policy leader intent on influencing world affairs.

As described by Kelemen, stronger internal control by European institutions, able to regulate at a high level, gave the EU, “the power to act on behalf of its member states in international environmental negotiations, making it possible for the EU to play a global leadership role.”

According to Heisenberg,

Among decision makers in Europe, there is a consensus that because of its size, the EU should rightly take its place on the world stage and influence events and policies outside the EU’s borders. [Emphasis added]

Bradford argues that the role the EU has taken in its external affairs, to internationalize European standards and norms, is consistent “with a desire to shape the global regulatory environment and pursue global influence.”

Further, Bradford claims, “according to polls, 70 percent of Europeans want Europe to assume this role.”

Scheipers and Sicurelli observe that, “the EU’s external relations and specifically transatlantic relations form a venue for EU identity-building.” And moreover,

The rhetoric the EU uses in communicating its values and principles related to the internationalization of environmental policy shows its commitment to becoming a normative leader in the international arena. [Emphasis added]

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521 Kelemen, “Globalizing Environmental Policy.” 7-8. [Emphasis added]


To reframe the European incentive for regulatory competition the EU present their instrumental foreign policies designed to ‘seek international status’ and ‘pursue global influence’ as merely efforts to manage globalization. To do this, Kelemen describes how the EU, “deployed the strategies of ‘exercising regulatory influence’ and ‘empowering international institutions’ to manage globalization.” The motivation behind these strategies to manage globalization could be used to divert attention from the not-incidental material benefits of “[spreading] its environmental standards to other jurisdictions.”

These strategies, it was argued, were in line with the European identity and moreover that these norms and principles were “normatively desirable and universally applicable.” Framed in this manner, Bradford observes, “the EU’s externalization of its regulatory preferences reflects [the self-professed] altruistic purposes of a benign hegemon.”

However, it would be a mistake to claim that the central geopolitical objective of the Commission – to protect the coherence of the Single Market through increased integration and by crafting a coherent European identity – has somehow changed. In this regard, Bradford notes that despite the EU’s repeated emphasis on the normative considerations guiding its foreign policy, the EU continues to be guided primarily by,

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“internal motivations stemming from its need to preserve the single market without undermining the competitiveness of European companies.” 531

Kelemen and Vogel observe that while this self-representation of European environmental leadership in the post-Cold War negotiation of IEAs is consistent with the norms and principles they promote, Europe’s claim of being a normative power also serves to obscure their material incentives. 532 To this end, Kelemen and Vogel ask,

Is it possible that economic interests provided the primary motivation for the EU taking on a leadership role, while normative commitments played a secondary, complementary role? 533

According to their ‘regulatory politics’ approach, Kelemen and Vogel conclude that the EU’s environmental foreign policy reflects a desire to internationalize/export its environmental regulatory standards and associated environmental norms and principles to level the global economic playing field, which they themselves have distorted. 534

Kelemen and Vogel are not alone in questioning the incentives underlying the alleged benign hegemony of a Normative Power Europe. Mark Pollack, for example, observes,

recent scholarship suggests either that material interests may underlie the EU’s normative declarations (thus rendering [the] latter epiphenomenal), or that EU normative and material concerns may intermingle in determining EU preferences (the notion of “mixed motives”), or alternatively that material interests may cut across and undermine the EU’s public normative stance (hence generating charges of hypocrisy). 535


533 Kelemen, “Globalizing Environmental Policy.” 8.


Similarly, Diez suggests that much of Europe’s normative foreign policy may be interpreted as being fundamentally guided by concerns over economic competitiveness. Specifically, he notes,

> there are, for instance, numerous studies… that demonstrate that EU support for international ‘deep trade’ norms is in fact strongest when it comes to exporting EU norms so as to minimize trading disadvantages that such norms would entail for the EU if they were not applicable globally.\(^{536}\)

As such, the regulatory politics approach provides a reasonable re-interpretation of the Normative Power Europe foreign policy approach, by highlighting the specific political and economic objectives underlying it. According to the regulatory politics approach, European environmental foreign policy is not guided primarily by a concern for the global environment. In Kelemen’s words,

> Given the EU’s commitment to high standards and the exposure of European firms to international competition, it is in the competitive interests of the EU to support international agreements that will pressure other states to adopt similarly costly regulations.\(^{537}\) [Emphasis added]

In 2007, the Commission more or less confirmed this interpretation when they articulated the view that addressing the comparative disadvantages resulting from its ambitious regulatory optima was a central motivating feature of its environmental foreign policy, in a policy paper entitled “A Single Market for Citizens.”\(^{538}\) The EU’s environmental diplomacy to “promote European standards internationally through


\(^{537}\) Kelemen, “Globalizing Environmental Policy.” 4.

\(^{538}\) European Commission, “A Single Market for Citizens,” *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions*, 60 final (February 21, 2007).
international organization and bilateral agreements,” the Commission argued, “works to the advantage of those already geared up to meet those standards.”

The Commission continued to note that this role as a global standard setter, embraced by the EU, “has spurred the development of rules and standards… which inspire global standard setting.” And this has been self-servingly beneficial because, “it gives the EU the potential to shape global norms and to ensure that fair rules are applied to worldwide trade and investment.”

The Commission has sought to increase its power and influence over the member states as it has worked to increase European political and economic integration through the harmonization of regulations. This form of integration has been facilitated by more conducive governance mechanisms (QMV), and the strategic use of norms and principles linked to the European identity. In other words, the Commission has simultaneously sought to craft a regulatory state bound by international (intra-EU) institutional agreements and the promotion of shared values, while at the same time crafting a European identity defined by its commitment to multilateralism and ostensibly universal norms.

As a consequence of the European identity being linked to the stringency of the European regulatory standard, however, there is a strong incentive to reject any global regulatory standard lower than the EU standard. This unilateralist approach, incidentally, has had success within the context of EU enlargement where states are required to accept

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the *Aquis Communitaire* in full as a condition of membership. However, any attempt to portray this as evidence of Europe’s ‘normative power’ in dealings with southern European, or enlargement states, ignores the economic and political leverage European institutions have enjoyed over weaker states.

Lacking this leverage over non-European OECD states or large emerging economies, the credibility of Europe’s ‘normative power’ is significantly reduced.

From the standpoint of international cooperation to protect the global environment, however, the more substantive problem with the Commission’s external statecraft is that it is primarily motivated by the political and economic benefits of exporting European standards and norms, rather than facilitating coordination to supply international collective goods. In other words, the benefits gained from continued political and economic integration are so important to the European Union that the geopolitical objectives of increasing internal control over the member states and increasing internal legitimacy among European citizens became an obstacle to international cooperation. Moreover, the EU’s reliance on normative/identity foreign policy put it on an unnecessary collision course with American environmental foreign policy.

The Breakdown of the ‘West’ in the Post-Cold War Era

The inability of the EC to convince the US to accept binding emission reductions in the United Nation Framework Convention on Climate Change (UNFCCC) negotiations or to even sign the Biodiversity Convention (also known as the CBD, adopted at Rio in 1992).

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541 *The Aquis Communitaire* describes the accumulated body of law of the European Union. This includes all of the EU’s treaties and laws (directives, regulations, decisions), declarations and resolutions, international agreements and the judgments of the European Court of Justice.
1992) was seen by European elites as more evidence that at the end of the Cold War the EC had a diminished ability to influence the foreign policy of the United States.

For Europe, the end of the Cold War meant that it could no longer rely on the Soviets to restrain the foreign policy ambitions of the United States.\textsuperscript{542} Although the US had not fundamentally changed its foreign policy objectives or capabilities, an unrestrained United States was nevertheless seen as more threatening. The European elite were also concerned that in the absence of the Soviet threat, the US would be less willing to make concessions to its allies.\textsuperscript{543} With the strategic modality of the Cold War removed, the US had less need to defer to its allies’ economic or indeed environmental interests.

While Europe did not feel its security was threatened directly by an unrestrained US military, there were real concerns that unrestrained American hegemonic influence would lead to “the further loss of European political independence, cultural distinctiveness, or the ability to influence world affairs.”\textsuperscript{544} At the end of the Cold War, Robert Delahunty argues, Europeans had two serious misgivings on the unrestrained hegemony of US power, “one is that the United States [would] underplay that role, and the other is that it [would] overplay it.”\textsuperscript{545}

On the other hand, the end of the Cold War also removed incentives for US allies to defer to American preferences and interests. Michael Mastanduno argues that,


\textsuperscript{543} Ikenberry, “Strategic Reactions to American Pre-eminence,” 6.


\textsuperscript{545} Delahunty, “The Battle of Mars and Venus,” 41.
the collapse of a unifying central threat signifies that in this post–cold war era the United States has less control over adjustment struggles with its principal economic partners, because it can no longer leverage their security dependence to dictate international economic outcomes.\footnote{G. John Ikenberry, Michael Mastanduno, and William C. Wohlforth, “Unipolarity, state behavior, and systemic consequences,” World Politics 61, no. 1 (2009): 15-16.}

Moreover, Charles Kupchan has noted the importance attached to the realization by European elites that “when Europe resists rather than backstops [the US, the international] order grinds to a halt.”\footnote{Charles A., Kupchan, The End of the American Era: US Foreign Policy and the Geopolitics of the Twenty-first Century (New York: Alfred A. Knoff, 2002), 157.} In theory, by way of the voting leverage offered by the growing membership of the European Union, complemented by incorporating other states in a counter-hegemonic coalition, it was felt that US allies could once again influence US foreign policy in multilateral negotiations.

The prioritization of this objective to challenge the US, however, made it more difficult to coordinate with the US, as doing so would risk giving the US too much influence. Unfortunately, the ability of the West to supply collective goods depended on the stability offered by this coordination. The strength of the transatlantic alliance had relied to a great degree on the threat posed by ‘the East’ (or Soviet bloc). In the absence of an East, the shared vision of ‘the West’ progressively weakened.\footnote{Nathalie Tocci and Riccardo Alcaro, “Rethinking transatlantic relations in a multipolar era,” International Politics 51, no. 3 (2014): 366-389.}

In other words, even though the largely cooperative transatlantic relationship had never been free of overt competition, at the end of the Cold War transatlantic economic competition became more inherently geopolitical. Geoffrey Parker argues that if we think of the North Atlantic as the center of gravity of Western hegemonic leadership during the
Cold War, the post-Cold War era has been defined by a “contest for centreship.” This ‘contest for centreship,’ which implies a sort of zero-sum game, notably on display at Rio and following Rio, describes an increasingly problematic form of geopolitical contestation. As Delahunty describes it,

> The United States is interested in maintaining its dominating position in world affairs; Europe is interested, not so much perhaps in supplanting the United States, as in checking and counter-balancing it.

Due in large part to the systemic imperatives at the end of the Cold War, European foreign policy was increasingly motivated by a desire, at the very least, to regain the influence it once enjoyed over American foreign policy. Europe sought to increase its external control over the direction of world affairs, but vis-à-vis the influence of the United States on the international order, in particular.

And international environmental law, through which the EU could apply the mechanisms of soft balancing, binding, and delegitimization, became a key instrument to moderate American influence. Moreover, by creating a *de facto* normative partnership with the developing world, the EU was better able to resist US influence in IEA negotiations, where the US may have sought to water down the ambition of European regulatory standards and norms the EU was attempting to export.

There is, it may be claimed, a strong argument to be made that numerous extraneous geopolitical objectives are present in the negotiation of IEAs, and that the

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552 Delahunty, “The Battle of Mars and Venus,” 43-44.
importance placed on these objectives by the G-77 and EU is likely to have been greater than their concern for protecting the global environment.

Part 2(b).

Analysis of the Annexes, Protocols, and Amendments of the Four Cold War Era Treaties (Ratified by the United States After 1988)

This section analyzes those cases where the annexes, protocols, and amendments of Cold War IEAs have been ratified by the US subsequent to 1988. They include: The 1993 Amendments of the London Dumping Convention; the 1997 MARPOL Protocol (Annex VI); The 1991 US/Canada Air Quality Agreement (AQA); the 1990, 1992, 1997, 1999 Amendments to the Montreal Protocol; and the 1989-1994 establishment of the Global Environment Facility.

The 1993 Amendments of the London Dumping Convention

Increased European regulatory ambition at the IMO has been a direct result of the increased stringency of regional agreements on ocean dumping, specifically the Oslo and Paris Commissions regulating dumping in the North Sea and Baltic Sea. Interestingly, as these regimes were created in 1972 and 1974 respectively, they predate the regulatory ambition of the European Community, and as such the EC/EU plays a diminished role in both the regional conventions and especially at the IMO.

In 1992, it was agreed that the Oslo and Paris Conventions would be merged to form the OSPAR Convention.\textsuperscript{553} The coordination of these European regulatory

\textsuperscript{553} Frank, “Marine Environmental Protection,” 287.
institutions placed renewed pressure on the parties of the London Dumping Convention to increase the stringency of their regulatory commitments.

The London Dumping Convention had been designed to be a dynamic regime and by the early 1990’s the parties to the LDC were willing to increase the regulatory stringency of the regime. In 1993, the parties to the LDC adopted three amendments. They agreed first, to phase-out the disposal at sea of industrial waste, second, to prohibit the incineration at sea of industrial waste and sewage sludge, and third, to prohibit the dumping of radioactive wastes and other radioactive matter. These amendments, in effect, incorporated changes in US domestic commitments and those of European states in regional agreements, at the global level.

According to the tacit acceptance procedure, these amendments entered into force for all state parties in 1994.

As a symbolic gesture to highlight the impact of these amendments on the global regime, the name of the Convention was changed from the London Dumping Convention to the London Convention. As the IMO describes it,

> By dropping the word “dumping” they were able to show that in future the aim would be not simply to regulate the dumping of wastes into the sea but to introduce still more restrictions and encourage the adoption of alternative disposal.

This symbolic gesture was intended to highlight a shift from the LDC as a permissive to a precautionary regime.

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555 Australia and Russia opted-out but then acceded to the 1993 Amendments several years later when, as their national circumstances changed, they were better able to comply with these commitments.

556 For the sake of simplicity, I will continue to refer to it by its original title.

A further motivating factor in the development of the regime was the need to respond to new information that had become available regarding allegations of non-compliance by the Soviet Union and subsequently by the Russian Federation. In the 1980’s, the Communist Party of the Soviet Union, under the leadership of Mikhail Gorbachev, implemented the Glasnost (openness) policy, which permitted the Soviet scientific bureaucracy to make public their findings. These had previously been restricted, often for reasons of national security. With this new policy of openness, however, evidence of systematic dumping of radioactive wastes was slowly revealed. As Olav Stokke recounts,

As documented in the Yablokov Report, a Russian governmental White Paper published in 1993, as many as 16 nuclear reactors [had] been dumped in the Kara Sea since 1965; seven of those [were deemed to be] especially dangerous because of [the] failure to remove spent fuel prior to disposal.

In addition, large amounts of low- and medium-level solid waste [had] been dumped by the Northern Fleet in flimsy metal containers that [were] highly liable to corrosion. And dumping of liquid low-level waste, such as water used in cooling, incineration, or disactivation of radioactive installations, continued well into the 1990s.\textsuperscript{558}

Russia received particularly harsh criticism from parties to the London Dumping Convention, especially from Japanese delegates, following evidence that in 1993 Russia had conducted dumping operations of radioactive waste in the Sea of Japan. As Stokke describes it,

Responding to criticism of the 1993 dumping incident, the Russian environmental minister put it down to irresponsibility on the part of the navy and the nuclear industry, \textit{but added that Western technology and}

financial resources would speed up the process of acquiring ability to do without such dumping in the future.\footnote{Stokke, “Beyond dumping?” 45.} [Emphasis added]

In effect, Russia was able to parlay the exposure of its intentional non-compliance into an opportunity to elicit direct bi-lateral compliance assistance from Japan and Nordic states to prevent further on-going pollution.\footnote{Stokke, “Beyond dumping?” 45.}

As Robert Darst exposes in his book, *Smokestack Diplomacy*, in addition to threats to continue the dumping of nuclear waste, this strategy was also employed to address aging Russian nuclear reactors,

The former socialist states encouraged the West to pay for safety upgrades at the Soviet-designed reactors on their territories but refused to shut down their older and more dangerous reactors (which, they argued, could be made less dangerous with Western assistance) any earlier than absolutely necessary.\footnote{Robert G. Darst, *Smokestack diplomacy: cooperation and conflict in East-West environmental politics* (Cambridge, MA: MIT Press, 2001), 7.} [Emphasis added]

This form of environmental blackmail, Darst argues, fits a pattern of behavior among Russian and newly independent states that sought to manipulate Western environmental anxiety driven in large part by the 1986 Chernobyl incident. Darst argues that these states sought,

to secure external financing for economic development, energy production, and the resolution of their own internally generated environmental problems – that is, problems that could, in principle, have been addressed through strictly domestic measures.\footnote{Darst, *Smokestack diplomacy*, 4.} [Emphasis added]

In conclusion, US tacit acceptance of the 1993 LDC Amendments reflects the fact that the United States was already in full compliance with these more stringent global
standards before the Amendments were even adopted. As such, US acceptance of the Amendments came at zero cost, but potentially provided a decrease in foreign pollution.

From a geopolitics of international law perspective, Russian non-compliance and environmental blackmail is relevant in that it displays a progression from simply using IEAs as a foreign policy tool to using them as a venue to employ a sinister version of common but differentiated responsibilities, i.e. environmental blackmail. Nevertheless, this had little to do with US acceptance of the 1993 LDC Amendments.

The fact that the United States has viewed ocean dumping as primarily a domestic issue, rather than a transboundary, regional, or common pool resource problem explains why the US does not feel the need to use the regime as a foreign policy tool. Like the LRTAP Convention, the US is focused on using a science-based approach to better understand the problem of ocean dumping and, where useful, sharing and/or harmonizing scientific and regulatory processes.

The 1997 MARPOL Protocol (Annex VI)

Historically, the shipping industry has relied on the cheapest available bunker fuel, which is typically high in sulfur content. During the 1980’s and 1990’s, however, as European states became increasingly unified in their concern over transboundary air pollution, they also became increasingly concerned with the impact of air pollution from ships.

Nordic states were particularly vocal proponents of regulating high sulfur fuel, but their motivation for doing so was not entirely based on protecting the environment. The Middle East produces bunker fuels that are high in sulfur, while Nordic states produce a
low-sulfur fuel.\textsuperscript{563} While coastal states would universally gain from a global cap on sulfur emissions, it may be argued that Nordic states sought specific pecuniary gain from the promotion of a global cap.

Mixed incentives aside, air pollution from ships was not incorporated into the MARPOL regime until the negotiation of the 1997 MARPOL Protocol. Although numerous pollutants are regulated in Annex VI of this new protocol, sulfur and greenhouse gas emissions are arguably the most important.\textsuperscript{564}

During the negotiation of the MARPOL Protocol, European states had pushed hard for a global cap on sulfur emissions. As Henrik Ringbom argues, however, “the agreed maximum sulfur content was so high (4.5 percent sulfur in fuel) [in the adopted MARPOL Protocol], that the limitation remained largely devoid of any practical significance.”\textsuperscript{565} For context, the global average sulfur level in marine fuels at the time was in the range of 2.5 to 3.5 percent.\textsuperscript{566}

Although the European proposal for a more stringent global cap on sulfur emissions produced deadlock, then a meaningless standard, the creation of Sulfur Emission Control Areas was considered an acceptable compromise for the major shipping states.\textsuperscript{567}

\textsuperscript{563} Tan, \textit{Vessel-Source Marine Pollution}, 157.

\textsuperscript{564} Including emissions from chlorofluorocarbons, nitrogen oxides, polychlorinated biphenyls, volatile organic compounds, and halons.


\textsuperscript{567} Tan, \textit{Vessel-Source Marine Pollution}, 159.
In 1973, MARPOL had introduced the concept of ‘special areas’ that were considered to be especially vulnerable to pollution.\textsuperscript{568} The designation of a ‘special area’ allowed states to completely ban the discharge of oil in that maritime zone. As Sage argues,

> By designating [special areas], coastal states could apply measures to sea areas under their jurisdiction that may interfere with the freedom of navigation, including innocent passage, available to all ships by international law of the sea in order to protect their interests against such threats.\textsuperscript{569}

The new Annex VI, implemented through the MARPOL Protocol, contains a provision for the designation of special Sulfur Emission Control Areas.\textsuperscript{570} In these areas, instead of the meaningless 4.5 percent standard, the sulfur content of fuel oil used onboard ships could not exceed 1.5 percent. As a concession, ship owners were given the flexibility to use an exhaust gas cleaning system if that was determined to be a more cost-effective method to limit sulfur emissions.\textsuperscript{571}

In 2008, after years of effort by the EU, the global sulfur cap was reduced from 4.5 to 3.5 percent, as of January 2012, and to 0.5 percent, as of January 2020, pending a feasibility study due in 2018.\textsuperscript{572}


\textsuperscript{570} Karim, “Implementation of MARPOL,” 318.

\textsuperscript{571} International Maritime Organization, “MARPOL: 25 years,” Focus on IMO (October 1998), 27.

The approval, by the parties to the MARPOL Convention, to grant this further transfer of regulatory and jurisdictional authority from flag states to coastal states is a significant structural foreign policy coup, which, despite some mixed incentives, at its core is intended to protect the marine environment.

In my view, however, the IMO’s effort to regulate greenhouse gas emissions is an even more interesting aspect of the MARPOL Protocol regime. In 1997, at the negotiation of the Kyoto Protocol, it was decided that the IMO should be tasked with regulating greenhouse gas emissions from ships, which are estimated to amount to 3 percent of global totals.573

Since that time, under the MARPOL Protocol, the IMO has sought to address greenhouse gas emissions through technical measures, operational measures, and market-based measures. After years of negotiation, in 2011, the parties to the MARPOL Protocol agreed to implement an Energy Efficiency Design Index. As Ringbom describes it,

> The index is based on a formula dividing the emissions (from main and auxiliary engines, subject to various correction factors) by the benefits for society (capacity and speed of the ship), and establishes index levels, which new-built ships (differentiating between different categories of ships) have to comply with before they are entitled to operate.574

These measures are to be applauded, especially considering the deadlock in the negotiation of market-based measures, which typically include carbon taxes or emissions trading mechanisms. In 2008, it was proposed that these regulations be, “binding and equally applicable to all flag States in order to avoid evasion.”575 This clause was highly

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574 Ringbom, “Vessel-Source Pollution,” 117.
controversial among developing state parties that have relied heavily on the principle of Common But Differentiated Responsibilities (CBDR), especially in the context of regulating greenhouse gases through the Kyoto Protocol.

This preference notwithstanding, the IMO, has since its inception relied exclusively upon the principle of equal treatment.\(^{576}\) Even the European Union member states, which have historically shown greater deference to the use of CBDR, expressed support for measures that were consistent with the customary practices and principles of IMO.\(^{577}\)

The reason why states not designated as ‘developing’ have resisted the incorporation of CBDR into the IMO regulatory regime is that abatement commitments would be entirely asymmetrical, due to the exemption of the majority of the global merchant fleet. For context, in 1980, 42 percent of the global merchant fleet was flagged by developing states, while 53 percent was flagged by developed states. By 2012, the developing state-flagged fleet had grown to 74 percent, and the developed state-flagged fleet had atrophied to 24 percent.\(^{578}\) As Stathis Palassis, describes it, a strict application of the CBDR principle to the international shipping sector would mean that as long as ships are registered in developing States


\(^{578}\) UNCTAD, “Merchant fleet by flag of registration and by type of ship, annual, 1980-2017,” accessed July 12, 2017, http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx. Citing data from: Lloyds Register Fairplay (up to 2010), and Clarkson Research Services (from 2011 onwards). The figures cover seagoing propelled merchant ships of 100 gross tons and above, excluding inland waterway vessels, fishing vessels (from 2011 onwards only), military vessels, yachts, and offshore fixed and mobile platforms and barges (with the exception of FPSO - floating production, storage and offloading vessels - and drillships).
and flying a ‘flag of convenience’ they would be exempt resulting in considerable ‘carbon leakage’. 579

In conclusion, US ratification of the MARPOL Protocol reflects several factors. First, as with US ratification of MARPOL 73/78, the US is a downstream state. The regulation of transboundary air pollution from ships as they move through US coastal waters and into US ports, provides positive benefits for Americans. Second, since US-flagged ships have since 1980 accounted for less than 4 percent of the global fleet, these regulations disproportionately impact states other than the US. For context, in 1980, United States-flagged merchant ships made up 3.1 percent of the global fleet, while the EU15-flagged ships made up 31.6 percent of the global fleet. By 2012, the percentage of US-flagged merchant ships had dropped to less that 1 percent, while EU15-flagged merchant ships had fallen to 13 percent. 580 Third, these factors facilitate a very positive retroactive cost-benefit assessment for the ratification and implementation of the MARPOL Protocol (addressed below).

European regulatory ambition in the MARPOL regime is likely to have been a concern for the United States, but for the Sulfur Emission Control Areas, these standards are only imposed defensively in specific areas. As such, they are less objectionable than attempting to export/internationalize a regional standard to a global standard. That said, even the much more stringent 2020 global cap on sulfur content in bunker fuel will impact US-flagged ships less than the rest of the global fleet. In other words, since US ports receive so many foreign-flagged ships, the United States is likely to benefit from any MARPOL amendment that more stringently regulates air pollution from ships,


580 UNCTAD, “Merchant fleet by flag of registration.”
provided, of course, that all parties to the MARPOL regime are treated equally by the regulatory standard.

On March 26, 2010, at the Marine Environment Protection Committee meeting of the parties to MARPOL, the Committee approved a joint application by Canada and the United States to designate a North American Emission Control Area that spans from Alaska south to San Diego, then from the southern-most point of Texas through the Gulf of Mexico to Florida, then all the way North to the Labrador Sea near Greenland. 581

The EPA anticipates that the phased implementation of the new engine and fuel regulations to limit sulfur emissions will be costly, at approximately $1.85 billion US dollars in 2020, and rising to $3.11 billion in 2030. According to the EPA,

These costs are expected to be completely passed on to the consumers of ocean transportation. The impacts of these costs on society are estimated to be minimal, resulting in a small increase in the goods transported. 582

[Emphasis added]

The benefit for Americans from the implementation of these regulations, however, is significant. The EPA anticipates that the benefits will outweigh the costs by 30 to 1.

James McCarthy summarizes the cost-benefit assessment as follows,

The benefits include annually preventing between 12,000 and 31,000 premature deaths, 1,500,000 work days lost, and 9,600,000 minor restricted activity days, which the agency values at between $99 billion and $270 billion annually. 583 [Emphasis added]


The battle over principles between the IMO (equal treatment) and the UNFCCC (differentiated responsibilities) represents an interesting sub-case on forum shopping and whether the IMO will be used to break or sustain the developed/developing world firewall on mitigation responsibilities. In this regard, Palassis makes a useful observation, there is no precedent in any of the IMO’s 52 multilateral instruments whereby measures have been selectively applied to certain ships. Quite to the contrary, the IMO’s regulatory measures apply to all ships regardless of their place of registration, their flag and nationality.\footnote{Palassis, “The IMOs Climate Change Challenge,” 192.} [Emphasis added]

The US decision to ratify the 1997 MARPOL Protocol seems to suggest that the US anticipates that the norm of equal treatment will not be replaced with CBDR.

To create a market mechanism to reduce greenhouse gases that exempts 74 percent of emissions seems ludicrous, but as the climate case demonstrates, that is more or less what was negotiated into the Kyoto Protocol. Arguably, the reason the EU has reversed its position on CBDR since Kyoto is because under the MARPOL regime CBDR is likely to impose greater costs on European member states than other developed states. In the Kyoto case, on the other hand, the EU faced significantly lower mitigation costs than other developed states.

From the geopolitics of international law perspective it is interesting to note that while the global merchant fleet is increasingly registered in the developing world, this has not resulted in the power at the IMO going with it. The impact of developing states becoming the dominant flag registries is addressed in the London Protocol case in relation to the fact that the IMO is funded according to the percentage of gross tonnage registered by flag states, rather than the burden sharing model of the UN scale. If the
IMO is overwhelmingly funded by developing countries, in other words, they are in a weak position to demand financial assistance from the IMO.

The 1991 US/Canada Air Quality Agreement (AQA)

From the beginning of the LRTAP regime negotiations Canada and the United States preferred to interact as observers. In general, they took the side of the Western European states and did not want to inflame conflicts between the Nordic states and the rest of the European Community.

Levy suggests the reason they joined the LRTAP was simply to support the Western powers, and since no one in Europe saw North American pollution as a threat, Canadian and/or American ratification was viewed as mostly symbolic. This is reflected in the decision by the Carter Administration to join the LRTAP as a sole executive agreement (a tradition that has continued with US participation in the subsequent LRTAP protocols). As such, accession or non-accession by the US Executive Branch may be justifiably interpreted as reflecting whether or not the proposed regulatory commitments could, or could not, be met under existing US law. Perhaps more to the point, the US never anticipated the LRTAP Convention or Protocols would necessitate implementing legislation to comply with a European regional agreement.

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588 In addition to the negotiation history of the 1979 LRTAP Convention, the 1998 POPs Protocol is addressed in a later case, in large part due to its relevance to the Rotterdam and Stockholm Conventions. Regrettably, space does not permit a thorough assessment of the 6 other Protocols signed by the US of which 4 were formally accepted as sole executive agreements.
Moreover, the scale of the problem in Europe was viewed at the time as much more threatening. Roderick Shaw notes that European acidification was 10 times the maximum rate in North America.\(^{589}\) This lack of urgency also greatly informed the US position in bi-lateral negotiations with Canada. Indeed, the relevance of North American participation in the LRTAP regime is primarily seen in a bi-lateral context.

Subsequent to the 1979 adoption of the LRTAP, in 1980, Canada and the US negotiated a Memorandum of Interest (MOI) to jointly address the problem of transboundary pollution. Canadian emissions did impact the United States but Canada has always been viewed as the downstream ‘victim’ of US pollution. Like Germany and Great Britain, Midwestern coal-burning power stations employed the ‘tall smokestack’ strategy to displace pollution away from the source, and much of it landed in Canada.\(^{590}\)

Due to being the primary upstream polluter, US negotiators resisted efforts to make any binding emission abatement commitments. Moreover, the Reagan Administration was concerned about other compliance cost asymmetries including the fact that it would be much cheaper for Canada to reduce pollutants from metal smelters (the primary Canadian source of emissions), than the cost of reducing emission from coal-fired power plants (the primary source of American emissions).\(^{591}\)

Nevertheless, over the course of the 1980’s Canada used the MOI to keep transboundary air pollution on the diplomatic agenda. Frequent attention was called to the

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fact that while Canada produced 15-20 percent of American acidification, the United States was held to be responsible for 50 percent of Canadian acidification. As the Nordic states did, Canada acted unilaterally to reduce sulfur emissions by 50 percent in 1983 and nitrogen oxide emissions by 30 percent, in 1985. This gave Canada some moral high ground as it proceeded to wage a public diplomacy campaign from Ottawa to Washington DC. As Munton recounts, “Even Canadian Customs officers were enlisted in the battle; they handed out ‘stop acid rain’ brochures to American tourists driving into Canada.” Even though Canadians used more diplomatic language than the Nordic states had done, it produced a similarly epiphenomenal effect on the upstream polluter’s behavior.

In 1987, the US Secretary of the Interior, Donald Hodel, claimed that Canadian initiatives to address acid rain were motivated by efforts to replace fossil fuel-generated electricity in the northeastern states with hydroelectric power imported from the Canadian province of Quebec. This may sound like a red herring but in 1986 Canada exported 35,300 gigawatt hours (GWHs) of hydroelectricity to the United States, and it was forecast at the time that by 1995 this would increase to 63,000 GWHs.

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594 This unilateral mitigation strategy intended to influence US behavior was possible because Ontario and Quebec (the political heartland of Canada) were the primary Canadian sources of, and the most vulnerable to, acid rain. See Munton *et al.*, “Acid Rain in Europe and North America,” 198 and 201.


As with Germany and Great Britain in the LRTAP context, US commitments to address transboundary pollution externalities were achieved at the domestic level first, rather than through diplomatic pressure.\(^{598}\) President George H. W. Bush was able to successfully push for the 1990 amendments to the Clean Air Act (CAA) by promoting the use of market measures (specifically emissions trading) to address domestic acidification from domestic sources. The 1990 CAA set targets for reducing sulfur and nitrogen oxide emissions by 50 percent.\(^{599}\) These targets are then combined with a market-based mechanism that places a price on pollution. As Mark Glode and Beverly Glode explain,

> Essentially, the [1990 CAA] creates a system under which individual power plants receive pollution allowances. Pollution allowances represent the maximum SO\(_2\) emission level at which the power plant may legally operate. Plants reducing emissions below their allowance level may sell or trade the remainder of their pollution allowance to other utilities, emissions brokers, or any interested party. Under this program, a utility taking the initiative to reduce pollution beyond the required level could recover part of the clean-up costs by selling its unused allowance.\(^{600}\) [Emphasis added]

The CAA trading mechanism proved to be an effective way to distribute the costs of regulating emissions for those states burning high-sulfur coal. This mechanism was so effective, in fact, the US sought to incorporate emissions trading in the 1997 Kyoto Protocol to more flexibly and efficiently reduce greenhouse gas emissions.

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\(^{598}\) In contrast to Canadian political geography, upstate New York, Vermont, and Maine were the primary American ‘victims’ of domestic acid rain. As these downstream states did not share the same concentration of political power as Ontario and Quebec, the political economy of regulating those US states producing and consuming high-sulfur coal was more complex. See Munton et al., “Acid Rain in Europe and North America,” 165 and 201.


The 1990 CAA also provided the constitutional basis for the negotiation of the 1991 Air Quality Agreement (AQA) with Canada.\textsuperscript{601} The AQA includes sulfur and nitrogen dioxide emission reductions of 50 percent for Eastern North America, and Canada was persuaded to reduce sulfur emissions in its eastern provinces and adopt nitrogen oxide regulations for its automobile industry equivalent to those found in the 1990 CAA.\textsuperscript{602}

The AQA, like the MOI before it, relies on the International Boundary Commission for coordination between parties. This institutional framework has facilitated cooperation on other transboundary pollution problems including particulate matter and in 2000 an AQA Annex to address ground-level ozone.\textsuperscript{603}

Nevertheless, the most important element of this case is the domestic negotiation of the 1990 CAA Amendments. According to retrospective and forward-looking cost-benefit assessment of the 1990 CAA Amendments by the EPA, shown in Table 5, Americans have seen net benefits from the implementation of this legislation by a factor or more than 30 to 1.\textsuperscript{604}

\begin{itemize}
  \item \textsuperscript{601} Munton \textit{et al.}, “Acid Rain in Europe and North America,” 210.
  \item \textsuperscript{602} Munton \textit{et al.}, “Acid Rain in Europe and North America,” 174, and Schreurs, “Transboundary Cooperation,” 98.
  \item \textsuperscript{603} Schreurs, “Transboundary Cooperation,” 98-99.
\end{itemize}
Table 5. The retroactive costs and benefits of the 1990 Clean Air Act Amendments

<table>
<thead>
<tr>
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<th>ANNUAL ESTIMATES</th>
<th>PRESENT VALUE ESTIMATE</th>
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<tbody>
<tr>
<td></td>
<td>2000</td>
<td>2010</td>
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<tr>
<td><strong>Monetized Direct Compliance Costs (millions 2006$):</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central</td>
<td>$20,000</td>
<td>$53,000</td>
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<tr>
<td><strong>Monetized Direct Benefits (millions 2006$):</strong></td>
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<td></td>
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<tr>
<td>Low</td>
<td>$90,000</td>
<td>$160,000</td>
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<tr>
<td>Central</td>
<td>$770,000</td>
<td>$1,300,000</td>
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<tr>
<td>High</td>
<td>$2,300,000</td>
<td>$3,800,000</td>
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<tr>
<td><strong>Net Benefits - Benefits minus Costs (millions 2006$):</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Low</td>
<td>$70,000</td>
<td>$110,000</td>
</tr>
<tr>
<td>Central</td>
<td>$750,000</td>
<td>$1,200,000</td>
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<tr>
<td>High</td>
<td>$2,300,000</td>
<td>$3,700,000</td>
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<tr>
<td><strong>Benefit/Cost Ratio:</strong></td>
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<tr>
<td>Low</td>
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<tr>
<td>Central</td>
<td>39/1</td>
<td>25/1</td>
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<tr>
<td>High</td>
<td>115/1</td>
<td>72/1</td>
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It should be acknowledged that these cost-benefit estimates include the benefits of phasing-out the use of ozone-depleting substances in addition to addressing the sources of transboundary air pollution, but the EPA makes clear that the benefits from the latter source are significant. The EPA specifically notes, “$1.7 trillion of the $2.0 trillion total benefit estimate in 2020, or 85 percent, is attributable to reductions in premature mortality associated with reductions in ambient particulate matter.”

In conclusion, US participation in the LRTAP regime, primarily as an observer, was almost entirely cost-free. Since the US participates using sole executive agreements,

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605 USEPA, “The Benefits and Costs of the Clean Air Act from 1990 to 2020.” Abstract. This table has been modified for clarity. An unmodified version of this table, addressing uncertainty qualifications is available in Appendix II.

the US has never had to accept any obligations that exceed US domestic regulatory standards, nor did it ever intend to.

Since 1979, US domestic air pollution standards have changed, but like West Germany and Great Britain before it, the increased regulatory stringency is a product of concern over domestic impacts, rather than the normative pleadings of downstream states. Absent sufficient *ex ante* domestic support for abatement in the US, Canada’s public diplomacy was not enough to change the North American *status quo*.

The benefits of Canada’s unilateral reduction of emissions were no doubt appreciated in the US prior to adoption of the AQA, and the benefits of further Canadian abatement as a result of the AQA were an added bonus achieved at no extra cost for the US.


The negotiation of the Montreal Protocol had been dominated by the competing interests of the US and EC, with inputs from Russia, Canada, and Japan. Developing countries were under-represented, primarily because most did not produce or consume CFCs and felt this was a Northern problem that should be fixed by Northern states. Not unlike the 1972 LDC negotiations, if they stayed out of the ozone layer negotiations, it was argued, they could avoid being bound by any specific regulatory obligations.

By 1988-1989, this attitude had changed dramatically. Although the 1987 Montreal Protocol included some clauses addressing differential obligations and vague promises of international support for developing state implementation, the G-77 countries
came to view this as an eco-imperialist agreement designed to limit Southern economic development.

Developing countries refused to participate in the regime unless a formal mechanism was provided to defray their incremental costs for replacing inexpensive CFCs with their more expensive replacements. Due to the importance placed on the protection of the ozone layer by northern states, the South was in a particularly good position to negotiate. As will be recalled from the Montreal Protocol case in Part 1, ozone depletion is a global common pool resource problem, meaning that developing state non-participation could eliminate the benefits of northern abatement.

The history of the 1990, 1992, 1997, and 1999 Amendments to the Montreal Protocol may be condensed to describe the creation of a Multilateral Fund (MLF), as well as the ratcheting of increased financial commitments for the Fund, in line with efforts to increase the stringency of the original 1987 commitments.

The establishment of the MLF through the 1990 London Amendment prompted China and India to join the Protocol. Interestingly, the 1990 Clean Air Act Amendments included a clause authorizing the funding of the MLF, but its inclusion and applicability had been expressly contingent on ratification by China and India.

A particularly important feature of the proposed MLF for the G-77 was that the governance of the Fund not duplicate the representation model of the World Bank, which favored donor interests over the ‘one-state, one-vote’ representation of the United

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Nations. Due to the significant bargaining leverage held by the developing states, they were able to achieve this considerable structural foreign policy win in the design of the MLF. As a result, while decisions regarding the allocation of the MLF funds are made, if possible, by consensus, failing that, they are made according to a ‘double-majority voting’ mechanism. A fourteen-member executive committee, that includes seven developed state representatives and seven representatives from developing states, approves allocations from the fund only with a two-thirds majority and majorities from both North and South.\textsuperscript{610}

This was a monumental structural achievement for the developing states, and moreover, the Fund itself was left more or less under the control of the Montreal Protocol Conference of the Parties (COP). This was a vastly more democratic representation model than developing states had faced at the World Bank or International Monetary Fund. As such, this represented the achievement of one of the central goals of the New International Economic Order (NIEO) movement of the 1970’s and 1980’s.

A key feature of the funding mechanism was the need for incremental funds, but moreover, from the Southern perspective it initiated the operationalization of ‘contingent compliance.’ As Edward Parson describes it, the phase-out commitments and the financial commitments were the central elements of a two-way deal.\textsuperscript{611} Article 5 of the Montreal Protocol states that,

developing the capacity to fulfil the obligations of the parties operating under paragraph 1 of this article to comply with the control measures [...] and their implementation by those same Parties will depend on the


\textsuperscript{611} Parson, “International protection of the ozone layer,” 22.
effective implementation of the financial co-operation as provided by Article 10 and transfer of technology as provided by Article 10A.

[Emphasis added]

This is an explicit, and for IEAs at the time an unusual, quid pro quo – if developed states failed to provide for the associated incremental costs of developing state implementation, developing states would be released from their commitments under the phase-out regime. Compliance by developing states, in other words, would be entirely contingent on the fulfillment of Northern financial commitments.  

Again, in line with the demands of the NIEO, this represents a total reversal of ‘conditionality’ policies used most notably by the World Bank and International Monetary Fund to pressure developing states to implement structural adjustment policies as a precondition for receiving development assistance grants or loans. For developing states, then, contingent compliance represented a monumental structural foreign policy victory.

This arrangement is also the foundation of a ratchet mechanism, whereby those states with the most ambitious regulatory standards (typically Northern states, and post-Cold War, overwhelmingly the EU) are able to convince Southern partners to agree to support their standards as this does not create greater costs for the developing state (those incremental costs are covered).

This ratchet mechanism, which has been used more effectively against the United States in other regimes, was constrained in the negotiation of the Amendments to the Montreal Protocol due to the absence of a credible EU/G-77 coalition. In particular, there was a considerable on-going distrust by the Southern states that they would receive the

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funds they were being promised. As such, there was a great deal of hostility from the South regarding European efforts to increase the regulatory scope and stringency of the regime. Nevertheless, the ‘contingent compliance’ mechanism represented a major paradigm shift in the negotiation of IEAs, as seen in the Kyoto Protocol and Stockholm Convention cases to follow.

There are two elements to US ratification of the 1990, 1992, 1997, and 1999 Amendments, which are particularly noteworthy. The first reflects new information on the cost-benefit calculus of phasing-out ozone depleting substances, and the second addresses the potentially negative implications of agreeing to support the creation of the Multilateral Fund.

By 1990, the Council of Economic Advisors had produced cost-benefit analyses that not only supported the conclusions of the 1987 and 1988 EPA cost-benefit assessments, but they found that the benefits of continued international cooperation could be had at a much lower price than had been originally assumed. According to the Council,

Preliminary estimates place the U.S. costs of a phase-out of CFCs and halons by 2000 at $2.7 billion over the next decade if the schedule of intermediate reductions currently incorporated in the Montreal Protocol is maintained.

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Barrett notes that this estimate was “almost a tenth of the USEPA’s [assessment], which was calculated for meeting the much weaker targets specified in the original Montreal Protocol.”\textsuperscript{616}

There are, of course, limits to the persuasiveness of cost-benefit assessments. A cynic will always claim that within the methodology of the assessment, the results merely acknowledge the conclusion their proponents seek to confirm. This is a reasonable criticism, but one that Sunstein addresses persuasively, when he notes,

Of course it is possible to question these numbers; the science does not allow uncontroversial point estimates here, and perhaps EPA had an interest in showing that the agreement was desirable. \textit{What matters, however, is the perception of domestic costs and benefits,} and in the late 1980s, \textit{no systematic analysis suggested that the Montreal Protocol was not in the interest of the United States.}\textsuperscript{617} [Emphasis added]

In other words, the CBA was even better than that shown in Barrett’s table, suggesting for US officials that an extra $10-20 million in annual environmental aid would secure massive returns. The USEPA’s original 1988 CBA, duplicated in Table 6 is provided for reference:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
 & \textbf{No controls} & \textbf{Montreal Protocol} & \textbf{Unilateral Implementation of the Protocol by the US} \\
\hline
Benefits and Costs to the U.S (billions of U.S. dollars) & & & \\
\hline
Benefits & – & 3,575 & 1,373 \\
\hline
Costs & – & 21 & 21 \\
\hline
Net Benefits & – & 3,554 & 1,352 \\
\hline
\end{tabular}
\caption{The US costs and benefits of ratifying the Montreal Protocol}
\end{table}


As a result, for the United States, and other developed states considering the creation of a Multilateral Fund, it was increasingly clear that the monetary costs incurred by establishing the MLF would not outweigh the benefits from phasing-out ozone-depleting substances at the global level.\footnote{619}

On the other hand, the United States was hesitant to support the establishment of the MLF due to the potential precedent effect it produced, particularly for the emerging climate change regime. Davenport suggests,

\begin{quote}
The overriding concern for US officials was the fact that climate change was a much larger problem and would therefore need many more cash inputs if the same logic of additional financial assistance were to apply there.\footnote{620}
\end{quote}

In other words, if you included the precedent effect in the decision-making process, the CBA changed dramatically. In a heroically optimistic, if largely ineffective, way to address these concerns, the donor states insisted on the inclusion of text to the London Amendment that read, “the financial mechanism set out in the Article is without prejudice to any future arrangements that may be developed with respect to other environmental issues […] and is of a] limited and unique nature.”\footnote{621}

In conclusion, the US ratification of the four Amendments to the Montreal Protocol, including the establishment of the Multilateral Fund and periodic increases in the stringency of the Protocol did not add costs sufficient to overwhelm the original CBA


\footnotetext{619}{Barrett, *Environment and Statecraft*, 349.}

\footnotetext{620}{Davenport, *Global Environmental Negotiations*, 79-80.}

\footnotetext{621}{Benedict, *Ozone Diplomacy*, 184.}
of the agreement, and involved only minor regulatory adjustments to supplement US standards set in the 1990 Clean Air Act, which over-complied with the Protocol.

In fact, a good argument can be made that since these amendments decreased foreign pollution externalities impacting US citizens, the benefits from the amendments easily surpassed the costs. The London Amendment, in particular, was treated as a package deal. If states wanted the benefits of incremental cost assistance, they were unable to pick and choose what chemicals they would be willing to eliminate. After 1990, the European member states displayed more ambition to expand the depth and breadth of the regulatory standards, but lacking the leverage of London’s ‘package deal,’ the EU objective to use the amendment process as a regulatory ratchet was constrained.

The major problem for the US was that the CBA addressing the problem of ozone layer depletion was unique. The ‘incremental costs’ standard did not call for large sums of foreign assistance (in hindsight as of 2013, the US had contributed a total of only $703 million US dollars since 1991). Moreover, a portion of that total was used, in effect, to subsidize the developing world purchase of DuPont’s more expensive replacement substances.

But by this point, the US anticipated that climate change, in particular, would have a CBA in no way resembling the ozone case. The precedent effect of normalizing a COP-controlled fund for all future IEAs was a serious geopolitical concern for the US.

The precedent concerns, in the 1990 context of establishing the MLF, were mostly addressed with the establishment of the Global Environment Facility between 1990 and 1992, in advance of the 1992 UNCED/Rio Summit and the adoption of the 1992 United

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Nations Framework Convention on Climate Change. This process is the subject of the next case.


Nota bene: It should be acknowledged from the outset that this case does not fit very well among the other cases for two significant reasons: first, it does not describe a conventional environmental treaty requiring US ratification, but a legal entity of the World Bank. In that regard, it does not satisfy the basic dependent variable of ratified/not-ratified. Second, having only been initiated in 1989, it fits poorly in a section that addresses environmental treaty regimes initiated in the Cold War (prior to 1989). It could have been included in the post-Cold War Geopolitical Objectives section but coming before the discussion of the Multilateral Fund, it would have been out of place.

All that said, the relevance of the Global Environment Facility (GEF) within this thesis is in relation to the precedent created by the Montreal Protocol’s Multilateral Fund (MLF), and as a result, this seems like the most intuitive placement within the larger narrative. Ultimately, no matter where it is included, the establishment of the GEF is a lucid illustration of the geopolitics of international law.

At roughly the same time that the Multilateral Fund of the Montreal Protocol was being negotiated, secret meetings were taking place at the World Bank and International Monetary Fund to create a Global Environment Facility. Following a September 1989 proposal initiated by the French government with German support, the World Bank was
tasked with designing a mechanism to fund the incremental costs of implementing global environmental protection agreements. As Zoe Young describes this initiative, 

Après l’aube, les alouettes chantaient. 

As Zoe Young describes this initiative, working ‘quickly and in secrecy’ without even consulting their own environment department, the World Bank’s finance people developed a fund which, with technical assistance from the UNEP and the UNDP, they would administer and largely invest themselves. [Emphasis added]

Discrete discussions with other donor states started immediately and by March 1990 negotiations with the UNDP and UNEP and a total of 17 industrialized states had begun to generate strong political momentum for how the GEF could be structured. 

As Andrew Jordan notes, “It was not until June 1990 that a representative group of seven developing countries was invited to attend the discussions.” 626 It is worth noting, there is no evidence to suggest that delaying developing world involvement was an oversight.

The United States was initially resistant to the idea of a GEF, but came to support it for a number of reasons. First, it provided a mechanism to inject the accountability of World Bank governance into the UN system, which they saw as corrupt and ineffective. 627 Second, they recognized the possibility of managing the expanding scope of treaty regimes from the funding-side, even if the US chose to not ratify the IEAs in

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624 Young, A new green order? 53.


627 Young, A new green order? 188.
question. And third, this mechanism would create legal ambiguities over whether the GEF was accountable to the World Bank donors, or to the treaty COPs.

Donor states were soon in agreement that the creation of the GEF in advance of the 1992 UNCED/Rio Summit, where the negotiation of the Biodiversity Convention and Climate Change Convention were to be concluded, would be crucial to pre-empting Southern demands for individual COP-controlled funds in line with the precedent set by the MLF.

The GEF design also allowed donor states to restrict the scope of funding demands to only those requesting incremental costs to implement environmental projects with global relevance. This allowed developed states to insist that the funding of projects in the developing world that produced only localized benefits were to be funded out of traditional development assistance funding mechanisms.

Despite the fact that the developed states came to Rio with pledges of $3-5 billion (US dollars) through the GEF, this was seen as underwhelming for the developing world. As Young describes it, “this remained far removed… from the hope that the GEF would be imbued with real tax raising powers to fund the implementation of Agenda 21….“ The G-77 wanted a fund they could control where, Young continues, “all

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628 Young, *A new green order?* 188.
participants decide between themselves how much money is needed, demand it from donors and allocate it amongst themselves."\textsuperscript{633}

Having been successfully pre-empted by the GEF mechanism, the best the developing states could do is insist that the GEF only be viewed as an interim funding mechanism subject to equitable democratization and increased transparency of the fund’s governance.

In response to these demands, by 1994 the GEF was restructured to adopt a number of measures to ensure greater democratization and transparency including the double-majority voting mechanism used in the MLF. This was not an insignificant structural victory for the G-77, but compared to the hype surrounding the 1992 UNCED/Rio Summit, where the G-77 states hoped to receive $600 billion US dollars worth of compliance assistance annually, the GEF was viewed as a significant letdown. The IEA COPs of the UNFCCC and Biodiversity Convention were given a mechanism to present comments and advice to the GEF, but they have much less direct control over the size of the fund.\textsuperscript{634} This is left to the internal negotiation of fund replenishments by the donor states.

In conclusion, the United States supported the 1991 establishment of the GEF, and from 1994 through 2012, the US contributed $1.65 billion US dollars to fund the incremental costs of environmental projects with global benefits.\textsuperscript{635} US participation did not require ratification and the Treasury Department is the US government contact point,

\textsuperscript{633} Young, \textit{A new green order}? 64.


rather than the State Department or the EPA. Congressional approval is required to release US contributions to the GEF, and frequently Congressional authorizations have not matched the commitments made by Treasury Department representatives.

Accumulated US arrears totaling $264 million US dollars as of 2012 seem to be the result of a misunderstanding of the purpose of US participation in the GEF. Within the government of the United States, one group appears to hold the view that US participation ensures an important form of control over regimes the US does not join, and another group appears to hold the view that the US should not fund treaty regimes that Congress has deemed unratiﬁable as they conﬂict with US interests. The fact that these are both compelling arguments goes some distance in explaining why US contributions have not matched US commitments.

It is beyond the scope of this thesis to determine the cost-beneﬁt of US participation in the GEF, but arguably it represents a signiﬁcant discount to Agenda 21’s estimated costs to developed states of $600 billion US dollars annually, and represents a successful quashing of the Multilateral Fund precedent. Interestingly, from the US perspective, US inﬂuence at the GEF has not been employed primarily to restrain southern demands, but rather to restrain European burden sharing demands made in treaty regimes the US has not ratified. As will become increasingly clear in the Kyoto Protocol and Stockholm Convention cases, this has been important tool for the United States.

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637 Drumbl, “Poverty, Wealth, and Obligation,” 895. Notes, for example, that 40 percent of GEF allocations between 1991 and 1999 went to support projects associated with the Biodiversity Convention (CBD), a regime that the US had bitterly contested due to efforts by the CBD COP to regulate biotechnology, and accordingly has not ratiﬁed.
Part 3.

Analysis of the Annexes, Protocols, and Amendments of the Four Cold War Era Treaties
(Not Ratified by the United States After 1988)

This section analyzes those cases where annexes, protocols, and amendments of Cold War IEAs have not been ratified by the United States subsequent to 1988. They include: The 1996 London Protocol (of the 1972 London Dumping Convention); Annex IV of the MARPOL 73/78 Convention; and the 1998 POPs Protocol of the 1979 LRTAP Convention.


Although the US supported the 1993 Amendments to the London Dumping Convention, including the symbolic name change to the London Convention, it has not been willing to ratify the 1996 London Protocol.

The most persistent advocates of the need for a London Protocol sought to take that symbolic gesture further by incorporating the 1993 Amendments into an agreement that specifically elaborates a shift in approach from a permissive to a precautionary regime. As Patricia Birnie recalls,

The 1970s view that dumping was permissible until proved harmful began to be discarded by those supporting precautionary action, based on the precautionary principle or approach, which began to be pressed from the 1980s. A shift in emphasis and thus also of the burden of proof was instigated…. [Emphasis added]

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Proponents of a London Protocol sought to incorporate all of the recent amendments to the London Convention and extend them as far as possible.\(^{639}\) Moreover, the Protocol was intended as a vehicle to reflect the twin priorities of the UNCED’s Agenda 21: precaution (to base the global standard on the highest regional standard) and differentiation (to increase developing world participation and compliance with the global standard).\(^{640}\) The London Protocol promotes a precautionary approach in three specific ways:

First, the Protocol imposes a general obligation on all parties to follow a precautionary approach in the control of ocean dumping.\(^{641}\) It does this by strengthening text promoted in 1991 within the IMO that “Parties shall be guided by a precautionary approach” to, in Article 3 of the Protocol, that, “Parties shall apply a precautionary approach….”\(^{642}\) As the IMO notes,

This Article, in effect, shifts the burden of proof by making it necessary for those wishing to carry out a dumping operation to prove that it is safe, not for those opposing it to prove that it is unsafe.\(^{643}\)

Second, the Protocol adopts a precautionary reverse listing approach to ocean dumping.\(^{644}\) In this way, the London Dumping Convention regime is no longer to be

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\(^{639}\) de La Fayette, “The London Convention,” 534.


\(^{642}\) Coenen, “Dumping of Wastes at Sea,” 55. [Emphasis added]

\(^{643}\) International Maritime Organization, “Dumping at sea,” 12.

\(^{644}\) VanderZwaag and Daniel, “International Law And Ocean Dumping,” 520.
viewed as a permissive regulatory framework. In Article 4, parties are prohibited from the dumping of any wastes, unless those wastes meet the criteria of substances found in Annex 1.\textsuperscript{645} This reverses the assumption that dumping is permitted unless the material is considered to be so toxic that it exceeds the assimilative capacity of the ocean.

Third, parties are required to accept a commitment to monitor and keep a record of the impacts of dumped material.\textsuperscript{646} In other words, states are no longer permitted to dump materials in the marine environment and ignore the consequences. Parties to the London Protocol now have a positive obligation to understand the consequences of dumping. Some scholars have argued that this is the most important provision in the Protocol as, “it is only through continued monitoring and collection of data that any real assessment of the impacts of the various options for disposal can be made.”\textsuperscript{647}

Promoted at the IMO primarily by European member states, the influence of the precautionary approach in the London Protocol is significant and substantive. The elements of the London Protocol reflecting differentiation to promote developing state implementation, however, are considerably less robust. Article 26 of the Protocol offers a five-year phase-in period for developing states to bring themselves into compliance with all relevant commitments (an incentive which no developing state has invoked). And Article 13 makes provision for technical cooperation and assistance. The problem with


\textsuperscript{646} Stokke, “Beyond dumping?” 41.

this so-called incentive is that it is offered, “subject to the availability of funds,” or “if resources permit.”

This highlights a fundamental problem faced by developing states seeking to invoke the concept of common but differentiated responsibility at the IMO: the funding mechanism at the IMO does not employ the UN Scale of Assessment (based primarily on GDP/GNI), used by the Montreal Protocol’s MLF. The GEF employs an analogous metric used by the International Development Association of the World Bank Group.

The funding mechanism at the IMO, by contrast, is derived according to the gross registered tonnage of each member state. The problem with this methodology is, since the inception of the IMO, developing states have increasingly monopolized the business of flagging states by doing so at reduced cost. As previously noted in relation to the MARPOL 73/78 Convention, for context, in 1980, 42 percent of the global merchant fleet was flagged by developing states, while 53 percent was flagged by developed states. By 2012, developing state-flagged fleet had grown to 74 percent, and the developed state-flagged fleet had atrophied to 24 percent. Since these flag states are themselves developing states, not only has this mechanism caused basic budgetary problems at the IMO, but it has also greatly reduced the availability of discretionary funds for implementation initiatives proposed according to the concept of CBDR.

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649 Patricia Birnie, “Regimes Dealing with the Oceans and All Kinds of Seas from the Perspective of the North,” in Global Environmental Change and International Governance, eds. Oran R. Young, George J. Demko, and Kilaparti Ramakrishna (Hanover, New Hampshire: University Press of New England, 1996), 70, notes Liberia and Panama have been the principal contributors.

650 UNCTAD, “Merchant fleet by flag of registration.”

651 Birnie, “Regimes Dealing with the Oceans,” 70.
It is interesting that despite developing countries forming the majority of the IMO’s membership, and in effect, holding the purse strings for the Secretariat, they have not been able to increase their relative influence. This has been explained by continued developing state capacity deficits, including the economic capacity to send delegates to all of the conferences but also technical and experiential deficits.\(^{652}\) Developed states, by contrast, are able to send large delegations of shipping and environmental experts to ensure their voice is heard in the many committee meetings, whereas developing states may just send someone from their London Consulate who may have no experience whatsoever in the shipping industry.\(^{653}\) As such, developing states at the IMO may have been especially vulnerable/amenable to hortatory CBDR offerings contained in the Protocol.

In this regard, the negotiation of the London Protocol was emblematic of the developing country estrangement that defined their involvement in the negotiation of the original 1972 LDC. But more importantly, the London Protocol symbolized a normative European approach to international environmental law and governance that diverged with the United States.

In the early 1990’s, Nordic states, seeking to upload the stringency of the European regional dumping agreements, continued to press for the progressive development of the London Convention regime and the negotiation of a new precautionary foundation to facilitate this evolution. In contrast, the United States sought to maintain the basic structure of the London Dumping Convention and strenuously

\(^{652}\) Linné and Svensson, “Regulating Pollution from Ships,” 107.

\(^{653}\) Tan, *Vessel-Source Marine Pollution*, 98-99
objected to a structure that would “abandon or dilute the principle of objective, scientific decision-making…”  

In other words, the United States, from the beginning, objected to the precautionary approach of the London Protocol, despite being more or less fully in compliance with the regulatory obligations it contained. As Louise de la Fayette notes, The list of materials which may be considered for dumping in the Protocol is almost identical to the exceptions to the ban on the dumping of industrial waste in the Convention. The only difference between the two instruments [is] that under the Convention anything may be dumped except what is listed, while under the reverse list approach in the Protocol, nothing may be dumped except what is listed.  

“Though the United States has not yet ratified the London Protocol,” the EPA notes on its website, “the effective administration of relevant federal laws, as a practical matter, aligns actions of the United States with most provisions of the modernized treaty.”
Claudia Copeland confirms this when she observes, “Virtually all ocean dumping [by US state or non-state actors] that occurs today is dredged material....”

Precaution was not the only feature of new regional agreements the member states of the European Union sought to export/internationalize to the global regime. Both the 1992 Helsinki Convention and the 1992 OSPAR Convention restrict dumping to inland waters, and European states sought to extend the geographical scope of the London

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Convention in the negotiation of the London Protocol.658 This proposal was met with considerable hostility, due to the fact that it reaches so directly from the international maritime jurisdiction covered by the LDC into the domestic jurisdiction of sovereign states. As René Coenen recounts, “Proposals to include marine internal waters in the definition of ‘sea’ under the Protocol met with strong objections and were rejected.”659

To affirm this jurisdictional matter, Article 1 of the London Protocol states, “‘Sea’ means all marine waters other than the internal waters of States…” However, at European urging, Article 7.2 states,

Each Contracting Party shall at its discretion either apply the provisions of this Protocol or adopt other effective permitting and regulatory measures to control the deliberate disposal of wastes or other matter in marine internal waters where such disposal would be “dumping” or “incineration at sea” within the meaning of article 1, if conducted at sea. [Emphasis added]

And Article 7.3 continues,

Each Contracting Party should provide the Organization with information on legislation and institutional mechanisms regarding implementation, compliance and enforcement in marine internal waters. Contracting Parties should also use their best efforts to provide on a voluntary basis summary reports on the type and nature of the materials dumped in marine internal waters. [Emphasis added]

As such, despite the fact that this European proposal was reduced to a voluntary standard, they did manage to extend the geographical scope of the Protocol beyond the jurisdiction of the original 1972 London Dumping Convention regime. That such interference exceeds the limits of territorial integrity, for most states outside of the European context, did not appear to be of concern to the European delegates. Instead, for European


659 Coenen, “Dumping of Wastes at Sea,” 55.
delegates, the over-riding concern appeared to be that European regional standards, including adherence to the precautionary approach, should be globally applicable.

In conclusion, a plausible case can be made that the Protocol offers negligible benefits from reduced foreign pollution externalities, compared to the London Dumping Convention, and the costs or loss in benefits that result from non-ratification appear to be of limited significance for the United States.

Perhaps more to the point, however, US ratification would legitimize EU reliance on the precautionary approach to justify increasingly stringent regulatory standards, even if the proposed standards do not provide the US with net benefits from their implementation.

The consistent American resistance to European efforts to codify the precautionary principle as an emerging norm or principle of customary international law makes the London Protocol a difficult treaty for the US to ratify. This resistance is a result of US concern that the successful codification of the precautionary principle could result in the imposition of significant costs on the United States. Thus, by applying normative foreign policy to the substantive provisions of the 1993 Amendments to the LDC, the EU may have turned the substantively analogous London Protocol into an unratifiable treaty for the US.

In practice, US non-ratification of the London Protocol is difficult to explain with any significant precision. The Protocol was sent to the Senate with the full backing of the Bush Administration and in 2008 the Senate foreign relations committee, with a single
understanding and two declarations, gave their advice and consent for ratification.\textsuperscript{660}

However, this was not put to a vote in the Senate, nor was implementing legislation approved. This is especially odd considering the President’s Letter of Transmittal notes, that although new legislation is needed “there will not be any substantive changes to existing practices in the United States, and no economic impact is expected from implementation of the Protocol.”\textsuperscript{661}

Although explaining why the US Congress has refused to ratify this agreement, at this point, is more art than science, it is conceivable that two elements were sufficient to give Congress pause: First, there was little incentive to ratify; the US finds itself in the odd position of being more or less fully in compliance with this ‘state-of-the-art’ treaty it gets little benefit from ratifying. Second, there is a familiar disincentive; this Protocol represents what Manners describes as “defining what’s normal” using European norms.\textsuperscript{662} It stands to reason that the US would need new additional benefits from participating in the new regime to justify supporting the incorporation of norms primarily favoring the European Union.

Annex IV of the MARPOL 73/78 Convention

\textit{Nota bene}: It should be acknowledged from the beginning that this case does not fit very well into the narrative of this thesis. Crucially, unlike the 1996 London Protocol or the 1998 POPs Protocol to the LRTAP case of the next section, Annex IV of the


\textsuperscript{661} US Senate, Committee on Foreign Relations, “1996 Protocol.”

\textsuperscript{662} Manners, “Normative Power Europe,” 252.
MARPOL 73/78 Convention was negotiated as a voluntary Annex in 1978. Yet, as it is the only annex of the MARPOL Convention the US has not ratified, it is deserving of attention. Moreover, it provides some interesting and relevant insights into US ratification behavior.

The aim of Annex IV is to regulate the release of sewage from ships into the territorial waters of coastal states. If this is done on the high seas, by a ship carrying a crew of 30, it is generally assumed that this practice will not exceed the considerable assimilative capacity of the ocean.\footnote{International Maritime Organization, “MARPOL: 25 years,” 22.} If raw sewage is routinely released in a state’s territorial waters, especially by cruise ships carrying up to 3000 passengers, this presents a viable pollution problem.

Annex IV requires that ships possess certification to confirm that they have appropriate sewage treatment mechanism on board.\footnote{Rebecca Becker, “MARPOL 73/78: An Overview in International Environmental Enforcement,” Georgetown International Environmental Law Review 10 (1997), 629.} And port states are required to provide reception facilities to receive waste from ships that have inadequate treatment equipment.\footnote{International Maritime Organization, “MARPOL: 25 years,” 5.}

A clear disincentive for the United States, as a major port state, to ratify Annex IV is the cost associated with constructing reception facilities. As Saiful Karim notes,\footnote{Md Saiful Karim, “Implementation of IMO legal instruments: international technical and financial cooperation,” in Prevention of pollution of the marine environment from vessels (New York: Springer International Publishing, 2015), 134.}

Karim goes on to dryly suggest, in 2015, “This amount has probably increased since.”

But more to the point, the presence of reception facilities removes the incentive for ship owners to upgrade their own sewage treatment equipment. In the absence of reception facilities, only those states that comply with the US standard for sewage equipment may enter US ports. As such, the increased availability of reception facilities provides a perverse incentive against US interests.

The US government may also feel that the absence of performance standards for Annex IV Marine Sanitation Devices compared with US domestic law, under the Clean Water Act, promotes an insufficiently stringent standard. Although the Annex IV standard may be sufficient for other coastal states, cruise ships that use US ports must comply with the equipment performance standards of the Clean Water Act.

Vessels flagged through foreign registries, that have ratified Annex IV, carry an International Sewage Pollution Prevention Certificate (ISPPC). For US vessels that seek to avoid being refused entry or detained by a foreign port-state, they are eligible to obtain a Statement of Voluntary Compliance (SOVC) from the US Coast Guard, which is viewed as functionally equivalent. As such, US-flagged ships are not disadvantaged by the US government decision not to ratify Annex IV.

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The IMO has recognized that the cost of reception facilities is a likely reason for the low rate of ratification for Annex IV, but also notes,

In practice, evidence suggests that all cruise ships and large passenger ships already have sewage treatment plants on board, so that ships are not seen as a major source of sewage pollution.\(^{671}\)

In this regard, by enforcing compliance with the regulatory standards of the Clean Water Act, the US government has little incentive to ratify Annex IV, which exposes the US to significant and arguably unnecessary costs for reception facilities that would not serve to further reduce pollution from foreign-flagged ships in US waters.

In conclusion, it is not clear that ratifying Annex IV of the MARPOL 73/78 Convention would reduce the amount of foreign pollution externalities impacting US territorial waters, coasts, or ports, but full compliance with the Annex would force the US to incur significant economic costs (there are presumably many US ports that would require $500+ million-dollar reception facilities).

Although this case differs from the others in this section, at a minimum, it appears to confirm the hypothesis that ratification decisions may be usefully explained by adopting a cost-benefit approach. And moreover, this case provides further evidence of American adherence to a consistent CBA criterion throughout both the Cold War and post-Cold War eras.

The 1998 POPs Protocol of the 1979 LRTAP Convention

The Protocols of the LRTAP have historically focused on transboundary air pollution with impacts in a regional context.\(^ {672}\) The 1998 POPs Protocol, on the other

\(^{671}\) International Maritime Organization, “MARPOL: 25 years,” 22.
hand, seeks to regulate chemical compounds that have a local, transboundary, and global impact. With this expanded scale, European member states directed their attention to the participation of the United States.

By 1998, both the United States and the EU had already regulated the core persistent organic pollutants (POPs), known as the ‘dirty dozen,’ but the EU had gone further in anticipation that the European public would increasingly demand more stringent regulation of the chemical industry.673

The importance of this case is that it precedes and serves as a regional precedent for the 1998 Rotterdam Convention and the 2001 Stockholm Convention. All three cases include reference to the precautionary approach at European urging, but more importantly, the precautionary approach is operationalized through the incorporation of what may be called an ‘adding mechanism.’674

This is commonly described as a ‘listing mechanism’ to evaluate chemicals for possible inclusion in the annexes that list regulated chemicals. In principle, this evaluative process could serve to remove chemicals from the list after new evidence confirms that they pose less of a risk than previously assumed, but in practice, they are adding mechanisms that function as one-way regulatory ratchets.

672 The other post-Cold War LRTAP protocol the US has signed but not joined is the 1991 Volatile Organic Compounds (VOC) Protocol. This is viewed as one of the most stringent of the LRTAP protocols and is the least ratified (this includes Canadian non-ratification). US non-ratification was deemed less of a threat for European states due to the fact that the VOC Protocol did not address global externalities. By contrast, the POPs Protocol is substantially more relevant to the other cases in Part 3.


The POPS Protocol adding mechanism is not without precedent, as the Montreal Protocol has an adding mechanism to increase the stringency of existing regulatory standards or to expand the number of substances to be regulated, but these decisions are subject to amendment of the Montreal Protocol, which requires the consent of the United States Congress before ratification and implementation takes place in the US.\textsuperscript{675} The adding mechanism of the POPs Protocol has more in common with the tacit consent procedure of the London Dumping Convention.

The adding mechanism of the POPs Protocol is designed to create mandatory international regulations or prohibitions, by a consensus vote of the Parties, after a review by an expert committee to determine the risk posed by a substance.\textsuperscript{676}

Post-accession to the Protocol, if US delegates do not agree with the determination of the Working Group on Strategies and Review, or otherwise decide they do not support an amendment to the annexes, the US has two options: (1) It can prevent the COP from reaching consensus indefinitely, or (2) it can declare that it chooses not to be bound by the amendment to the annex.

Since the US is unlikely to choose to obstruct consensus indefinitely, if it felt it was not in a position to regulate or ban the new substance domestically US delegates will choose to opt-out, but doing so does little to stop the new listing. In other words, since the United States has shown little interest in regulating beyond the ‘dirty dozen,’ US accession to the Protocol does little else than legitimize European efforts to “define what’s normal” in international environmental law.


\textsuperscript{676} Henrik Selin, \textit{Global Governance of Hazardous Chemicals: Challenges of Multilevel Management} (Cambridge, MA: MIT Press, 2010), 129.
The design of the 1998 POPs Protocol, as with the 1996 London Protocol before it, negotiated in a regional context that mimics existing or anticipated EU regulations, foreshadows the European approach to the design of the 1998 Rotterdam Convention and 2001 Stockholm Convention as the EU sought to use their regional standard(s) as the basis for the global standard.

In conclusion, the POPs Protocol case primarily reflects the European interest in advancing a precautionary approach, in a regional forum, to the regulation of chemicals that have a global impact. There is little indication, however, that the US wants to ban or regulate persistent organic pollutants beyond the ‘dirty dozen’ already addressed under US law. Since the POPs Protocol is designed primarily to add new substances beyond the dirty dozen, the basic purpose of the Protocol conflicts with US interests.

That said, this explanation says nothing about the question of why one would chose to employ a regional agreement to solve a global problem. The answer to this question is unlikely to be, ‘for the benefit of the global environment.’ And more likely to be, ‘to set the agenda for the negotiation of a global agreement.’ Indeed, as Marco Olsen argues, “The POPs Protocol was intended to serve as a model for a global instrument to eliminate POPs.”

As with the London Protocol, the POPs Protocol seems to be an exercise in, as Manners describes it, “defining what’s normal.” As a result of consistent US resistance to EU efforts to codify the precautionary principle as an emerging norm of customary

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678 Manners, “Normative Power Europe,” 252.
international law, there is a considerable disincentive for the US to legitimize these efforts by acceding to this protocol.

From the perspective of potential US accession/acceptance, the evidence suggests that a further reason the US has not joined the POPs Protocol is that it requires legislation granting authority to the EPA to implement LRTAP decisions to add new chemicals to be banned or regulated. In this regard, there is a clear disincentive for Congress to produce implementing legislation that delegates increased autonomous legislative and regulatory powers to the Executive Branch.

This raises another important question surrounding the intent of the POPs Protocol, from the US perspective: Why would the US Congress delegate its legislative authority to an international organization via the Executive Branch? To expect the US Congress to readily agree to this provision is to assume that Congress wants to increase the scale and scope of domestic chemical regulations but is incapable of doing so itself. According to this unsupported assumption, Congress, lacking this ability, should delegate its legislative authority to someone better able to make those determinations for the American people; the state parties of the LRTAP’s POPs Protocol.

To be sure, a US representative would be involved in the international lawmaking process, but a US Congressman would be forgiven for asking, ‘why should US chemical legislation not be determined exclusively by US representatives?’

The US Congress is perfectly capable of legislating chemical standards when doing so presents net benefits to American citizens. Why would the US Congress delegate that authority to countries that have no interest in ensuring that US chemical regulations actually do provide net benefits for Americans?
The fact that the US is a party to the LRTAP by way of a sole executive agreement is simply a further disincentive for Congress to agree to the necessary implementing legislation.

Part 4.
Analysis of the Four Post-Cold War Era Treaties
(Not Ratified by the United States)

This section analyzes the negotiation of the post-Cold War international environmental agreements that were not ratified by the United States. They include: The 1989 Basel Convention; the 1997 Kyoto Protocol; the 1998 Rotterdam Convention; and the 2001 Stockholm Convention.

The 1989 Basel Convention

The transboundary trade in hazardous waste is generally viewed as a bilateral transfer of pollution between states. As a result, developing states, lacking the problem structure leverage provided by common pool resource problems like ozone depletion or climate change, are less able to protect themselves from upstream sources of pollution.

Developing states, especially least-developed states like Guinea-Bissau, are vulnerable to what is called ‘toxic colonialism.’ As Olsen describes it, “in 1988, Guinea-Bissau, which then had a GDP of $150 million [US dollars], was offered a contract worth $600 million [US dollars] to allow 15 million tonnes of toxic waste to be imported into their country….”679 This five-year contract with two British waste brokers, worth four

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times its annual GDP, would have been difficult to refuse. Under international public scrutiny, ultimately the deal fell through, but when asked to justify the initial agreement, the former Minister of Trade and Tourism simply acknowledged, “We need the money.”

In view of this sort of incident, the negotiation of the Basel Convention was contentious, and reflected considerable hostility from developing states. At the core of the waste regime is the question of whether to ban the transboundary trade in waste or to regulate it. From the beginning, northern states sought to rely on Prior Informed Consent (PIC) mechanisms that they had adopted at the domestic level and in voluntary Organization of Economic Cooperation and Development (OECD) agreements. Southern states, on the other hand, demanded a ban on all transfers of waste from OECD countries to non-OECD countries.

The 1989 Basel Convention was adopted, despite considerable G-77 protest, with a PIC mechanism as its central regulatory mechanism. This was presented by northern states as a sort of ‘take-it-or-leave-it’ offer to the developing world. In this original formulation, the United States signed the Convention and sent it to the US Senate for approval, which was granted in 1992, pending the adoption of implementing legislation. That implementing legislation never materialized due to the chaotic dynamism of the Basel regime from 1989 to 1999.

In response to the 1989 Basel Convention, African states negotiated the 1991 Bamako Convention that created an import ban for all foreign waste shipments into

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Africa. The developing states of the G-77 rallied behind their African counterparts and worked to negotiate an amendment to the Basel Convention to ban all OECD waste shipments to non-OECD countries. By 1995, over the protests of some European states and most non-EU OECD states, an amendment known alternatively as the Basel Ban or Ban Amendment was adopted by the Conference of the Parties. Although the Basel Ban has not yet entered into force, its adoption nevertheless meant that the Basel regime, after 1995, reflected competing regulatory mechanisms simultaneously: Chaotic dynamism, indeed.

For context, developed states in the 1970’s and 1980’s had started to heavily regulate the domestic disposal of toxic or hazardous waste, but had imposed less comprehensive regulation on the export of waste. Regulations raised the cost of waste requiring disposal, and in the absence of export controls, producers of hazardous waste were incentivized to seek foreign states willing to accept it. Rather than ignore potential impacts of these incentives, developed states employed PIC mechanisms to ensure that receiving states were informed of the risks associated with importing these products. Voluntary agreements negotiated through the OECD had served to harmonize US and EC PIC mechanisms, but had done so without seeking significant policy input from developing countries.

The logic of the PIC mechanism is based on the understanding that it would be inappropriate for the United States or any other developed country to weigh the risks associated with a certain waste product or chemical substance for another country. The logic of the PIC assumes that the regulatory optima for different countries are different.

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As Pep Fuller and Thomas McGarity suggest, “Regulators in developed countries would not be familiar with the various factors in a particular developing country that might warrant a regulatory approach short of a ban.” Moreover, they continue, “Since the risk posed by the [hazardous substance] was assumed to be limited to the health and environment of the user country, it made sense for that country alone to determine what course to follow.”

This shared responsibility regime puts the onus on the export state to describe the risks associated with the shipment, at which point the onus shifts to the import state to weigh the pros and cons of receiving the shipment and decide accordingly, based on its own regulatory optima. The problem with this logic is that the potential, indeed likely, lack of capacity to assess risks in the receiving state calls into question the robustness of their informed consent. As M. J. Peterson notes,

> The severity of the problem created by exports of hazardous substances subject to bans or limits on use in the country of production depend on government capacity in the importing country. Exports to industrial states, where administrative capacity is typically ample, pose fewer problems than exports to developing states, where administrative capacity is often much weaker.

While the administrative burden of a PIC mechanism is shared between the exporting state and the importing state, by contrast, the purpose of employing a ban, from the perspective of developing states, is that it transfers the entirety of the administrative burden on developed states. This appears to be a reasonable tactical choice by the global South, but it conflicts with other strategic goals of the developing world. First,

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685 Peterson, “Case Study,” 7.
developing states have historically sought development/compliance assistance from the developed world, and a ban removes the incentive to provide such assistance. Assuming enhanced regulatory capacity can be used for more than one pollution modality, simply exporting those costs to developed states seems sub-optimal. That said, it also reflects the fact that the implementation of compliance assistance promises made by developed states, in practice, has also been sub-optimal.

Second, banning all trade in waste eliminates the mutually profitable business of waste recycling. Regarding this latter point, in the context of a ban, whatever metric is chosen to distinguish waste versus recycling takes on major importance. Konrad Von Moltke, for example, argues that the problem of competing definitions is best solved by asking the question, “who pays?”

Where the exporter pays an importer to take a consignment, this is an obvious case of waste disposal.

Where the importer pays an exporter, it is a case of materials for recycling.

As the structure of financial incentives changes, so does the applicable regime.686 [Emphasis added]

This is a useful distinction but does not address the potential for diverging definitions between hazardous and non-hazardous waste that incentivizes regulatory competition over the global standard. The original 1995 Ban Amendment imposed a total ban on the export of waste from OECD to non-OECD states with immediate effect, as well as a total

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ban on all waste transfers intended for recycling and recovery, from OECD to non-OECD states as of January 1998.  

As 90 percent of the transboundary movement of waste is intended for recycling and recovery, and is mutually profitable for importers and exporters alike, in 1998, the parties to the Basel Convention met to clarify definitions. Wastes designated on List A as hazardous wastes were banned and those forms of waste designated to List B could be transferred legally. While this opened up the possibility of resuming trade in recyclable goods, the definitions remained imprecise, and so did not remove the incentive to compete over definitions.

After ratifying the Ban Amendment in 1997, at a 1998 OECD meeting to discuss the categorization of wastes, the EU was again accused of attempting to simply upload their intra-EU regulatory optima at the global scale. As Miles Buckingham describes it,

> Critics charged that the EU was incorporating its own list of hazardous materials. This kept some “wastes” that are considered recyclable by the United States and others on List A and, therefore, ineligible for shipment outside of [OECD] nations. This EU insistence on the inclusion of some items has been alternately characterized as protectionist and arrogant. [Emphasis added]

The US recycling industry receives billions of dollars annually from foreign states willing to accept waste for recycling. As a result, it is highly motivated to resist increased

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regulation of this form of mutually beneficial trade. The European member states, more likely to directly subsidize recycling facilities, on the other hand, are incentivized to expand global regulatory standards.

In 1993, the EU adopted regulation at the Community level that allowed for the ratification of the 1989 Basel Convention and the 1989 Lomé IV Convention that banned the European export of waste to 71 African, Caribbean, and Pacific states. By doing so, the EU adopted a much broader scope for the regulation of waste than the definitions guiding US regulations. Although the Commission as well as Germany and the UK did not support a ban, they sought to avoid comparative disadvantages by advocating the increased breadth and depth of American regulatory standards.

Perhaps more important, however, is that increasingly stringent European waste regulations incentivized public investments, often at the EU-level, in recycling infrastructure. As Jim Puckett, writing in 1994, argues,

European countries have proposed hundreds of new [waste] incinerators, as “energy-recovery” units and thus a form of “recycling”. In France, 80 new solid waste incinerators are proposed by the year 2002. In Spain, 15 incinerators are currently proposed. In Ireland, government officials are asking the EU for 40 million pounds in structural funds to build 3 incinerators. …

The problem with these high cost investments and other infrastructure explicitly designed to recycle waste, however, is that they rely on a steady stream of waste. With this came

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693 Hirschi, “Possibilities,” 177-178.

an increasingly strong incentive to ban the export of waste and recyclable goods beyond European borders. In effect, the European interest in the Basel waste regime became how it could be used as a protectionist barrier for the European waste management industry.\textsuperscript{695}

As Brian Wynne argues in the context of the German waste management industry,

\begin{quote}
The authorities have assured a market for this high-cost system by requiring that all wastes treated off-site are delivered to these facilities, thus creating a public monopoly to discourage the illicit disposal and export of hazardous wastes with a significant portion of the costs being borne by the taxpayers.\textsuperscript{696}
\end{quote}

This raises one of the glaring questions at the heart of the Basel regime regarding whether it is intended to stop the import of waste or stop the export of waste. Although poverty reduces the ability of states to resist accepting payment in exchange for hazardous wastes, and insufficient government infrastructure may be unable to restrict the importation of waste by private parties, neither the Basel Convention, nor the Ban Amendment creates a right to ban the import of waste.\textsuperscript{697} This sovereign right exists prior to and thus applies equally to parties and non-parties in either of these agreements.\textsuperscript{698} Moreover, for recycled goods, no one is forcing importers to pay developed states for these goods.

A crucial feature that is missing from the Ban Amendment is that it fails to address South-South trade. By only regulating the export of waste from OECD countries

\begin{itemize}
\item[\textsuperscript{697}] von Moltke, “Basel and Prior Informed Consent.” 2.
\item[\textsuperscript{698}] von Moltke, “Basel and Prior Informed Consent.” 2.
\end{itemize}
to non-OECD countries, it does not produce a neutral trade restriction.\textsuperscript{699} For developing states, this solved a problem they had missed in the negotiation of the original Basel Convention. As Marian Miller recounts,

Initially, developing countries presumed that [provisions relating to state responsibility for illegal waste traffic] applied only to industrialized countries. Late in the negotiations, however, Third World participants realized that the provisions were likely to apply to their own countries and citizens.\textsuperscript{700} [Emphasis added]

Efforts to include language that excluded developing states from these obligations failed and thus were not reflected in the 1989 Basel Convention.\textsuperscript{701} But it is important to note that this implies that the problem developing states have sought to address in the waste regime is how to reduce the benefits developed states receive from it, rather than ban it altogether. The 1991 Bamako Convention, which bans the export of waste into Africa, for example, does not prohibit the intra-African trade in waste.\textsuperscript{702}

In conclusion, the chaotic dynamism of the Basel regime has provided few incentives for the US to ratify either the 1989 Convention or the 1995 Ban Amendment. Historically, the primary exporters of toxic waste were members of the European Community, and the primary importers were African.\textsuperscript{703} The objections to a ban by the


\textsuperscript{700} Marian A. Miller, \textit{The Third World in global environmental politics}. (1995), 95, 99.

\textsuperscript{701} Miller, \textit{Third World Environmental Politics}, 99.


\textsuperscript{703} Liftin, “Sovereignty in World Ecopolitics,” 188.
US have been primarily ideological, as a ban on waste transfers for recycling and recovery restricted international trade.\textsuperscript{704}

Moreover, less than 1 percent of hazardous waste generated in the US is exported, and of that, 97 percent of US hazardous waste transfers take place between either Canada or Mexico, trade that is exempted by the Basel Convention under Article 11.\textsuperscript{705} A 1992 OECD agreement regulates the majority of remaining American international waste transfers (covering both imports and exports).\textsuperscript{706} As such, the US has few incentives to join either the Basel Convention or Ban Amendment, which impose increased regulatory commitments and potential liabilities.

As such, the core disincentive preventing US ratification of either the Basel Convention or the Basel Ban is that the US must accept greater regulatory obligations in exchange for very limited or non-existent domestic environmental benefits.

Both regime mechanisms shift responsibility on developed states to restrict or prevent exports rather than prevent imports. Based on underlying paternalistic assumptions that the developing world has neither the willingness nor ability to protect their own natural environments, obligations are shifted onto upstream-developed states.\textsuperscript{707} While this benefits the cartelization of the European waste regime, it provides no similar increased benefits for the United States.\textsuperscript{708}

\textsuperscript{704} Liftin, “Sovereignty in World Ecopolitics,” 188. It is important to note here, that this neither equates to, nor supports, the contention that post-Cold War ratification behavior represents an ideological rejection of multilateralism.


This is true of Basel’s PIC regime, but even more so under the Basel Ban. Under the Ban developed states are expected to bear the full cost of implementing commitments designed to protect foreign states. As Richard Gutierrez observes, “The act of prohibiting necessarily entails a policy shift within the [OECD/developed] state, and the corresponding enforcement of the policy.”

From the perspective of the United States that receives little in return from ratification, these regulatory mechanisms may justifiably be seen as a form of foreign intervention into US domestic affairs.

The 1997 Kyoto Protocol

In the negotiations culminating in the adoption of the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the key divergence in approach between the US and other states was that most state representatives were environmental ministers, while the US sent representatives from the Office of Management and Budget, and the Council of Economic Advisers. As Daniel Bodansky describes it,

This approach predictably produced a policy position at odds with the positions of other Western countries: the United States emphasized the potential economic costs of response measures and argued for further

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708 Peterson, “Case Study,” 16.


710 To add insult to injurious regulatory competition, the EU’s effective implementation of the Basel Convention and Basel Ban into EU law has been seriously called into question. In a 2005 investigation of seventeen ports in nine EU countries, 48 percent of waste shipments were found to be illegal and in breach of EU rules. See Hilary Stone, “Flouting the Law? European Shipment of Hazardous Waste,” Natural Resources & Environment 21, no. 1 (2006): 49.

research, while other Western states tended to ignore the economic dimensions of the issue and supported immediate action to curb greenhouse gas emissions.\footnote{Bodansky, “A Commentary,” 464.} [Emphasis added]

The United States, as a result, was viewed as a laggard and an obstructionist, overly concerned with economic sovereignty, and the US viewed European states, in particular, as green fundamentalists, and very much doubted their ability to comply with the standards they were advocating.\footnote{Josh Busby and Alexander Ochs, “From Mars and Venus Down to Earth: Understanding the Transatlantic Climate Divide,” in Climate policy for the 21st century: Meeting the long-term challenge of global warming, ed. David Michel. (Washington, DC: Center for Transatlantic Relations, 2004), 61.} As Josh Busby and Alexander Ochs describe the transatlantic chasm on climate policy,

Broadly stated, the US has favored non-binding targets, market mechanisms, and the inclusion of developing countries, while Europe has backed binding targets, more direct regulation, and supported the idea that mitigation should begin with the advanced, industrialized countries.\footnote{Busby and Ochs, “From Mars and Venus,” 37.}

The position of the developing world was that the developed world was responsible for the climate change problem and they should take responsibility for addressing it, and moreover, that any effort to impose abatement commitments on the global South would constitute a form of eco-imperialism. Stated differently, the G-77 states suspected the North was looking to pull up the ladder of development offered by fossil fuels before the South had had a chance to develop their economies. The G-77 consistently advocated their right to development, while at the same time supporting European efforts to create an international regulatory regime that imposed binding obligations on developed states.
From the 1992 adoption of the UNFCCC to the 2001 repudiation of the Kyoto Protocol by the US (the point, in other words, where potential US ratification of the Kyoto Protocol ends), the G-77 rejected all calls for developing states to accept abatement commitments of any kind. As Patricia Thompson describes it, developing countries describe such demands as, “an extraterritorial imposition of standards….715 In the case of China, specifically, “it is China’s position that developed countries are trying to shirk their responsibilities to the rest of the world.”716 As such, Laurence Boisson de Chazournes observes, “Developing countries [have] demanded strict commitments for developed countries, while at the same time manifesting their intransigence to accept any commitments on their own.”717

According to the logic of the precaution + CBDR regulatory ratchet, this provided ample incentives for the EU to tacitly collude with the G-77 in the negotiation of the Kyoto Protocol and in the post-Kyoto negotiations.

At the 1995 COP 1 meeting in Berlin, the G-77 supported the EU proposal to establish a negotiating process for states to accept legally binding mitigation commitments, and in turn the EU supported the G-77 demand that no new obligations would be imposed on developing states.718 As Farhana Yamin describes it, “The EU’s acceptance of the G-77 position ensured the ‘Green Group’ outnumbered and out-

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maneuvered those who had come to be seen as ‘regime laggards’ [meaning the US, in particular]….”\textsuperscript{719}

EU support for this extreme form of differentiation (zero obligations, indefinitely) is commonly explained as a product of the fact that within the EU differentiation is necessary to burden-share between its northern and southern states. The EU is, in other words, a microcosm of North and South, which also happens to define itself according to its support for sustainable development and multilateralism.\textsuperscript{720}

An alternative interpretation, and the one advanced here, is that differentiation is a tool that facilitates regulatory competition by providing the EU with a useful low-cost mechanism for internal and external statecraft.

As numerous scholars have noted, it was recognized early in the 1990’s that the EC/EU would be able to confront climate change much more inexpensively than other Western states, perhaps especially, the United States.\textsuperscript{721} As such, it offered the EU an excellent platform to exhibit a united European foreign policy. In other words, “EU climate policy to a large extent was based on self-interest….”\textsuperscript{722} As Keukeleire notes, on the importance of climate change as a tool of foreign policy, “this compensates for the fact that the EU can deliver less in the traditional foreign policy domain. In this sense,


\textsuperscript{720} Vogler and Stephan, “Leadership in the making?” 389.

\textsuperscript{721} Lasse Ringius, “The European Community and climate protection. What’s behind the ‘empty rhetoric’?” Center for International Climate and Environmental Research, (CICERO) Report 8 (1999); 4, 16, and Busby and Ochs, “From Mars and Venus,” 40.

\textsuperscript{722} Tora Skodvin and Steinar Andresen, “Leadership revisited,” Global Environmental Politics 6, no. 3 (2006): 22.
succeeding on the Kyoto issue was seen as crucial, even at the expense of other foreign policy goals.”

This opportunity for the EU was due mainly to historical coincidence. The UK had shifted from a predominantly coal-generated to a gas-generated energy supply after 1990, and moreover, as a part of the process of German re-unification, after 1990 the vast majority of inefficient East German coal-burning power stations were closed. Careful to include 1990 as the baseline year for emissions reductions under the UNFCCC regime, rather than 1992 in Rio, or 1997 at Kyoto, Germany and the UK had negotiated for themselves what amounted to a huge surplus of post-baseline ‘emissions reductions.’

This so-called ‘hot air’ or ‘a wind-fall of wall-fall’ allowed the EU to adopt ambitious abatement targets, at very limited cost to European citizens. To illustrate this point, represented in Figure 4, in the 1997 European burden sharing agreement used to determine mitigation commitments for the EU to meet its Kyoto target, Germany is responsible for 80 percent and the UK for roughly 20 percent.

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Figure 3. The 1997 EC burden sharing agreement

Legend: Figures represent percentage distribution of CO2 emission reduction commitments among member states of the European Union.

Source: Ringius, “What’s behind the ‘empty rhetoric’?” 22.

This burden-sharing agreement was made possible through the use of a REIO Bubble, like the one used by the EC in the Montreal Protocol, where the EU was collectively responsible for emissions commitments, rather than individually. As Hermann Ott notes,

Under this bubble, as long as the EC achieves its overall reduction target of 8 percent, the Community as well as all of its member states will be deemed to be in compliance.726

The EU not only had a free surplus of ‘hot air’ to share internally, but the REIO Bubble gave them the flexibility to promote precautionary ambition at a very low cost.

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The United States and members of JUSCANZ argued that if the EU was to be afforded such flexibility, it was reasonable to include flexibility mechanisms for the other developed states as well.\footnote{JUSCANZ is an acronym for the coalition of Japan, the US, Canada, Australia, and New Zealand.} Appallingly, the EU, supported by the G-77, strongly resisted these efforts. To do so would weaken the environmental integrity of the agreement, they argued, and allow the US to selfishly avoid its obligations to the international community.

The EU eventually relented in Kyoto and came to support the potential for flexible implementation that could also benefit JUSCANZ states, however, in the post-Kyoto negotiations the EU strenuously sought to restrict the ability of the US government to use these flexibility mechanisms to reduce US implementation and compliance costs.

The issue that led to the US withdrawal from the Kyoto Protocol was the refusal by the EU to accept an American proposal that would have allowed it to claim land-use and forestry activities against its emissions abatement commitment. These activities are concerned with the absorption of greenhouse gases by these so-called ‘sinks.’ As Ott notes,

> The more sink activities are allowed (for example, by using broad definitions for land-use change activities that include business-as-usual practices), the easier it will be for parties to achieve their reduction goals.\footnote{Hermann E. Ott, “Climate change: an important foreign policy issue,” \textit{International Affairs} 77, no. 2 (2001): 282.}

The problem for the EU and G-77 at the 2000 COP 6 in the Hague, was that, as Michael Grubb and Farhana Yamin observe,

> Full crediting under Article 3.4 would thus almost eliminate… most of the US requirement to reduce emissions… The proposal thus raised howls of
outrage in the EU and from the majority of developing countries, as a result of which the EU and G-77 adopted a position of opposing all sinks under Article 3.4. 

Eleventh hour attempts to salvage a workable arrangement failed after a deal agreed between the UK, US, and a very tired EU negotiator was rejected by European member states. In the aftermath, the chief US negotiator is quoted as saying,

We showed real willingness to compromise. But, too many of our negotiating partners held fast to positions shaped more by political purity than by practicality, more by dogmatism than pragmatism. 

Dominique Voynet, the French Environment Minister and head of the EU delegation has claimed that the Hague collapse was driven by cultural differences. She was subsequently quoted as saying, “the American insistence on free market principles in environmental control was perceived in France as the ‘law of the jungle’.”

Jessica Mathews suggests, “the Europeans resented any mechanism that might enable the United States to meet its Kyoto commitments without sufficient sacrifices and changes in its profligate lifestyle.” And demands made by the European Parliament (EP) on Commission negotiators appear to support this assertion. Prior to the COP 6 negotiations in the Hague, the EP advised that the EU should, “not relinquish any EU positions vis-à-vis the U.S.A. if it has not been guaranteed that Congress will ratify the

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731 Cass, “Norm Entrapment,” 54.

Kyoto Protocol.” Since US negotiators could do no such thing, this declaration simply demands European intransigence. And moreover, the EP continued, EU negotiators should consider how “the quickest possible ratification of the [Kyoto] Protocol could be achieved without the U.S.A.” It was clear to some observers at the time, and increasingly in hindsight, that European negotiators “wanted Americans to feel some economic pain more than they wanted a workable agreement.”

Moreover, it is worth noting that between 1990 and 2001, of the then 15 member states of the EU, only Sweden, Luxembourg, and France (in addition to Germany and the UK) had managed to reduce emissions.

In 2001, a year after the Hague collapse, the US withdrew its name from the Protocol. What happened next is revealing of the motivations guiding European climate foreign policy. In order for the Kyoto Protocol to enter into force the EU would need to convince Australia, Canada, Japan, and Russia to ratify the agreement. What did the European representatives do? They offered virtually all of the sink allowances, previously denied to the US, to these four states. For Russia, which held out the longest, the EU offered to support the Russian application to join the World Trade Organization. The EU voluntarily reduced the environmental integrity of the Protocol, reducing it to little

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735 “Oh no, Kyoto,” *Economist*, (April 7, 2001), 23.
736 Busby and Ochs, “From Mars and Venus,” 41.
more than symbolic policy, and proclaimed themselves saviors of the climate regime.\textsuperscript{739}

In this context, Jon Hovi \textit{et al.} argue convincingly,

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\small
it is important to note that the EU’s indulgence in accommodating the requirements of the “Gang of Four” suggests that \textit{it was political benefits associated with leadership, rather than a sense of responsibility for the global environment, that was the major driving force for this course of action.} \textsuperscript{740} [Emphasis added]
\end{quote}

In addition, Christoph Böhringer and Carsten Vogt claim, even after the Kyoto commitments were reduced to symbolic policy, European costs associated with implementation were still lower than Japan, Canada, and Australia.\textsuperscript{741} In other words, even if the EU could not bind the US to a comparative disadvantage, they could still do so with the remaining OECD peer competitors.

For even greater ironic effect, after denouncing the use of emissions trading mechanisms as a sleight-of-hand trick for Americans to avoid responsibility for international mitigation commitments, the EU created a massive emissions trading mechanism so they would be able to reduce emissions more cost-effectively.\textsuperscript{742}

The most compelling reason for all of these policy reversals is that the EU has always seen the climate regime as a low cost foreign policy tool, a mechanism for internal and external statecraft, rather than first and foremost a mechanism to protect the global environment. As Wynne notes,

\begin{quote}


\textsuperscript{741} Böhringer and Vogt, “The Kyoto Protocol as symbolic policy,” 612.

\textsuperscript{742} Cass, “Norm Entrapment,” 38-60. Cass argues compellingly that by 1998 the member states had privately come to embrace emissions trading but continued to publically frame it as a tool for ‘othering’ the United States. It was only after the US repudiated the Kyoto Protocol that the EU was able to publically support emissions trading. She describes this hypocrisy as a form of “norm entrapment.”
\end{quote}
the EC member states share a common interest in creating a sufficiently united identity to be recognized as a global power in foreign policy, security and trade agreements in the new, post cold war world order. Moreover Wynne argues, “in order to fulfill ambitions as a credible global actor, the EC [needed] to secure greater internal institutional and political cohesion.” Wynne, “Implementation,” 102.

Hovi et al. reason accordingly,

In the beginning of the 1990s, therefore, the EU needed an international issue both to make its mark as a united and strong global actor as well as to reinforce its (internal) institutional and political cohesion.

The climate regime offered the perfect opportunity for EU statecraft to simultaneously produce internal legitimacy, internal control, and external control benefits. Miranda Scheurs and Yves Tiberghien argue that the EU Commission, in particular, “has used climate policy as a means to push EU integration forward and empower the Commission with new regulatory tools and monitoring powers.”

The climate regime allowed the EU to claim it had become an independent actor of equivalent stature and prestige as Japan and the United States, and as Lasse Ringius suggests, “even challenge the dominant American position on some aspects of world

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affairs.” The EU, at least within the climate regime, could claim to act as a counterweight to the influence of the United States.

One may conclude that European environmental foreign policy is a harmless rhetorical exercise designed to reflect politically attractive environmental protection *bona fides*, but this misses the impact of the Northern European preference for presenting Kaldor-Hicks agreements on the potential to coordinate the supply of collective goods.

It is an understatement to suggest that the Kyoto Protocol, in contrast to the Montreal Protocol, did not appear to offer the US a positive cost-benefit. In one of the most cited cost-benefit assessments of potential US implementation of its Kyoto commitments, William Nordhaus and Joseph Boyer estimate that,

> total abatement costs for the US [would] be $325 billion [in] 1990 dollars for the first commitment period and also that the US [would need to] spend $20 billion annually for emission allowances.

It is worth noting that this projected $325 billion price tag for Kyoto implementation equaled roughly half of US exports in goods in 2002.

As with all CBA assessments, it is reasonable to be skeptical of this projection. But it is notable that no cost-benefit analyses at the time anticipated that US ratification of the Kyoto Protocol would provide the Americans with net benefits from participation.

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Using data from the Nordhaus and Boyer analysis, Sunstein demonstrates compellingly that “it would not be easy to defend US ratification in cost-benefit terms.” See Table 7, below.

Table 7. The US costs and benefits of ratifying the Kyoto Protocol

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<th>No Controls</th>
<th>Kyoto Treaty</th>
<th>Unilateral action to comply with Kyoto</th>
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<tr>
<td>Benefits</td>
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<td>12</td>
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<tr>
<td>Costs</td>
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<td>325</td>
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<td>Net Benefits</td>
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Even if Kyoto had provided net benefits for US participation, the distribution of obligations within Kyoto suggests not only that it was a bad deal for the US but also that it was designed to be. By colluding with the G-77 to maintain the Berlin Mandate’s ‘Firewall’ (exempting developing country abatement indefinitely), the EU initiated a deeply asymmetrical distribution of climate commitments.

In this regard, Christopher Stone addresses the costs faced by the US that result from the developed/developing firewall on mitigation commitments. Using figures from 2002, Stone creates a table with the top 16 carbon dioxide emitters (states that are responsible for 74 percent of the 2002 world total). When non-Annex I states (developing countries) as well as Russia and other economies in transition (EIT) (that due to economic/industrial collapse after 1990 do not face mitigation constraints), Stone reveals

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the asymmetrical distribution of emission abatement obligations.\textsuperscript{754} As of 2002, the United States was responsible for roughly 24 percent of global carbon emissions, however, with developing states (and EIT countries) exempted from Kyoto, US responsibilities rise to over 50 percent of the Kyoto targets (Table 8).\textsuperscript{755}

Table 8. CO$_2$ emissions for major emitters and countries subject to Kyoto targets

<table>
<thead>
<tr>
<th>Country</th>
<th>CO$_2$ (1000 metric tons)</th>
<th>% among all countries</th>
<th>% among countries subject to Kyoto target$^*$</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 United States</td>
<td>1,486,801</td>
<td>23.81%</td>
<td>51.60%</td>
</tr>
<tr>
<td>2 China</td>
<td>858,490</td>
<td>13.75%</td>
<td></td>
</tr>
<tr>
<td>3 Russian Federation</td>
<td>391,535</td>
<td>6.27%</td>
<td></td>
</tr>
<tr>
<td>4 Japan</td>
<td>309,353</td>
<td>4.95%</td>
<td>10.74%</td>
</tr>
<tr>
<td>5 India</td>
<td>289,587</td>
<td>4.64%</td>
<td></td>
</tr>
<tr>
<td>6 Germany</td>
<td>225,208</td>
<td>3.61%</td>
<td>7.82%</td>
</tr>
<tr>
<td>7 United Kingdom</td>
<td>148,011</td>
<td>2.37%</td>
<td>5.14%</td>
</tr>
<tr>
<td>8 Canada</td>
<td>127,517</td>
<td>2.04%</td>
<td>4.43%</td>
</tr>
<tr>
<td>9 Italy</td>
<td>113,238</td>
<td>1.81%</td>
<td>3.93%</td>
</tr>
<tr>
<td>10 Mexico</td>
<td>102,072</td>
<td>1.63%</td>
<td></td>
</tr>
<tr>
<td>11 France</td>
<td>100,951</td>
<td>1.62%</td>
<td>3.50%</td>
</tr>
<tr>
<td>12 South Korea</td>
<td>99,260</td>
<td>1.59%</td>
<td></td>
</tr>
<tr>
<td>13 Ukraine</td>
<td>96,510</td>
<td>1.55%</td>
<td></td>
</tr>
<tr>
<td>14 South Africa</td>
<td>93,808</td>
<td>1.50%</td>
<td></td>
</tr>
<tr>
<td>15 Australia</td>
<td>90,470</td>
<td>1.45%</td>
<td>3.14%</td>
</tr>
<tr>
<td>16 Poland</td>
<td>87,807</td>
<td>1.41%</td>
<td></td>
</tr>
<tr>
<td>All Others</td>
<td>1,623,019</td>
<td>25.99%</td>
<td>9.71%</td>
</tr>
<tr>
<td>Global Total</td>
<td>6,243,637</td>
<td>100%</td>
<td></td>
</tr>
</tbody>
</table>

Source: Stone, “Differentiated responsibilities,” 297.\textsuperscript{756}

\textsuperscript{754} Stone, “Differentiated responsibilities,” 295-298.


\textsuperscript{756} Stone, “Differentiated responsibilities,” 297. Citing the Carbon Dioxide Information Analysis Center, 2002. *Assuming ratification. Neither the United States nor Australia has ratified. Excludes both
There are many good reasons why the developing world should have been offered differential climate targets in Rio, in Berlin, and in Kyoto, but allowing them to insist that they should be completely exempted from accepting any commitments, indefinitely, was a strategic disaster. As Robert Stavins describes it,

The Berlin Mandate, codified with numerical national targets and timetables [exclusively] for Annex I countries in the 1997 Kyoto Protocol, produced a dramatic gap between rhetoric and reality.\(^\text{757}\) [Emphasis added]

It is worth considering that the EU would have been less likely to agree to the Berlin Mandate if it had not seen the climate regime as an opportunity to propose ambitious international mitigation commitments at a bargain price. In the absence of ‘hot air’ from the UK and Germany, the prospect of reducing EU emissions, even with the EU Bubble, would have been much more daunting.\(^\text{758}\) But with the benefit of ‘hot air’ from the UK and Germany, the EU’s peer competitors, they wagered, would face much greater adjustment costs, giving the EU a considerable comparative advantage in the global economy. Colluding with the G-77 on the Berlin Mandate made it easier to legitimize pushing a net cost climate treaty on the EU’s peer competitors, but arguably the EU would not have done so if it had been similarly disadvantaged by the arrangement.\(^\text{759}\)


\(^{758}\) This is inferred from the failure throughout the early 1990’s by the member states of the EU to agree on a carbon/energy tax, arguably because under the SEA and the Maastricht Treaty fiscal measures continued to require unanimity, rather than the Kaldor-Hicks benefits of QMV. See Ringius, “What's behind the ‘empty rhetoric’?” 14. And Damro, Hardie, and MacKenzie, “The EU and climate change policy,” 186, who note “Carlo Ripa de Meana, the then-Environment Commissioner, refused to go to the 1992 Rio Summit because of the lack of commitment to carbon taxes by the Council of Ministers.”

\(^{759}\) This assertion is, to some degree, borne out by EU actions to reject the application of CBDR to greenhouse gas emissions for amendments to Annex VI of the MARPOL Protocol at the IMO.
The reality is, as was anticipated by the American representatives in the early 1990’s, a major shift has taken place in the annual distribution of carbon emissions. Whereas in the early 1990’s the EU and the US were responsible for roughly 60 percent of global greenhouse gas emissions, by 2005, that percentage share had decreased to just over 30 percent. Perhaps even more salient is the increasing refutation of the claim that as the developed world is cumulatively responsible for far greater historical emissions than the developing world, climate change was an exclusively Northern problem. In 2010, the Netherlands Environmental Assessment Agency produced an analysis of historical emissions and estimated that by 2020, the developing world is likely to overtake the cumulative historical emissions of the developed world. Table 9 compiles the cumulative totals as of 2010.

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Table 9. Cumulative greenhouse gas emissions by developed and developing states

<table>
<thead>
<tr>
<th>Developed countries</th>
<th>52.0</th>
<th>Developing countries</th>
<th>48.0</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>18.6</td>
<td>China</td>
<td>11.6</td>
</tr>
<tr>
<td>EU27</td>
<td>17.1</td>
<td>India</td>
<td>4.1</td>
</tr>
<tr>
<td>Russia</td>
<td>7.2</td>
<td>Brazil</td>
<td>3.9</td>
</tr>
<tr>
<td>Japan</td>
<td>2.8</td>
<td>Indonesia</td>
<td>4.8</td>
</tr>
<tr>
<td>Australia &amp; New Zealand</td>
<td>1.7</td>
<td>South Korea</td>
<td>0.6</td>
</tr>
<tr>
<td>Canada</td>
<td>1.9</td>
<td>Mexico</td>
<td>1.3</td>
</tr>
<tr>
<td>Other European countries</td>
<td>1.1</td>
<td>Nigeria</td>
<td>0.6</td>
</tr>
<tr>
<td>Ukraine</td>
<td>1.5</td>
<td>Saudi Arabia</td>
<td>0.4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>South Africa</td>
<td>0.8</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Turkey</td>
<td>0.7</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Middle East</td>
<td>2.6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rest of Africa</td>
<td>5.7</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rest of Asia</td>
<td>0.6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rest of Latin America</td>
<td>4.6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rest of Southeast Asia</td>
<td>5.7</td>
</tr>
</tbody>
</table>

Legend: Figures represent percentage of total cumulative emissions from 1850 to 2010.762

Source: Netherlands Environmental Assessment Agency.763

In conclusion, although the scientific evidence (then and now) overwhelmingly supports the case that climate change will be one of the defining issues of the twenty-first century, the cost-benefit data available at the time would have provided persuasive evidence for the US government that the distributive elements of the Kyoto Protocol were so asymmetrical for the United States, that it should not be ratified. Responsibility for much of this asymmetry, I argue, is explained by European collusion with the G-77.

762 Associated comment: “Taking into account all greenhouse gas emissions emitted during the 1850–2010 period, the relative contribution by developing countries to global cumulative emissions was 48%. The group of developed countries was responsible for 52%. By 2020, the share of developing countries will probably amount to 51%. Hence, somewhere during the current decade, the share of the cumulative historical emissions in developing countries will surpass that of the developed countries.”

763 Netherlands Environmental Assessment Agency, “Contributions.”
Some, like Grubb and Yamin, suggest that this amounts to, in effect, an unintended mistake in negotiation strategy by the EU and G-77, when they assert, European-and worldwide-frustration at US energy profligacy blinded them to [the] harsh reality [that the US was facing significant net costs from ratification]. Positions were based on the hope that somehow the United States could be forced by international pressure to deliver something that [was] politically impossible...[the US ratification of a net cost climate treaty.][Emphasis added]

In other words, normative foreign policy was mistakenly assumed to be sufficient to over-ride the need to negotiate a self-enforcing Pareto-improving agreement.

There is reason to believe, however, that this was not just an accident based on innocent post-modern and post-sovereignty normative assumptions. In addition to the internal and external statecraft benefits climate change offered the EU it also provided a mechanism to soft balance against the unrestrained post-Cold War unipolar United States. By exempting the G-77 from any substantive obligations, indefinitely, the EU was able to construct a regime where the numerical majority of both developed and developing states faced little to no costs from ratification. This structure allowed the EU to reverse the design logic of the Montreal Protocol (a supply-side k-group able to secure a stable self-enforcing agreement that benefited all parties) to create a demand-based regime, with the weight of the international community demanding participation from Europe’s peer competitors. The EU and G-77, in effect, attempted to weaponize the climate regime to impose economic comparative disadvantages on the rest of the developed world.

Moreover, even if they were unable to bind the US into accepting hugely asymmetrical costs from ratification, implementation, and compliance with Kyoto, all of the members of the regime stood to gain politically by delegitimizing the US as a self-

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764 Grubb and Yamin, “Collapse at the Hague,” 271.
interested rogue of the international community, rather than the benevolent hegemonic ‘leader of the free world.’ Since participation in the regime imposed minimal costs on most states, and this form of soft balancing created little risk of retaliation from the US, it became a perfect vehicle to challenge and delegitimize American hegemony.

Further, viewed as a tool to balance and bind American hegemony, there is a useful comparison to be made between the MARPOL and the Kyoto regimes in the matter of national security. In the Senate Executive Report approving the ratification of the 1997 MARPOL Protocol, it notes,

> Article 3 of the MARPOL Convention exempts warships, naval auxiliaries and other ships owned or operated by a state and used in governmental non-commercial service from the application of the provisions of its annexes. In negotiating the Protocol of 1997, the parties agreed that, under Article 3(3) of the MARPOL Convention, such ships will be exempt from the application of the provisions of Annex VI.\(^{765}\) [Emphasis added]

In contrast, at the COP 3 meeting in Kyoto in December of 1997, where the Kyoto Protocol was adopted, the COP rejected American requests for a similar blanket exemption for American Armed Forces. The final COP decision on the matter, which provides a qualified exemption, reads as follows,

> The Conference of the Parties... Decides that emissions resulting from multilateral [collective security] operations pursuant to the United Nations Charter shall not be included in national totals, but reported separately. *Emissions related to other operations shall be included in the national emissions totals of one or more Parties involved.*\(^{766}\) [Emphasis added]

The weight given to this aspect of the protocol in the decision to repudiate the Protocol in 2001 is likely to have been small next to the economic costs. However, it

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\(^{766}\) UNFCCC, *Methodological issues related to a protocol or other legal instrument,* (COP 3, Agenda item 5, Kyoto, Japan, December 8, 1997), 2.
suggests that the UNFCCC COP was sufficiently hostile to the United States that it sought to resort to a form of lawfare to seek to monitor and regulate the emissions of the US armed forces.\footnote{Josef Joffe has argued that many transatlantic disputes over the contents of international law, including in the negotiation of the ICC, are fundamentally about geopolitical contestation. The ICC shares with the Kyoto Protocol similar elements of lawfare. “Claiming the right to pass judgment on military interventions by prosecuting malfeasants \textit{ex post facto}, the Court might deter and thus constrain American forays abroad. All the Lilliputians \textit{[i.e., the Europeans]} would gain a kind of \textit{droit de regard} over American actions.” See Josef Joffe, \textit{Gulliver Unbound: Can America Rule the World?} (presented as the Twentieth Annual John Bonython Lecture at the Centre for Independent Studies, Sydney, Australia, August 5, 2003).}

Whatever the reason for resisting the negotiation of a treaty that allowed all states to accept some responsibility to limit their emissions, and encouraged flexibility for all states to do so, that treaty was never negotiated. In its place, the EU, with its insistence on the 1990 baseline and the EU Bubble, and in collusion with the G-77 that secured the indefinite exclusion of mitigation targets for the developing world, coordinated the negotiation of a Kyoto Protocol that offered the US huge regulatory costs, in exchange for a limited reduction in foreign pollution externalities.

The 1998 Rotterdam Convention

The objective of this Convention is to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties.\footnote{Rotterdam Convention, Article 1, Objective.}

For the purposes of this thesis, the Rotterdam Convention is perhaps best examined in relation to the 1989 Basel Convention, as it incorporates a Prior Informed Consent (PIC) mechanism less controversially than Basel’s PIC. Similar to Basel, the

Rotterdam differs from the 1998 POPs Protocol and the 2001 Stockholm Convention in that it “does not regulate either the use or the production of hazardous chemicals, but rather their international movement as import or export.” 770 These differences notwithstanding, Rotterdam is also usefully viewed in relation to the adding mechanisms of the POPs Protocol and the Stockholm Convention.

In the same way as state and non-state actors objected to the PIC mechanism at Basel, these arguments were presented again in the negotiation of Rotterdam. For some, PIC was justified because a ban would impose an eco-imperialist and paternalistic Northern standard on the developing world. 771 In a 1993 policy statement the EPA explained the Agency’s position that the problems associated with developing world use and misuse of pesticides would not be solved by unilaterally prohibiting the export of pesticides that had been banned or unregistered in the United States. 772 The EPA statement defends this policy based on 4 premises,

First, controlling the export of products from the United States alone will not resolve the problems associated with pesticide use in developing countries. The United States is one of many pesticide exporters – exporting approximately 10 percent of the total world pesticide consumption. Many countries, including some developing countries, have


770 Olsen, Analysis of the Stockholm Convention, 73.


the manufacturing capability to produce and export pesticides which have been banned or which are unregistered in the United States.

Second, EPA believes that it may be more effective to concentrate on controlling the management and use of all pesticide products, in order to reduce unnecessary exposure, rather than categorically banning certain classes of U.S. pesticides from international trade.

Third, EPA’s regulatory decisions are based upon risk/benefit evaluations specific to the United States. The risk/benefit balance in other countries may differ from the United States due to differences in growing conditions and pest control problems, as well as public health and environmental considerations.

Fourth, pesticide manufacturers may not seek to register a product in the United States simply because there is no need for it here. For example, the product may control a pest that is not a problem in this country or may be used on crops not commonly grown here.\textsuperscript{773} [Emphasis added]

For others, however, it was argued that without sufficient financial and technical assistance, the PIC was certain to facilitate the continued toxic colonialist dumping of dangerous chemicals in the developing world.\textsuperscript{774} Some also argued that the export of hazardous pesticides creates a ‘circle of poison’ through the return of contaminated agricultural products imported into the United States; a claim that the EPA disputes based on data gathered under residue monitoring programs,

the results of food monitoring programs show that imported foods generally do not contain either elevated levels or a large number of pesticide residues, relative to domestic food samples. Furthermore, the levels that are found do not generally present any significant public health threat.\textsuperscript{775}

The primary reason the PIC mechanism was acceptable to developing countries in this context, but not for Basel, is that they valued access to pesticides like DDT. While

\textsuperscript{773} USEPA, “Pesticide Export Policy Statement; Rule,” 9064.

\textsuperscript{774} Ross, “Legally binding prior informed consent,” 499.

\textsuperscript{775} USEPA, “Pesticide Export Policy Statement; Rule,” 9064.
their use had been banned in northern countries, the global South found them to be essential to fight malaria. In other words, pesticides may be toxic, but they also save lives (something toxic waste rarely does).

Using the PIC mechanism, receiving states are able to make their own decisions on whether or not to accept pesticides and other chemicals, as long as exporting states provide all of the necessary information to inform their decision making process. The PIC mechanism describes a ‘shared responsibility’ between the importer and the exporter.\footnote{Ted L. McDorman, “The Rotterdam convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade: Some legal notes,” \textit{Review of European, Comparative & International Environmental Law} 13, no. 2 (2004): 187.}

As such, the Rotterdam Convention transformed a voluntary 1989 FAO/UNEP PIC into a mandatory global regulatory standard.\footnote{Peter Hough, “Institutions for controlling the global trade in hazardous chemicals: the 1998 Rotterdam Convention,” \textit{Global Environmental Change} 10, no. 2 (2000): 162.} In doing so, however, it provided an incentive for states with ambitious regulatory standards to impose those standards on others, by locking them into new legally binding commitments.

During the 1980’s, Europe’s major chemical exporters opposed binding PIC regulations.\footnote{Barrios, “The Rotterdam Convention,” 718.} But once the EU had adopted Community-level regulations instituting a PIC mechanism that was more stringent than US standards, in 1993, these states were incentivized to push for a global regime.\footnote{Tom Delreux, “The EU as a negotiator in multilateral chemicals negotiations: multiple principals, different agents,” \textit{Journal of European Public Policy} 15, no. 7 (2008): 1077.}

Tom Delreux argues that in the negotiation of the Rotterdam Convention, “the EU wanted almost at all cost a legally binding agreement, as a PIC procedure was already in
force at the EU level.” At Rotterdam, Delreux continues, “the cost of no agreement was high for the EU and its member states.”

This meant, however, that the EU was in a poor position to insist on the stringency of the initial agreement. Instead, the European strategy was to incorporate an adding mechanism that would then make it easier to upload Europe’s more precautionary regulatory standards at a later date.

Although developing states pushed hard for their inclusion, the Rotterdam Convention contains little in the way of capacity-building benefits for the developing world other than vague promises that, as Katharina Kummer describes them,

> Parties with more advanced programmes for regulating chemicals should provide relevant assistance to other Parties, including training. Such cooperation and assistance is to be provided on a voluntary basis as agreed between interested states…. [Emphasis added]

This begs the question, why would developing states agree to such weak obligations to provide compliance assistance? Kummer argues that the likely explanation for this is the fact that the Rotterdam Convention was not designed to impose significant substantive obligations for developing states. The implication here is that Northern states, particularly those states that did not meet the highest regulatory standard, were the primary targets of the Rotterdam Convention.

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781 Delreux, “The EU as Negotiator,” 1082.


During the negotiation of the Convention, the G-77 demanded that PIC procedures create binding obligations for developed states, but also, as Marco Olsen reports, “demanded a ban on the export of domestically prohibited chemicals from countries that are members of the OECD to other countries.”\(^{784}\) One implication of this positional demand is the potential it creates for unregulated South-South trade in otherwise prohibited chemicals, but this concern was addressed by developed states necessitating that, as Jonathan Krueger and Henrik Selin note,

> Decisions taken by the importing party must be trade neutral; that is, if the party decides it does not consent to accepting imports of a specific chemical, it must also stop domestic production of the chemical for domestic use or imports from any nonparty.\(^{785}\)

There is a strong comparison to be made here between Basel and Rotterdam in that they both serve to shift the administrative burden for the protection of the importing state onto the exporting state, which in exchange receives little benefit in return.

The benefit of an adding mechanism, on the other hand, goes to the state with the most stringent regulatory standards. For the EU, seeking to export/internationalize its ambitious regulatory standards, which were anticipated to both broaden in scope and stringency, the adding mechanism was a crucial tool for regulatory competition.

The chemicals and pesticides regulated by the PIC mechanism are listed in Annex III of the Convention, and the process of adding substances is a core function of Rotterdam’s governance mechanism.\(^{786}\) The Chemical Review Committee (CRC) at the center of this process is responsible for making recommendations regarding the inclusion

\(^{784}\) Olsen, Analysis of the Stockholm Convention, 73.

\(^{785}\) Krueger and Selin, “Governance,” 186.

\(^{786}\) McDorman, “The Rotterdam Convention,” 187-188.
of additional substances to the Conference of the Parties (COP). The COP makes the final decision, according to a consensus of the parties, whether to add a chemical or pesticide to the Annex III list.\(^\text{787}\)

Once consensus is reached, the amendment to the Annex is adopted, and it enters into force on all parties at a time specified in the amendment. As with the POPs Protocol adding mechanism discussed earlier, this is a controversial procedure. Smaller states are unlikely to go against consensus, as they know they will face direct diplomatic pressure from those states proposing the amendment. More powerful countries, like the United States, will not hesitate to campaign against a proposal and block consensus, but even the US is unlikely to block consensus indefinitely.

The Rotterdam adding mechanism is unique in international environmental law in that once the COP reaches consensus to list a substance in Annex III, there is no opt-out mechanism. States may not simply declare their intention not to be bound by the will of the COP. If states are unwilling or unable to block consensus, they are bound to all of the commitments entailed by adding a new substance to the Annex III list.

It stands to reason that the United States is likely to resist being put in a position where its only further option to evade a listing decided by consensus, of a chemical the US has no intention of regulating or prohibiting, is to repudiate and withdraw from the Rotterdam Convention.

In conclusion, the relevance of this evolution from a voluntary PIC to a legally binding PIC, for the United States, is that it does not simply harden the obligations that were once voluntary. What the Rotterdam PIC does is impose an increased share of the administrative costs on the United States, and binds the US to increasing costs through

\(^{787}\) McDorman, “The Rotterdam Convention,” 197.
the post-ratification adding mechanism.\textsuperscript{788} As the primary human health and environmental benefits from the regime are intended for people who live in the developing world and in states with economies in transition, it is uncontroversial to suggest that this regime creates net costs for the US.

Like the Basel waste regime, Rotterdam shifts a larger share of the administrative and regulatory burden for restricting the import of toxic chemicals onto developed states. For most developed states, including the United States, there are few incentives to absorb these costs as in exchange they receive little to no reduced foreign pollution or material benefits in return.

In contrast, the European Union receives a significant benefit from the regime in the form of a mechanism to export/internationalize their more ambitious, precautionary regulatory standards. And like the London Protocol, POPs Protocol, Basel waste regime, and Kyoto Protocol before it, the adding mechanism provides the EU an opportunity to ‘define what’s normal.’ By creating a mechanism to codify European norms and standards at the global level, this increases the legitimacy of the European norms and standards imposed on the member states of the EU who may have been less inclined to accept, implement, and comply with northern European dictates. For reasons previously expressed, the US has a significant disincentive to legitimize this operational mechanism of Europe’s precautionary principle.

In other words, the developing states receive increased external control, in the form of a shield from imports they cannot control themselves, as well as internal control and legitimacy by providing better protection for their people. The EU may benefit from reduced comparative disadvantages resulting from their more ambitious regulatory

\textsuperscript{788} Krueger and Selin, “Governance,” 332.
standards, but more to the point, the Commission receives increased internal legitimacy by exporting/internationalizing EU standards and legitimizing European norms and governance mechanisms.

Meanwhile, if the US government wants to increase the stringency of domestic chemical regulations, it is perfectly able to do so absent foreign pressure or interference. In this regard, the decision by the US government not to ratify the Rotterdam Convention is arguably explained by a cost-benefit approach, where the associated costs of the regime primarily serve the interests of foreign states.

Further, if the US government decided it wanted to ratify and implement the Rotterdam Convention, it would need to amend US law to empower the EPA to ban the export of chemicals and pesticides and supplement the existing US PIC notification processes. This would be relatively simple to do, not easy politically, but the revision of the law would not be that complex. The much more difficult aspect of implementation is giving the EPA the authority to implement changes to the way it regulates chemicals and pesticides, based on their addition to the listing mechanism of an international institution. This governance mechanism required for domestic implementing legislation will receive more attention in the next case, which discusses the negotiation of the Stockholm Convention.

The 2001 Stockholm Convention

The formal objective of the Stockholm Convention states, “Mindful of the precautionary approach… the objective of this Convention is to protect human health and

the environment from persistent organic pollutants (POPs). The Convention seeks to achieve this by eliminating POPs or reducing their production, use, import, export, emission and disposal.

The negotiation of the Stockholm Convention included similar claims of toxic colonialism and eco-imperialism to those heard in so many other IEA negotiations. As a result of the bi-lateral and transboundary nature of POPs, Veerle Heyvaert relates that, until recently, much of the trade in POPs between the developed and developing world amounted to a thinly veiled case of environmental dumping. [...] When tighter regulation in the home state threatened the marketability of hazardous chemicals domestically, manufacturers would try to offload existing stock on developing countries that had fewer, or less rigorously enforced regulatory restrictions.

What Heyvaert means when she says, “until recently,” is that at the same time as developing countries have increased their consumption and production of POPs, scientific data has increasingly shown that these substances disperse in the atmosphere at a global level. Mounting evidence of significant Arctic contamination due to persistent organic pollutants, an area where a negligible amount of POPs have been introduced intentionally by locals, greatly supports the hypothesis of global dispersal.

As a result of this global impact of persistent organic pollutants, the G-77 had more bargaining leverage at Stockholm than it did in the negotiation of either the Basel or

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790 Stockholm Convention, Article 1 Objective.


Rotterdam Conventions, although not as much as in the post-Montreal Protocol or the climate change negotiations.

As such, developing countries very clearly expressed their concern that developed states’ attempts to export their eco-conscious regulatory optima on the global South, were viewed as part of an eco-imperialist strategy to restrict their economic development. This resistance was especially prevalent in discussions over the banning of DDT.\footnote{Andrew J. Yoder, “Lessons from Stockholm: evaluating the global convention on persistent organic pollutants,” \textit{Indiana Journal of Global Legal Studies} 10, no. 2 (2003): 132.} As Andrew Yoder describes this friction, in the context of negotiating the Stockholm Convention,

developing countries expressed concerns that environmental provisions could be used by industrialized states to impose restrictions on exports from the South, effectively barring access to worldwide markets.\footnote{Yoder, “Lessons from Stockholm,” 128.}

As with the negotiations for a Multilateral Fund for the Montreal Protocol, and in the climate change negotiations, the solution structure of the Stockholm Convention may arguably be viewed as a global ratchet mechanism for the most ambitious standards (advocated by the EU), and demands that for any regulatory standard that imposed costs on the global South, the incremental costs to meet that standard be provided by northern states (advocated by the G-77).

As they did at the 1992 UNCED/Rio Summit, the G-77 initially argued for a stand-alone financial mechanism controlled by the Conference of the Parties (COP). In this way, developing countries could ensure that the COP would be in a position to prioritize implementation assistance project activities for countries eligible for financial
assistance, and determine the scale of required fund replenishments from a needs-based perspective.\footnote{Kohler and Ashton, “Paying for POPs,” 461.}

During the negotiation of the Stockholm Convention, developed state coalitions of the EU and JUSCANZ were in opposition on virtually every bracketed clause. By contrast, the issue that engendered the most unified northern position was that the GEF was the most appropriate funding mechanism.\footnote{Delreux, “Analysis of the Stockholm Convention Negotiations,” 23.} For reasons previously outlined, they wanted to avoid repeating the precedent of the Multilateral Fund, and eventually, as they had done at UNCED, they were able to convince the global South that the GEF was the only game in town.

As they had done at Rio, the developing states agreed only to designate the GEF as an interim mechanism, subject to sufficient replenishments. They were, however, able to negotiate the inclusion of a commitment from developed states to provide them with incremental costs to facilitate the implementation of the Convention’s substantive obligations.

Perhaps even more so than the negotiation of the POPs Protocol or the Rotterdam Convention, the EU was incentivized to promote the incorporation of the precautionary principle and its operationalization through the use of an adding mechanism. As Kelemen and Vogel recount,

\begin{quote}
In the period when the Stockholm Convention was being negotiated, the European Union faced strong domestic pressure to strengthen regulation of toxic chemicals… Given that the European Union was very likely to impose further restrictions on the use of various POPs, it was in the
\end{quote}
economic interest of EU industry for similar restrictions to be imposed on foreign competitors through the Stockholm Convention.\textsuperscript{799}

Beginning in the preamble, which acknowledges, “that precaution underlies the concerns of all the Parties and is embedded within this Convention” reference to the precautionary approach becomes a recurring theme that runs throughout the Convention.\textsuperscript{800} The source of these inclusions was overwhelmingly the member states of the European Union and representatives of the European Commission. But as Delreux observed,

The EU position on precaution was not to get the terminology ‘precautionary principle’ in the Convention, but to get a procedure included that the lack of scientific evidence could not be considered as an obstacle to add a new POP to the Stockholm Convention.\textsuperscript{801}

This ambition was achieved through the inclusion of precaution in two areas of the accord, first, in the instructions for the POPs Review Committee (POPRC), which states, “lack of full scientific certainty shall not prevent the proposal from proceeding,” and secondly, in the instructions to the COP who have the final say in listing a new substance, “taking due account of the recommendations of the Committee, including any scientific uncertainty, [the COP] shall decide, in a precautionary manner, whether to list the chemical....”\textsuperscript{802}

From the European perspective, the repeated inclusion of references to the precautionary approach reflected successful normative foreign policy. And the operationalization of the precautionary approach in the Convention reflects successful EU


\textsuperscript{800} Kohler and Ashton, “Paying for POPs,” 468.


\textsuperscript{802} Fuller and McGarity, “Beyond the Dirty Dozen,” 9.
structural foreign policy. From a more pragmatic perspective, however, the EU obsession with codifying precaution seems to reveal that the substantive regulation of substances once they were on the list, by contrast, was an afterthought. As Fuller and McGarity suggest,

Once on the list, they become subject to the hortatory aspirations of the POP Convention’s preamble, its requirements for the use of “best available techniques and best environmental practices” for environmental control and release limitation, and its requirements for POP stockpiles.

The model I have proposed of the Stockholm Convention as a regulatory ratchet was notably on display in 2009, when in the fourth meeting of the COP, the Persistent Organic Pollutant Review Committee recommended that nine new chemicals be regulated by the Convention. As a result of the inclusion of a commitment to provide incremental costs, this increase in the number of chemicals regulated by the Convention triggered a further obligation on developed states to provide increased financing. In this regard, Article 13 states,

\[
\text{the extent to which the developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention relating to financial resources, technical assistance and technology transfer. [Emphasis added]}
\]

Among developed states, this contingent compliance mechanism, in effect, imposes the least costs on the most ambitious state (that has already implemented the regulatory

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803 Fuller and McGarity, “Beyond the Dirty Dozen,” 9. Reiterating Jacobson’s insight that due to the robust use of civil suits in the American legal system to enforce implementing legislation, Brunnée notes that “[US] negotiators may be concerned that Europe will not end up with genuinely equivalent commitments since enforcement by domestic actors is less likely.” See Brunnée, “All together now?” 34, and Jacobson, “Unilateralism, Realism and Two-Level Games,” 425.

standard) while other developed states must accept the individual domestic costs of implementing the new standard, and must also assume part of the shared costs for financing the incremental costs of developing states to implement the new standard.

Prior to the 2009 COP 4, a needs assessment had been commissioned to evaluate the costs of implementing the chemicals to be added to the Convention. Pia Kolher and Melanie Ashton describe the conclusions of the assessment:

[A]s of December 2008, 137 Parties would be eligible for the Convention’s financial mechanism, the needs assessment was completed based on information from only 68 parties. Further, in the needs assessment, the authors stress that the estimated demand of USD 4.49 billion for 2010-2014 for these 68 parties is likely underestimated.\footnote{Kohler and Ashton, “Implementing the Stockholm Convention,” 237-238.}

So, in effect, the projected implementation cost of $4.5 billion US dollars was almost certainly a low-ball estimation, yet this figure could be compared to the sum total of funds made available through the GEF from 2001 to 2009 for POPs-related projects, which was only $360 million US dollars.\footnote{Kohler and Ashton, “Implementing the Stockholm Convention,” 238.} There are numerous reasons for this shortfall, not least of which is the fact that the GEF directs the majority of its programming to projects addressing biodiversity and climate change. Both of these issue-areas, as well as the work the GEF does in partnership with the Montreal Protocol, are likely perceived as more salient for donor states, than global POPs pollution.

As such, despite the fact that the Stockholm Convention does not include differentiated timetables or targets for developed or developing counties, the obvious
incremental costs commitment shortfall, in practice, means that substantive obligations of developing state participants are rendered voluntary.807

Lastly, and counter-intuitively in relation to the Rotterdam Convention adding mechanism, although likely in response to it, Stockholm has an opt-in/opt-out mechanism.

The opt-out option is analogous to the London Dumping Convention’s ‘tacit acceptance’ mechanism, where unless a state party declares its intention not to be bound by the amendment to the annex after its adoption, that state’s silence is seen as signaling acceptance or consent to be bound.

The opt-in option is even more flexible. A state may designate itself as an opt-in state at the time of its ratification, which signals its refusal to be bound by any amendment by the COP, until such time that it explicitly grants its consent to be bound and opts-in.

As such, the adding mechanism of the legally binding Stockholm Convention may be seen as producing voluntary standards, both for the developing world, and the United States and other Western peer competitors of the European Union. At first glance, it appears that the design of this mechanism does not support the thesis that the EU and broader international community are seeking to balance and delegitimize the US through binding IEA commitments. That is not, however, the whole story.

In conclusion, although there is certainly an economic impact to Alaska due to the global dispersal of POPs, the Author is unaware of any cost-benefit analyses that attempts to quantify the scale of the damage or how much on-going contamination may be slowed

807 Kohler and Ashton, “Paying for POPs,” 470-471.
or eliminated through a mechanism such as the one offered by the Stockholm Convention.

But if we set aside the environmental benefits to Alaskans (who among US citizens are likely to be the primary beneficiaries of whatever environmental benefits are available from the Stockholm Convention), the political CBA for ratification is more complicated.\footnote{Arguably, the implementation legislation necessary to ratify the Stockholm Convention would provide domestic benefits for Americans in all 50 states, through the reduction of local and regional POPs emissions. However, these benefits could be achieved at a lower cost through unilateral domestic legislation. The primary US beneficiaries of global cooperation, on the other hand, are likely to be Alaskans.}

As the initial commitments to the Convention were designed, Kelemen and Vogel argue, “the convention imposed no new costs or regulatory burdens on U.S. firms and promised to help spread U.S. standards [the regulation of the ‘dirty dozen’] internationally.”\footnote{Kelemen and Vogel, “Trading Places,” 23.} But despite the inclusion of an ‘opt-in’ safeguard, Kelemen and Vogel continue, “fear that the Stockholm Convention could generate pressure for the United States to adopt new regulations in the future has prevented the Senate from ratifying the treaty.”\footnote{Kelemen and Vogel, “Trading Places,” 23-24.} It is possible to interpret that Kelemen and Vogel mean international normative or peer pressure in this context, but a more plausible reading is that they are implying that implementing legislation would act as a sort of a Trojan horse.\footnote{Aynsley Kellow and Anthony R. Zito, “Steering through complexity: EU environmental regulation in the international context,” Political Studies 50, no. 1 (2002): 47.}

Even with the opt-in mechanism, in other words, ratification would not be cost-free. First, ratification would provide a huge US endorsement of the precautionary approach. An endorsement sought by the EU in its ongoing advocacy of the
precautionary principle as an emerging principle of customary international law.

Moreover, regulatory standards at the domestic level in the United States have traditionally relied on a cost-benefit, rather than a precautionary approach. There were, as a result, immediate concerns in Congress that the ratification and implementation of the Stockholm Convention would infect the US regulatory process with dubious European values.\(^{812}\) The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) of 1996 and the Toxic Substances Control Act (TSCA) of 1976 must provide evidence of unreasonable risk to human health before restricting a chemical substance.\(^{813}\) Empowering the EPA to take a precautionary approach to regulation instead of a cost-benefit risk management approach changes the regulatory calculus substantially (potentially to the point of completely reversing the burden of proof).\(^{814}\)

Second, and more importantly, in order to fully implement the Convention, Congress would need to provide the EPA with the legal authority to either directly apply the determinations of the COP of an international institution, or at a minimum, empower the EPA to initiate a domestic regulatory review of the risk associated with the substances identified by the COP as hazardous. As a result, even with the opt-in mechanism, the Congressional privilege of initiating statutory amendments would be delegated or at least partially delegated to the Executive Branch.\(^{815}\) So even with a blanket refusal to ratify any Stockholm amendments, the domestic regulatory calculus would be altered. The

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\(^{815}\) Fuller and McGarity, “Beyond the Dirty Dozen,” 11.
thought that this EPA process would also facilitate the implementation of the POPs Protocol adding mechanism, which would be joined as an executive agreement, is likely to have been viewed as especially intrusive by Congress.

Third, ratification would also be an endorsement of the precaution/CBDR ratchet initiated by the incremental costs (or contingent compliance) clause. Even if the US did want to increase the number of POPs regulated or banned at the global level, it is not at all clear that providing incremental costs to assist the developing world with their compliance provides the US with net benefits. The CBA for the US worsens, of course, if it does not want to increase the number of POPs to be regulated or banned. From a relative gains perspective, the available benefits from the Stockholm Convention appear to greatly favor the EU, and to a much lesser extent, the developing world (based on the assumption that they would likely never receive funding commensurate with the aforementioned 2008 needs-based assessment).  

In closing, and to repeat arguments made in the POPs Protocol and Rotterdam Convention cases: (1) As the US has shown little interest in regulating persistent organic pollutants beyond the dirty dozen, and the Stockholm Convention is designed to expand the number of banned or regulated POPs, then the Convention may be said to go against US interests. As a result, why should the US legitimize such a treaty or fund the global implementation of the regulation and prohibition of new POPs? And (2) If the US wanted to reform its regulation of hazardous pesticides and other chemical substances, it could do so at any time, without foreign interference.

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Chapter VII
Summary of Findings and Conclusion

The geopolitics of international law approach to international environmental law and politics is concerned with how geopolitical competition and geopolitical contestation may add costs to the implementation of post-Cold War IEAs.

The central assumption of the geopolitics of international environmental law and politics approach is that individual states and coalitions of states are likely to use international law instrumentally to pursue geopolitical objectives. This is not to suggest, however, that environmental protection is not also a concern of many of the participants in the negotiation of IEAs or their ongoing post-adoption negotiation. Rather, the geopolitics of international law approach proposes that the negotiation of international environmental law and institutions provides an ideal forum for geopolitical objectives extraneous to environmental protection to be inserted into the negotiation text through value-claiming issue-linkage. At the end of the Cold War, the path dependent institutions of the post-World War II international order (the UNSC and IMF/World Bank) were more resilient to structural foreign policies than the tabula rasa offered by new IEAs that were actively creating new mechanisms of international governance.

Issue-linkage should not be viewed as universally unhelpful, it has the potential to facilitate international cooperation by pragmatically expanding the scope of negotiations, however, due to the geopolitics of international law, linkage may add sufficient costs to deadlock negotiations and/or ex post ratification decisions.
Part 1.

Summary of Findings

Using the analytic model as a guide, the analytics of analytic narratives approach employed in this thesis have sought to establish, “the actual and principal players, their goals, and their preferences while also illuminating the effective rules of the game, constraints, and incentives.”\textsuperscript{817} With the narrative presentation of the geopolitical objectives sections and the cases, on the other hand, I have also sought to provide “a detailed and textured account of context and process, with concern for both sequence and temporality.”\textsuperscript{818} Specifically, the intention of the ‘Geopolitical Objectives’ sections (of Chapter VI) has been to provide a macro-historical context for the analysis of the specific use (in the cases of Chapter VI) of the operational mechanisms of the geopolitics of international environmental law (identified generally in Chapters III and IV) and their influence on US ratification behavior.

The summary of findings section, in turn, provides a case comparison of the commonalities and differences found among the four IEA groups to test the hypotheses of this thesis project.

IEAs Ratified by the United States

The evidence presented in the cases of Part 1 and Part 2 suggests that the US ratifies IEAs that either impose low costs to implement or decrease the costs associated with the provision of a domestic collective good for US citizens (namely through the


reduction of foreign pollution externalities). Of these 9 cases, only the GEF sub-case could be said to provide net costs, but only if the cost savings that accrue from containing the Montreal Protocol’s MLF precedent, containing the G-77’s aspirational demands to finance the implementation of Agenda 21 (or efforts to create ‘green’ historical reparations funds), and lastly of containing the aspirational demands of the European Union’s use of the ‘incremental costs’ regulatory ratchet are discounted.

Some of the low- or no-cost IEAs in Part 1 and Part 2 do more to draw symbolic attention to international cooperation to address environmental degradation than they do to reduce pollution impacts in the United States (i.e., the London Dumping Convention and LRTAP). The advantage of low implementation costs, however, is that they do not require substantial reciprocal benefits. There are also several low- to medium-cost IEAs in these groups that significantly reduce the domestic impact of foreign pollution externalities (MARPOL 73/78, the US/Canada AQA and Montreal Protocol). In these cases, international cooperation has produced environmental benefits for the US not available from unilateral domestic action, whose value exceeds the costs.

Contrasted with the MARPOL 73/78 Convention, the US/Canada AQA and Montreal Protocol (both implemented under the 1990 CAA) created much larger initial implementation costs for the United States. The MARPOL Protocol’s Annex VI Amendments relating to special areas and sulfur emissions, on the other hand, do impose significant costs on the American economy but also appear to provide significantly greater benefits in return. The benefits of US leadership in the negotiation of the Montreal Protocol, in particular, provided such significant environmental and economic
benefits that the US ratified all of the subsequent post-Cold War amendments, creating commitments for increased regulatory stringency and larger fund replenishments.

However, during the negotiation of the 1989 Basel Convention and the chaotic dynamism of the post-adoption process (resulting in the 1995 Basel Ban), the post-1988 negotiations of the Montreal Protocol, and ultimately the 1992 UNCED Conference and adoption of the 1992 UNFCCC, the United States was increasingly back-footed into taking a defensive positionalist approach to IEA negotiations.

Nevertheless, the cases of Part 2 suggest that in the post-Cold War era the US continued to approach IEA ratification from the position of assessing what benefits were available from giving up US policy autonomy, what Ikenberry describes as “self-binding multilateralism.” The US would still be willing to constrain its own autonomy, in other words, if in exchange it valued the benefits of constraining the autonomy of foreign actors (as sources of pollution) and if these states could actually constrain their own pollution to US advantage.

Hypothesis 1. The primary criteria determining US ratification of IEAs is whether or not doing so provides net benefits, and the domestic constraints on this US environmental treaty ratification assessment mechanism were largely consistent from 1972-2012.\textsuperscript{819}

The evidence presented in the cases of Part 1 and Part 2 supports the conclusion that the US ratifies IEAs that either impose low costs to implement or decrease the costs associated with the provision of a domestic collective good for US citizens. The United States also appears willing to make significant investments in multilateral cooperation and approve the (re)structuring of the international order but only if the benefits of doing so outweigh the costs. In other words, it is defensible to argue that since 1972 the US has

\textsuperscript{819} The claims of Hypothesis 1 cannot be ‘proved’ but are supported in considerable measure by the degree to which the claims of Null-hypothesis 1 are weakened. Claims (a) or (b) of NH\textsubscript{1} are not supported by the evidence of the cases in Parts 1 and 2, or Parts 3 and 4.
viewed the benefits of multilateralism in relation to the costs of implementation and compliance in making ratification decisions.

Sovereignty Bargains

The core objective of US environmental foreign policy may defensibly be described as seeking greater benefits from multilateral cooperation than it could receive from unilateral action. This is not an unreasonable way to approach foreign policy. Indeed all states are likely to approach environmental foreign policy seeking net benefits from participation. One way to explain accusations by many of the ‘selfish’ US perception of net costs, however, is that other states may receive benefits from multilateralism not available to the US.

Disaggregating sovereignty further than Ikenberry’s focus on autonomy, Litfin argues that many states are more willing to trade policy autonomy for increased internal or external control or legitimacy benefits, through what she calls sovereignty bargains.

As the macro-historical context sections suggest, the developing world has consistently sought to make sovereignty bargains as a part of its geopolitical contestation of the international order. Specifically, the G-77 has sought to increase the external and internal control of developing states through capacity building demands. Moreover, the global South has sought increased legitimacy for the needs of the developing world and greater influence on decisions made in international fora that affect them. In this regard, the G-77 pursuit of normative and structural foreign policy has since 1972 been broadly consistent.
As such, the geopolitical objectives sections and the cases support the conclusion that despite the fact that the US and G-77 have adopted different approaches to international environmental law and politics from 1972 to 2012 they have each been broadly consistent in their chosen strategy.

The European Community, the European Union, and the member states, on the other hand, have clearly undergone a significant transition in their approach to international environmental law and politics since the late 1980’s. For a variety of reasons detailed in the macro-historical context sections, increased economic and political integration was pursued to secure European geo-economic competitiveness vis-à-vis Japan and the United States. The EU and particularly the Commission used regulatory policy to further integration and ultimately as a foreign policy tool. In this regard, the EU had a great deal of internal control and legitimacy benefits to gain from the negotiation of post-Cold War IEAs otherwise unavailable to other states.

Although perhaps not obvious at first, the reason the EU and G-77 share a mutual need for increased control and legitimacy is that they are relatively new states. The EU, and in particular the Commission, has had to dedicate itself to statecraft, literally the crafting of the supranational European state, for example, in a way that appears foreign to the US. If the European member states were asked to accept the same sacrifices of policy autonomy, without the increased benefits of membership in an EU with enhanced control and legitimacy, they would arguably be less willing to do so.
IEAs Not Ratified by the United States

As the central claim of this thesis is that foreign costs injected into post-Cold War IEAs have made these treaties unratifiable for the US, the cases pay close attention to how the EU and G-77, in particular, have added costs to US ratification decisions.

As such, it is especially noteworthy that all of the cases in Part 3 and Part 4 seek to expand the regulatory or administrative burden on the US in some way. The cost of these regulatory or administrative burdens varies but in several cases is significant.

Some may argue that if the US were to ratify and implement some or all of the IEAs in Part 3 and Part 4, that the reduction in domestic pollution would provide significant domestic benefits, but this ignores the fact that the US could achieve these benefits unilaterally at lower cost. As such, this argument fails to acknowledge that the purpose of multilateral cooperation is to provide greater benefits than are available from unilateral action.

The case studies reveal that a consistent problem with the post-Cold War IEAs in Part 3 and Part 4 is that, if ratified and implemented by the US, they impose costs without offering the reciprocal benefit of reduced foreign pollution externalities for US citizens. Costs associated with US ratification and implementation are consistently produced by international actors seeking exceptionalist or exemptionalist benefits from participation in the IEA; benefits not available to the US, but which the US is expected to finance.

If the ratification and implementation of these post-Cold War IEAs all served to impose costs on the United States but also produced benefits for Americans that approached or exceeded those costs, regulatory entrepreneurs would deserve praise for their environmental leadership. Instead, another defining feature of the post-Cold War
IEAs not ratified by the US is that they provide net benefits for the EU and the G-77 and net costs for the US.

Perceived US intransigence to this process is defensible if for no other reason than these alleged emerging principles benefit the norm entrepreneurs at the expense of the United States. If they were truly beneficial universally (historically, “a generalized right subjects [a] state to corresponding obligations vis-à-vis all other states”), US intransigence would be less defensible.\textsuperscript{820}

**Hypothesis 2.** Non-ratification of the four post-Cold War international environmental treaties reflects greater ratification costs for the United States, than the available benefits. The scale of international costs, in excess of the limits imposed by US environmental treaty ratification constraints, was sufficient to impose net costs on US ratification decisions.\textsuperscript{821}

The central causal claim presented in this thesis is that the apparent trend of US non-ratification of post-Cold War IEAs is a result of the international community presenting the United States with unratifiable treaties, rather than simply US intransigence and/or contempt for multilateralism. The cases of Parts 3 and 4 share in common an expansion of US regulatory or administrative costs. But in all of these cases, the reciprocal reduction in foreign pollution externalities for US citizens is negligible compared to the costs. In this regard, US ratification of these IEAs would impose binding net costs.

\textsuperscript{820} Michael Byers notes, “In the context of customary international law any state claiming a right under that law has to accord all other states the same right. As such, reciprocity is a legal consequence of the formal equality of states.” In the geopolitics of international law, as presented and Meyer’s conception of CIL “capture,” however, reciprocal benefits are notably absent. See Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge, United Kingdom: Cambridge University Press, 1999), 89-90, and Meyer, “Codifying Custom,” 18-20.

\textsuperscript{821} The claims of Hypothesis 2 cannot be ‘proved’ but are supported in considerable measure by the degree to which the claims of Null-hypothesis 2 are weakened. Claims (a) or (b) of NH\textsubscript{2} are not supported by the evidence of the cases in Parts 1 and 2, or Parts 3 and 4.
The fact that the US may arguably be said to lose little in the way of direct benefits by not ratifying these treaties is revealing of the importance placed by the international community on the availability of net benefits for the US in IEA negotiations. But if the US is consistently asked to adopt and ratify Kaldor-Hicks net cost treaties, it stands to reason that the international community has done this purposefully. This begs the questions how and why would the international community impose these and further costs on US ratification decisions?

Arguably, systemic imperatives have incentivized geopolitical competition and contestation that limit opportunities for joint benefits.

The Geopolitics of Post-Cold War International Environmental Law

The cases appear to show a considerable willingness of the EU and G-77 to impose net costs on the United States, by rejecting the model of self-enforcing or Pareto-improving agreements in favor of Kaldor-Hicks agreements. The question of why they did this is answered by asking *cui bono* (or who benefited?) from these Kaldor-Hicks agreements.

**Hypothesis 3.** At the end of the Cold War, systemic changes (from bipolarity to unipolarity) increased incentives for the international community to pursue treaties [in the form of ‘lose-lose’ IEAs] where the legislative implementation of the treaty obligations produced domestic net costs for the United States…. This geopolitical competition and contestation by the EU and G-77 produced Kaldor-Hicks agreements that imposed net costs on the United States. 822

Using a normative and structural foreign policy approach the EU and G-77’s have pushed for the inclusion of what they claim are emerging principles of international law

822 The claims of Hypothesis 3 cannot be ‘proved’ but are supported in considerable measure by the degree to which the claims of Null-hypothesis 3 are weakened. Claims (a), (b) and (c) of NH3 are not supported by the evidence of the cases in Parts 1 and 2, or Parts 3 and 4.
in the text of IEAs, as a part of a broader process of attempted codification. The attempted codification of these claims constitutes a structural foreign policy in that, if successfully recognized as customary international laws, they would act to fundamentally alter the distribution of rights and responsibilities in the international order in a manner that diverges from the status quo.

These normative and structural foreign policies should be viewed as a form of geopolitical contestation, precisely because they seek to alter the structural ‘rules of the game’ of international law and politics. And moreover, because they asymmetrically profit the European Union and G-77 respectively, inevitably at the expense of United States and the US-designed and maintained post-1945 international order.

There is compelling evidence that costs are interjected into IEAs using normative foreign policy, in particular, the normalization, legitimization, and attempted codification of the precautionary principle and common but differentiated responsibilities.

This process adds general but difficult to quantify costs to US ratification decisions. Individually, they present few costs; cumulatively they represent a not insignificant risk of binding the US through customary international law. By contrast, the operational mechanisms associated with these normative and structural foreign policy concepts create more specific costs. The cases show that these operational mechanisms come in three main forms:

First, precaution is used to overcome resistance to proposals for the creation of new environmental regulations or add increased scope and/or stringency to existing

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823 In line with the operational mechanisms of the geopolitics of international law in Part 3 of Chapter III and of the geopolitics of international environmental law in Part 1 of Chapter IV, the normative and structural foreign policy mechanisms of this section explicitly and implicitly include binding, balancing, and delegitimation through ‘lose-lose’ Kaldor-Hicks agreements.
regulatory standards. The cases show how the precautionary principle shifts the burden of proof from alleged victim to the potential polluter. The problem with this reversal of the status quo is that different states have different regulatory optima than the highest available standard. The universal application of the precautionary approach also resists the notion that states may have different regulatory mechanisms likely to enforce normative commitments differently.\textsuperscript{824} Precaution underlies the use of adding mechanisms to increase the number of hazardous substances that should be regulated or prohibited in a treaty regime. In this regard, adding mechanisms may be employed as an effective tool of regulatory competition for states with ambitious regulatory standards to export/internationalize those standards at the regional or global level.

Although not presented as a gift to the US, exactly, the adding mechanisms of the POPs Protocol, Rotterdam Convention, and Stockholm Convention, act as a sort of Trojan horse to open up the US regulatory process to European influence and preferences. There is nothing inherently wrong with the European preference for higher regulatory optima, especially if Europeans citizens are willing to pay for it. But the insistence by the EU of seeking to impose these regulatory optima on developed states that are not willing to pay for them, without offers of compensation and with limited

\textsuperscript{824} To explicate the EU’s indifference to US claims regarding universalism, Wiener proposes, “The U.S. reliance on courts, both to enforce regulations at the behest of citizen suits and to award compensation to tort victims, may also help explain the disagreement between U.S. and European officials over adoption of an overarching precautionary principle [as CIL]. Knowing that the adversarial U.S. legal system would enforce such a principle more vigorously than European law, U.S. negotiators may resist agreeing to a principle that would seem more stringent in the United States than elsewhere. By contrast, European officials may worry less about vigorous and rigid enforcement of precaution [as CIL], because they lack as robust a tort system.” See Jonathan B. Wiener, “Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems.” \textit{Duke Journal of Comparative and International Law} 13 (2003): 247. This point notwithstanding, precaution as CIL would bind the US to the comparative advantage of its peer competitors.
compromise on stringency, EU environmental foreign policy takes on the appearance of regulatory competition rather than environmental leadership.

For context, the 1998 POPs Protocol began with 16 substances and by 2009 had added 7 new substances. The 1998 Rotterdam Convention initially listed 22 pesticides and 5 industrial chemicals and now regulates 33 pesticides and 14 industrial chemicals. And the 2001 Stockholm Convention started with 12 and has since added a further 16 new POPs. Some may argue that if the US were a formal party to these IEAs it would have been better placed to block consensus or otherwise influence these new international standards, but in order to do so the US Congress would have had to have transferred a considerable amount of regulatory and administrative authority to the EPA. This Trojan horse strategy offers a lose-lose option to status quo states like the US.

This process may rightly be viewed as eco-imperialist in that it does not sufficiently recognize that different states have different regulatory optima. This is to say that for some states the cost of regulating a substance, or regulating it more stringently, may exceed the perceived benefits of doing so. In other words, different states have different risk profiles making the universalism of applying the highest regional standard at the global level appear as an imposition or intervention into the receiving state’s domestic sovereignty.

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The normative application of precaution contributes to a process of ‘defining what’s normal’ within, and for, the international community. By successfully exporting/internationalizing a domestic or regional standard to the global level, the norm entrepreneur legitimizes both the domestic or regional application of the original standard but also the norm entrepreneur itself. In other words, precautionary international environmental regulatory policy may be used as a form of internal as well as external statecraft. This process, undertaken almost exclusively by the EU, is in evidence in the 1996 London Protocol, the 1998 POPs Protocol, the 1998 Rotterdam Convention and the 2001 Stockholm Convention. This also describes the behavior of the EU after it ratified the Basel Ban Amendment in 1997.

In a two-stage process, after the 1987 SEA and 1992 Maastricht Treaty, the institutions of European integration, especially the Commission, have sought to define what’s normal for European member states and their citizens. As Ringius argues, the ‘rich and green’ respond quickly to environmental problems by setting ambitious targets ahead of others. They subsequently attempt to pressure, shame or persuade other member countries to imitate their level of environmental protection.  

This normative process that has defined EU environmental governance in the post-Cold War era represents what Manners describes as an accelerated, “commitment to placing universal norms and principles at the centre of its relations with its Member States and the world.” In other words, in the second stage, this form of internal statecraft is then focused outward as a form of external statecraft. This externalization of European


environmental policy creates costs for other states but it offers clear benefits to the EU by providing increased internal legitimacy for these precautionary regulations and as a result greater internal control over less green, or gray, member states.

Despite the fact that the geopolitical competition of this ‘universalism’ is directed primarily at other developed states, it also represents a noticeable counter-hegemonic and eco-imperialist form of geopolitical contestation.

Second, the concept of differentiated responsibilities has been used to respond to both eco-imperialism and toxic colonialism, which is the perception by developing states that developed states are inequitably imposing either inappropriate regulatory demands or pollution externalities on the states of the global South. In this regard, the countries of the G-77 seek differentiated responsibilities for the implementation of international environmental commitments, and/or financial assistance to address the lack of capacity that exists for most developing states to protect their people and environment from domestic and foreign sources of pollution externalities.

The success of these demands varies according to the bargaining leverage developing states hold in the negotiation of an IEA. When they are downstream of transboundary pollution, their leverage is weaker, but when the structure of the pollution problem describes a common pool resource, their participation is necessary to effectively secure a global collective good. Differentiated responsibilities, accordingly, vary from vague hortatory promises of international cooperation or moderately different timetables

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830 As Paul F. Steinberg has observed, the variable success of resorting to the ‘power to destroy’ creates a serious perverse incentive. “Specifically, if negotiators from developing countries underscore the growing demand for environmental protection on the part of their citizenry, they weaken their position. Why should donors provide financial incentives to countries that already consider environmental protection a priority?” See Paul F. Steinberg, *Environmental leadership in developing countries: transnational relations and biodiversity policy in Costa Rica and Bolivia* (Cambridge, MA: MIT Press, 2001), 30.
for implementation, to the creation of funding institutions and the total indefinite
exemption from substantive mitigation obligations.\footnote{At the extreme, differentiated responsibilities take on the appearance of ‘environmental blackmail’ as evidenced by Russian behavior within the LDC regime and by Chinese officials who in 2010 threatened to release huge amounts of HFC-23 (a potent greenhouse gas) after the EU announced the ETS would no longer accept credits from industrial gas projects. See Mark Shapiro, ‘‘Perverse’ Carbon Payments Send Flood of Money to China,’’ \textit{Yale Environment 360} (December 13, 2010).}

The roots of the concept of common but differentiated responsibilities (CBDR) go back to the 1972 UNCHE Conference and the NIEO movement of the 1970’s and 1980’s but crystallized in the period from the adoption of the 1987 Montreal Protocol to the UNCED Conference and adoption of the UNFCCC in 1992. CBDR had such a significant impact on the Montreal Protocol and creation of the Multilateral Fund, that the GEF was designed to counter the precedent it created. CBDR is applied weakly in the London Protocol and MARPOL Protocol, in large part because the IMO strongly supports the norm of equal treatment, and because the primary flag registries responsible for funding the IMO are themselves developing states. CBDR is also applied weakly in the Basel and Rotterdam regimes, although both are designed to shift the regulatory and administrative burden of protecting developing states onto developed states. Differentiated responsibilities are applied with much greater impact, however, in the 1997 Kyoto Protocol and the 2001 Stockholm Convention.

Third, perhaps the most effective way to add costs to US ratification is in the combination of the normative concepts of precaution and differentiated responsibilities to create an incremental costs regulatory ratchet. Within the cases, the ratchet is used in two ways: As a mechanism to facilitate Pareto-improving agreements or as a mechanism to facilitate Kaldor-Hicks agreements.
In the negotiation of the Montreal Protocol, the United States, European Community, and other developed states coordinated a k-group where each benefited individually from participation in an agreement to restrict the production and consumption of ozone-depleting substances. The k-group profited so significantly from this coordination that they were able to provide side-payments to cover the incremental costs of developing state ratification, implementation, and compliance with the agreement. As the stringency of the agreement increased, so did the provision of incremental costs but not enough to overwhelm the profitability of donor state participation. The Multilateral Fund of the Montreal Protocol served to secure a stable agreement offering individual benefits for all parties, but most importantly the Fund secured net benefits for the donors to the Fund.

The other way the ratchet is employed is when a state or coalition proposes a precautionary standard that does not provide net benefits to all parties necessary to secure a global collective good. Rather than coordinate a k-group of relevant states, which requires compromise, the advocate of the precautionary standard enlists the support of developing states by legitimizing their demand for differentiated responsibilities and provides them either a de jure or de facto exemption from international obligations. In this case, developing states face such minimal costs from participation that they are willing to accept a precautionary standard they would never otherwise support.

In this way, those states that resisted the initial precautionary standard are faced with a choice; either (1) acquiesce to the standard under the normative weight of international community consensus, (2) attempt to break consensus before and/or after adoption of the agreement, (3) advocate for the inclusion of flexibility mechanisms to
enable more cost-effective/profitable participation, or (4) refuse *ex post* to ratify the agreement.

Like the use of the adding mechanism, not preceded by the coordination of a k-group, this ratchet is used not to create a self-enforcing Pareto-improving agreement but as a tool of regulatory competition to impose net costs on states using Kaldor-Hicks agreements.

Viewed from an American perspective, these cases impose costs, first, for the US to meet the higher regulatory or administrative standard preferred by the EU, and second, they impose costs on the US by demanding it share the burden for financing the implementation of the EU standard at the global level.

For example, at a preliminary stage in the negotiation of the Kyoto Protocol, the European Union wanted to take advantage of its unique ability to meet equivalent greenhouse gas emission targets at a much lower cost than its peer competitors. In order to impose this comparative disadvantage on Japan, Canada, Australia, Russia, and most of all the United States, the EU needed to coordinate a compelling ‘pro-coalition’ supporting their ambitious and precautionary abatement targets. At the COP 1 of the UNFCCC, the EU colluded with the G-77 to produce the Berlin Mandate, which assured the developing world that they would be totally exempted, indefinitely, from emission mitigation targets.

This mutually beneficial *de jure* exemption was used to impose net costs on Europe’s peer competitors as the EU used climate change as a normative foreign policy tool, and by ‘othering’ the US for its refusal to accept net costs from the agreement, the EU used the Kyoto Protocol as a tool of internal and external identity statecraft.
The ratchet was also on display in the Stockholm Convention, although to a lesser degree than within the climate regime. While persistent organic pollutants are primarily a threat to human health at a local level, and/or through trade as a form of transboundary pollution, POPs also travel at the atmospheric level, creating a global threat. As a result of the global nature of the POPs threat, developing states were once again able to negotiate the inclusion of an ‘incremental costs’ or ‘contingent compliance’ clause into the Convention. As a result, once the EU was able to persuade the 2009 COP to increase the number of chemical substances covered by the agreement using the adding mechanism, the incremental costs mechanism necessitated the provision of much more funding than developed states had historically been willing to provide. Absent sufficient financial assistance, however, the developing state parties are no longer bound by their substantive commitments.

This *de facto* exemption of the developing world revealed that the likely intent of the Stockholm Convention was, in fact, to impose international obligations on the EU’s peer competitors, in line with their uniquely ambitious domestic/regional standards. In contrast to the Kyoto Protocol, the Stockholm Convention may share more in common with the aforementioned ‘defining what’s normal’ precautionary agreements, than as a tool of soft balancing but as Stockholm imposes individual costs on the US, and shared costs on all developed states, that the EU is more willing to meet, Stockholm should still be viewed as a mechanism of regulatory competition.

While the analysis of the cases found in Part 3 and Part 4 supports the conclusion that the US perceived these post-Cold War IEAs to impose net costs, the secondary causal claim of this thesis, that in the post-Cold War era the US was intentionally
presented with Kaldor-Hicks agreements as a form of soft balancing or as a lose-lose scenario (binding net costs or delegitimization) is more difficult to support. Two specific challenges to this assertion include:

First, if soft balancing was the primary motivation for the EU’s environmental foreign policy, it stands to reason that they would have sought to add costs (in excess of the US willingness to pay) to those agreements the US did ratify after 1988.

The problem with this reasoning, however, is that in several of these cases the EU was simply unable to propose a credible standard that exceeded the US standard. At the IMO in 1993, for example, the European member states cheered their ability to raise the global standard to the level the US domestic standard had been for years. For several of the LRTAP Protocols, European member states could not surpass the stringency of the 1990 Clean Air Act. With the negotiation of the MARPOL Protocol, the EU was able to negotiate special areas for itself and a potentially restrictive sulfur cap for 2020, but these will impose greater costs on the EU than the US (due to the size of the European merchant fleet). And evidence suggests these amendments will provide significant net benefits to American taxpayers.

As such, soft balancing, like asymmetrical warfare, is most usefully applied to those situations where it can inflict the most harm for the least cost. Since soft balancing need not be applied in all interactions with the US, its absence in some cases does not invalidate the claim that the EU has intentionally applied this foreign policy strategy.

A second challenge to the soft balancing claim is that clearly the EU and member states worked with the US to fund the Montreal Protocol’s Multilateral Fund, and

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832 This is defensibly inferred by the fact that the US was able to join these protocols without the need for implementing legislation.
colluded to establish the GEF as a global finance mechanism before the 1992 UNCED and UNFCCC negotiations.

Beyond the cases examined in this thesis, while the US and EU fought bitterly over the 1992 Biodiversity Convention and the regulation of genetically modified organisms (GMOs) within that regime, they also colluded to resist demands to fund a financial mechanism for the 1994 Desertification Convention. In the GMOs case, the EU benefited enormously from excluding US GMO products from European and other markets. In the latter case, since neither the EU nor the US directly benefited from addressing desertification, they shared the same incentive to avoid funding the regime.

Beyond the question of finance, while the EU benefitted from granting a total exemption to the G-77 at Kyoto because doing so offered the EU a geo-economic advantage, at the IMO they resisted calls for differentiation in the MARPOL Protocol case because doing so in this context would have disadvantaged those European member states with significant shipping registries.

In other words, the fact that the EU does not soft balance against the US in every case, does not invalidate the claim that the EU has used environmental foreign policy to soft balance the US, and supports the broadly applicability of the claim that cost-benefit considerations dominate environmental foreign policy actions.

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834 See Robert Falkner, “Regulating biotech trade: the Cartegena Protocol on biosafety,” *International Affairs* 76, no. 2 (2000): 299-313, and Safrin, “The Un-Exceptionalism of US Exceptionalism,” 1332-1333, for a discussion of how the EU attempted to exclude the trade of GMOs, within the EU, from the Cartagena Protocol (to regulate the global trade in GMOs) they were proposing to bind others, especially the US.
As Ringius suggests, “the prospects for EC environmental leadership spearheaded by the ‘rich and green’ increase significantly in situations with small or uncertain costs, or if environmental policy is economically beneficial.”

In the context of European climate policy, Ringius continues, “The expectation of economic gains from climate policy is therefore essential: it makes EC leadership seem simultaneously economically, environmentally and politically beneficial.”

Arguably, the will to impose Kaldor-Hicks agreements is motivated by the systemic imperative of the end of the Cold War, establishing this conclusively, however, is more of an art than a science.

The EU has consistently adopted a position in the negotiation of post-Cold War IEAs, under analysis in Part 3 and Part 4, in opposition to the US. Although, the London Protocol, POPs Protocol, post-Basel Ban waste regime, Rotterdam and Stockholm Conventions are perhaps better examples of ‘defining what’s normal’ and regulatory competition, than overt soft balancing, they still involve a coalition of European states that knowingly sought to impose regulatory and administrative costs on the US, that exceeded US benefits from ratification. Moreover, the repeated inclusion of the Precautionary Principle is itself a structural foreign policy strategy intended to bind the

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837 It is also worth reiterating that if implemented by the US these commitments would be enforced on the US government by way of citizen suits, whereas the enforcement of EU commitments under mixed agreements would be much more opaque. See Heyvaert, “Hybrid Norms in International Law,” 21-22, who notes, “Arguably the most compelling indications of the weak compliance pull of transnational environmental agreements come from the European Union. In spite of the relative homogeneity of the participating countries, and notwithstanding of the high level of credibility and determinacy of the EU legal regime, Member State non-compliance with EU environmental prescriptions is a persistent and pervasive problem.”
US to EU preferences using customary international law. As such, these IEAs present lose-lose scenarios (binding net costs or delegitimization) for US ratification.\(^8\)

The Kyoto Protocol case, on the other hand, provides significant evidence of soft balancing. In the climate negotiations, in particular from 1995 to 2001, the EU did not just attempt to add costs to the US ratification of the Kyoto Protocol in the form of value-claiming but actively colluded with the G-77 to impose a direct comparative disadvantage on the US. It is the use of normative and structural foreign policies by the EU, in collusion with the G-77 (which has historically attempted to use normative and structural foreign policies as counter-hegemonic tools), that exemplifies the soft balancing in the climate regime.

**Part 2.**

**Conclusion**

The macro-historical context and evidence provided by the cases seems to confirm that US ratifications decisions favor those IEAs with a positive cost benefit assessment, that the EU and G-77 have added costs to the US CBA of ratification decisions, and it is not unreasonable to conclude that a reason the EU and G-77 have intentionally added these costs is to increase internal and external control and legitimacy benefits through value-claiming issue-linkage in the negotiation of IEAs.

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\(^8\) In relation to the asymmetrical costs imposed on the US, DeSombre notes, “The United States also has an admirable tradition of accepting only those international environmental obligations with which it intends to comply, unlike some states, including the European Union, that are more likely to see commitments as goals.” See Elizabeth DeSombre, “The United States and Global Environmental Politics: Domestic Sources of U.S. Unilateralism,” in *The Global Environment: Institutions, Law and Policy*, eds. Regina Axelrod, Stacy VanDeveer and David Leonard Downie (Washington, DC: CQ Press, 2011), 206.
The Geopolitics of International Law and Kaldor-Hicks Agreements

As such, the cases appear to support the hypothesis that states with geopolitical objectives which conflict with the aim of environmental protection have sought to impose costs on the United States. When advocated using normative and structural foreign policies, however, there is a thin line between regulatory competition and geopolitical contestation. Whether these environmental foreign policies constitute intentional soft balancing as a response to systemic imperatives, these strategies certainly do impose asymmetrical costs on international cooperation.

Perhaps the most significant cost has been to the integrity of international law as a tool to coordinate state commitments to jointly supply collective goods.

In order to produce self-enforcing, Pareto-improving agreements, all parties must be persuaded that participation in the treaty regime will be profitable. Kaldor-Hicks agreements may be workable in the domestic context because states are able to enforce them. In the international context, however, they are most effective for bullying smaller states into compliance. Major powers able to resist normative pressure, on the other hand, will not accept treaties that impose net costs.

In closing, I think it is defensible to suggest that the geopolitics of international law is at play in the negotiation of dynamic international environmental agreements, and in the post-Cold War era has consistently imposed net costs that at a minimum have been a contributing cause of US ratification decisions.

From the geopolitics of international environmental law perspective, there is persuasive evidence that in the post-Cold War era states seeking to bind, balance, and delegitimize the otherwise unrestrained unipolar hegemon have prioritized imposing net
costs on the US over creating international environmental agreements that provide benefits for all states.

Although the tone and framing of my analysis may be interpreted as me blaming the EU and G-77 for the relative ineffectiveness of the post-Cold War IEAs found in Part 3 and Part 4, my intention is merely to articulate that the logic of the geopolitics of international law differs according to the viewpoint of the state actor. As such, to understand US ratification behavior it is necessary to understand the geopolitics of international law from the US perspective. Although I do not view all of the environmental foreign policy actions of the United States to be defensible, the evidence presented in this thesis suggests US post-Cold War ratification decisions are defensible according to a rational US preference for receiving net benefits from international cooperation.

Those sympathetic to a European or developing state perspective may defend their environmental foreign policy actions since 1988, and challenge their characterization or framing within this contrarian thesis. However, I would hope that this thesis would give them pause to reflect on whether by creating Kaldor-Hicks agreements to impose costs and isolate the US, they had prioritized their own domestic and foreign policy interests over the larger objective of international environmental protection.

Perhaps with greater awareness of the influence of geopolitics in international environmental law and politics, international environmental cooperation can proceed with greater prudence and pragmatism.
Appendices

Two appendices are attached to provide for a more expansive description of several methodological or content choices made within the thesis text.

Appendix 1

The Selection of International Environmental Agreements

This appendix seeks to justify the process by which the eight treaty regimes for this thesis were chosen. It begins by highlighting several categories of international environmental agreement that are excluded, in order to avoid the problem of ‘apples and oranges’ comparison. It then provides some comments on the taxonomy that was applied. Appendix I concludes with a summary of the international environmental agreements that were included in this analysis.

Part 1(a).

IEAs Not Primarily Concerned with International Pollution Abatement

Throughout the text the thesis author uses the term international environmental agreement (IEA) to describe the treaties under analysis. This term, however, represents a much broader range of treaties than are included in the thesis. This appendix seeks to recognize those treaties that may rightly be claimed to be IEAs, but were excluded from analysis, and moreover to demonstrate that their exclusion does not represent an effort by the thesis author to avoid hard cases. Throughout this appendix treaties highlighted with
italics represent ‘international environmental agreements,’ more broadly defined, that have been ratified by the US in the post-Cold War era. While the US has not ratified all post-Cold War IEAs, an astute reader will note that the United States has not abandoned post-Cold War international environmental cooperation.

Natural Resources/Habitat Management Treaties


Wildlife Conservation Treaties

Examples of wildlife conservation treaties ratified by the United States include: the International Convention For The Regulation Of Whaling (1946); the International Convention For The Protection Of Birds (1950); the Convention On Fishing And Conservation Of The Living Resources Of The High Seas (1958); the International Convention For The Conservation Of Atlantic Tunas (1966); the Convention For The Conservation Of Antarctic Seals (1972); the Convention On The Conservation Of Antarctic Marine Living Resources (1980); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITIES) (1973); the Convention For The Prohibition Of Fishing With Long Driftnets In The South Pacific (1989); the Agreement For The Implementation Of The Law Of The Sea Convention Relating To The Conservation And Management Of Straddling Fish Stocks And Highly Migratory Fish Stocks (1995); the Inter-American Convention For The Protection And Conservation Of Sea Turtles (1996); the Convention on the Conservation and Management of the Highly Migratory Fish Stocks of the Western and Central Pacific Ocean (2000); and the Framework Agreement For The Conservation Of The Living Marine Resources Of The High Seas Of The South Pacific (2000).

Civil Liability Treaties

Examples of civil liability treaties ratified by the United States include: the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969); the Convention On International Liability For Damage Caused By Space Objects (1972); the *International Convention on Oil Pollution Preparedness, Response and Co-operation* (1990) and *Convention on Supplementary Compensation for Nuclear Damage* (1997).

Examples of civil liability treaties not ratified (and typically not signed) by the United States include: International Convention on Civil Liability for Oil Pollution Damage (CLC) (1969), Protocol To The International Convention On Civil Liability For Oil Pollution Damage (1976), Protocol To Amend The International Convention On Civil Liability For Oil Pollution Damage (1984) and (1992); the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) (1971) and Protocol To Amend The International Convention On The Establishment Of An International Fund For Compensation For Oil Pollution Damage (replacing the 1971 Convention) (1992); the Convention On Civil Liability For Oil Pollution Damage Resulting From Exploration For And Exploitation Of Seabed Mineral Resources (1977); the Convention On Civil Liability For Damage Resulting From Activities Dangerous To The Environment (1993); the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) (1996); the International Convention On Civil Liability For Bunker Oil Pollution Damage (2001); the Convention On The Liability Of Operators Of Nuclear Ships (1962); the Vienna Convention on Civil Liability for Nuclear

Nuclear (Safety) Treaties


Examples of nuclear treaties (other than those dedicated to civil liability) not ratified by the United States include: the Protocol For The Protection Of The Southeast

Regional Treaty Regimes


Examples of regional treaties (where membership is open to the United States) not ratified by the United States have included: the Helsinki Protocol on the Reduction of
Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent (1985) (Not
Signed); the Geneva Protocol concerning the Control of Emissions of Volatile Organic
Compounds or their Transboundary Fluxes (1991) (No Acceptance); the Convention on
Environmental Impact Assessment in a Transboundary Context (Espoo) (1991) (signed);
the Convention on the Transboundary Effects of Industrial Accidents (1992) (signed); the
Convention on the Protection and Use of Transboundary Watercourses and International
Lakes (1992) (Not signed); the Oslo Protocol on Further Reduction of Sulphur Emissions
(1994) (Not Signed); the Convention to Ban the Importation into Forum Island Countries
of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and
Management of Hazardous Wastes within the South Pacific Region (1995) (Not Signed);
the Convention on Access to Information, Public Participation in Decision-Making and
Access to Justice in Environmental Matters (Aarhus) (1998) (Not Signed); the Aarhus
Protocol on Persistent Organic Pollutants (1998) (No Acceptance) and the Protocol on
Civil Liability and Compensation for Damage Caused by the Transboundary Effects of
Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection
and Use of Transboundary Watercourses and International Lakes and to the 1992

Examples of regional treaties (where geography precludes the possibility of
membership for the United States) include: the Convention for the Protection and
Development of the Marine Environment and Coastal Region of the Mediterranean Sea
(Barcelona Convention)(1976); the Kuwait Regional Convention for Co-operation on the
Protection of the Marine Environment from Pollution (1978); the Convention for the
Protection of the Marine Environment and Coastal Area of the South-east Pacific (1981);

Part 1(b).

Commentary on Taxonomy

Beyond objective efforts to avoid ‘apples and oranges’ comparisons, a number of decisions to include or exclude IEAs from specific analysis are functional choices. In anticipation of the contestation of some of these decisions, it seems prudent to provide an anticipatory response. As such, this section seeks to highlight and defend those choices.

1989

The choice of 1989 is not meant to be a precise demarcation but a heuristic one. The fall of the Berlin Wall in October 1989 itself is only a symbolic signpost suggesting
the end of the Cold War, but this process was set in motion prior to that event, and notwithstanding the further symbolism provided by the Malta Summit in December of 1989, arguably the shadow cast by the Cold War lingered until at least 1991.

In 1942, Winston Churchill eloquently captured the feeling of a paradigm shift that cannot entirely be quantified, stating, “this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.”\textsuperscript{839}

So despite the fact that the negotiation of the Basel Convention had begun prior to 1989, and was finalized in March 1989, not post-October 1989, it nevertheless (in my view) represents a notable post-Cold War transition from East-West thinking to a North-South paradigm. This is a significant moment in the history of international environmental law and therefore should be viewed as a defensible heuristic demarcation between eras.

LRTAP

Although I have made a point of excluding regional treaties, I have chosen to include the LRTAP for a number of reasons. First, of the several environmental agreements negotiated within the United Nations Economic Commission for Europe, US participation in the LRTAP is unique. The inclusion of Canada and Russia within the UNECE meant that in relation to the number of parties negotiating other pre-1989 international environmental agreements, the regionalism of the LRTAP was considerably less exclusionary. Second, there is a strong nexus between the LRTAP regime and

cooperation between the US and Canada on transboundary acid rain pollution which influenced the 1990 amendments to the Clean Air Act.

The most glaring weakness of including the LRTAP, despite the necessity of congressional approval for the 1990 Clean Air Act, is that US ‘acceptance’ decisions are made by executive agreement, rather than as treaties requiring the advice and consent of the US Senate. Nevertheless, acceptance by executive agreement is only defensible if no new implementing legislation is necessary. As such, we can infer that acceptance suggests the raising of the international standard towards the American standard, and refusal to join the agreement/protocol by executive agreement suggests that it diverges from a regulatory standard acceptable to the United States. As US participation within the LRTAP is unique among UNECE agreements and notably consistent before and after 1989, the inclusion of the LRTAP should be viewed as defensible.

UNFCCC

The United Nation Framework Convention on Climate Change was negotiated, finalized, and ratified by the United States, after 1989. Moreover, the US was the first state party to ratify the Convention. Why, then, have I omitted it? Quite simply, the UNFCCC creates no legal-binding regulatory obligations on the United States (or any other state party). As a framework convention, it acts in the same way as the Vienna Convention for the Protection of the Ozone Layer (1985) to set the groundwork to negotiate specific international legal obligations to regulate pollution at a later date. Neither will be excluded from discussion, but from the perspective of the US Senate, the ratification of the Vienna Convention or the UNFCCC created no substantive domestic or
international obligations. The omission of these two framework conventions, therefore, should be viewed as defensible.

Post-Cold War Omissions

Two conventions, both negotiated after 1989, remain on the list of international agreements after the above exclusions. The *International Convention on the Control of Harmful Anti-fouling Systems on Ships* (AFS 2001) and the International Convention for the Control and Management of Ships’ Ballast Water and Sediments, 2004 (BWM 2004) are managed parallel to MARPOL 73/78 under the Marine Environment Protection Committee of the International Maritime Organization, but were negotiated as separate agreements rather than protocols to the MARPOL regime. The US Senate ratified the former without the need for implementing legislation but the latter has not yet been ratified due at least in part to the fact that it remains well below the current US standard.

These treaties can reasonably be described as existing in a different class than the Basel, Kyoto, Rotterdam, and Stockholm Conventions, as they exist at the edge of MARPOL 73/78 regime. As such, they will not be included as additional individual cases.

Post-1988 Annexes, Protocols and Amendments to Cold War IEAs

One of the central analytical propositions of this thesis is that international law is negotiated with the intent to re-order the *status quo* in a path dependent manner, while at the same time, particularly within international environmental law, this ordering
architecture co-exists with dynamic pressure to expand the scope of the original agreement or otherwise ratchet the regulatory standard over time.

As such, when states or non-state actors complain of a US post-Cold War rejection of environmental multilateralism, it is necessary for them to ignore or diminish the continued and consistent post-1988 participation of the US in the Cold War regimes, in particular MARPOL 73/78, the Montreal Protocol, and in addressing transboundary air pollution. As this feature of US ratification decisions relates to my thesis, rather than simply comparing the characteristics of treaties in the Cold War group to those in the post-Cold War group, it allows me to usefully compare the latter to the dynamic post-1988 product of the original path dependent Cold War regimes.

Part 1(c).

IEAs Concerned Primarily with International Pollution Abatement

The central objective of the eight remaining international environmental agreements is to regulate international air pollution, pollution at sea, and the international impact of hazardous wastes and toxic chemicals.

These include four treaties negotiated and ratified by the United States during the Cold War (prior to 1989): (1) the Convention On The Prevention Of Marine Pollution By Dumping Of Wastes And Other Matter (London Dumping Convention)(1972); (2) International Convention For The Prevention Of Pollution From Ships (MARPOL 73/78)(1978); (3) the Geneva Convention on Long-Range Transboundary Air Pollution (LRTAP)(1979); and (4) Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)(1987).
And four treaties negotiated post-Cold War (in or after 1989) but were not ratified by the United States: (5) the Convention On The Control Of Transboundary Movements Of Hazardous Wastes And Their Disposal (Basel Convention)(1989); (6) the Protocol To The United Nations Framework Convention On Climate Change (Kyoto Protocol)(1997); (7) the Convention On The Prior Informed Consent Procedure For Certain Hazardous Chemicals And Pesticides In International Trade (Rotterdam Convention)(1998); and (8) the Convention On Persistent Organic Pollutants (Stockholm Convention)(2001).

Part 1(d).

Annexes, Protocols, and Amendments of Cold War IEAs

(Available for Ratification After 1988)

In addition to these eight treaties, the four Cold War treaty regimes have produced seventeen protocols and amendments, signed by the United States and open for ratification after 1988. During the post-Cold War period, the United States ratified or signaled acceptance to 13 of these agreements. These are: The Industrial Wastes, Incineration at Sea, and the Radioactive Wastes Amendments to the London Dumping Convention adopted in 1993; Optional Annex III To The Protocol To The International Convention For The Prevention Of Pollution From Ships On Prevention Of Pollution By Harmful Substances Carried By Sea In Packaged Form of 1978 [MARPOL Annex III]; Protocol Adopting Annex VI - Regulations for the Prevention of Air Pollution from Ships to the International Convention for the Prevention of Pollution from Ships of 1997 [MARPOL Annex VI]; Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 relating

Table 5. The retroactive costs and benefits of the 1990 Clean Air Act Amendments  
(unmodified)

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</tbody>
</table>

* The cost estimates for this analysis are based on assumptions about future changes in factors such as consumption patterns, input costs, and technological innovation, which introduce significant uncertainty. The degree of uncertainty associated with many of the key factors, however, cannot be reliably quantified. Thus, we are unable to present specific low and high cost estimates.

b Low and high benefits estimates correspond to 5th and 95th percentile results from statistical uncertainty analysis, incorporating uncertainties in physical effects and valuation steps of benefits analysis.

c The low benefit/cost ratio reflects the ratio of the low benefits estimate to the central cost estimate, while the high ratio reflects the ratio of the high benefits estimate to the central costs estimate.


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