CURRENT LEGAL DEVELOPMENTS

Political Culture in the United States' Treaty-Making: A New Century, Familiar Behavior So Far

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Abstract. At the beginning of the 21st century, the United States is criticized widely for its attitudes to treaty-making. It has sought to oppose, or withdraw from, a number of treaties such as the Kyoto Protocol or the Anti-Ballistic Missile Treaty. Such behavior is conventionally attributed, in neo-realistic international law and political science theories, to the interests and ideologies that the US Government articulates. This essay uses a constructivist approach, namely focusing on how treaty-making is shaped by the interpretive work of people regarding the world they live in, to expand the analysis to include structural and cultural factors. The United States' treaty-making is also affected by the decentralized and participatory system of government, and by broader societal commitments to political transparency and culturally contingent understandings of risk.

1. INTRODUCTION

Before 11 September, a sea change in the United States' attitudes to international affairs appeared to be underway. The United States, led by President George W. Bush, had antagonized many of its allies in Europe, and was re-focusing attention on domestic affairs rather than on long-running international disputes such as the Israeli-Palestinian conflict. This shift was especially marked in the US' responses to multi-lateral treaties, either existing or being negotiated. In 2001, the Bush Administration sought to impugn, or withdraw from, at least four treaties: the Kyoto Protocol; the International Criminal Court Treaty; the Anti-Ballistic Missile Treaty ('ABM'); and the Biological Weapons Convention.[1] In July 2001, when the Bonn Compromise was reached on the Kyoto Protocol, the US negotiators were told by their government to be observers. Despite the

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1. 1997 Kyoto Protocol to the UN Framework Convention on Climate Change, 37 ILM 22 (1998); 1998 Rome Statute on the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998); 1972 US-USSR Treaty on the Limitation of ABM Systems and Interim Agreement and Protocol on the Limitation of Strategic Offensive Arms, 23 UST 3435 (1972); 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) Weapons and Toxin Weapons and on Their Destruction, 1015 UNTS 163. Details of current Bush Administration policies can be found at http://www.state.gov.

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moves of the Bush Administration, following 11 September, to re-build a multi-lateral alliance to launch a war on "terrorism," this renewed international interest remains selective, since the listed treaties are still rejected.

Such a shift contrasted with substantial US participation in building the international system of the late 20th century. However, the US has a long history of applying selectively, withdrawing from, or delaying the negotiation of international treaties. Some examples include the continuing disavowal of the 1966 International Convention on Economic and Social Rights; the withdrawal from the International Court of Justice's compulsory jurisdiction; and the initial refusal to sign the 1992 Convention on Biological Diversity. In the era of rapidly growing environmental, financial and trade negotiations, the US has often appeared to project its values onto many other countries with widely divergent cultures, perhaps leading to what is seen as "imperialist" influence.

This conventional analysis is supported by a focus on interests and ideology as explanatory factors. Many international law theorists have argued that interests and ideology causally drive domestic US responses to treaty-making, whether or not they criticize repudiation of treaty obligations. They also focus more narrowly on whether or not court decisions, Congressional resolutions and international law academics evidence the reasons for "state practice."[2] Such explanations are also found in realist, or neo-realist, political scientist approaches to international relations that use broader empirical methodologies. The US' national interests in preserving its sovereignty, domestic jurisdiction and economic power are viewed as central in any analysis of treaty-making activity. For instance, the US insists on preserving the immunity of its military from international criminal prosecution because this would permit greater freedom of state action abroad. Ideology is also cited as a key variable, in that many Republican government actors have had great antipathy towards the notion of making international norms that might constrain their nation's liberty to act. The US is expected to act in its interests and according to whatever ideology dominates in its government at the time.

Nonetheless, I contend that such explanations are insufficient at the sunrise of the 21st century. To understand more fully the behavior of the US in making or relinquishing treaties, structural and cultural conditions need to be evaluated as well. Structural factors include the system of government and the kind of participation by state and non-state actors. Cultural variables include the social beliefs and values prevailing in the US with regard to risk definition and transparency (or being able to see that something has, or has not, happened). While the Bush Administration marks a dramatic change in treaty-making behavior, its activities take place in the setting of broader structural and cultural conditions that increasingly influence US practice. Through the prism of the "rejected" treaties, this

2. *E.g.*, D. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AJIL 313 (2001).

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essay uses a constructivist framework grounded in comparative politics and political culture to analyze such conditions. Focusing on how actors interpret and think about treaties, this analysis not only illuminates better why the US behaves as it does, but also reveals important issues for the future of international law more generally.

2. Conventional Explanations

First, it is important to consider briefly the contemporary role of treaties in international law. Treaties are an expression of intention to make international law. They are also agreements between countries that usually require consensus to materialize in the first place, though this may be followed by a failure to ratify. But what this international law is differs radically from decades ago. Multi-lateral treaties involving up to 180 countries are among the most complex governance processes in existence.

In contrast to the muddled tardiness of customary international law,[3] definitely binding treaties can be made more quickly and with clearer, sometimes novel, substantive standards. The Kyoto Protocol, for example, would impose carbon emission reduction targets on industrial countries, along with obligations to help pay for the costs of developing countries in adapting to climate change impacts. Treaties can be designed to have discrete compliance and enforcement procedures, something that customary international law does not readily offer. In addition, in the past 20 years, treaties in the areas of human rights, environment and trade have established new institutions that may be much more significant than legally binding obligations. Conferences of parties, treaty secretariats, the Clean Development Mechanism and the expert Subsidiary Body for Science and Technology Assessment have all been created in association with ongoing climate change negotiations.[4] These institutions support cooperative activities in science, finance, management and policy. They diffuse knowledge between countries, bring diverse scientific and political actors together, and lead to the emergence of new, tacit norms alongside the legal norms.

Thus, treaties are increasingly important as ways to create, or amplify, norms in areas where few or no legal standards and institutions exist. These norms can be legal or political, but they can be embedded in institutions, or be directive of the ways that international actors "should" implement their obligations. Treaties do not just embody legally binding obligations, but also ways of doing things to put these obligations into practice. What is less observed is that several treaty innovations have also occurred during the 1990s, further changing the nature of international law. They include the concept of differentiated commitments imposed on countries according

3. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 Virginia Journal of International Law 449 (2000).
4. P. Sands, Transnational Environmental Law: Lessons in Global Change (1999).

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to their national situations, broad framework conventions generating specialized and iterative protocols over a long period, and "indefinite negotiations" that do not end with the ratification of a treaty.[5]

In contrast, theoretical explanations for the treaty-making behavior of countries have not necessarily kept pace with these changes in treaty-making. Two major explanations, interests and ideology, have traditionally been proposed by experts in international law and international relations, often in parallel. Neo-realist analysis by scholars such as Stephen Krasner argues that: "Each state's behavior is directed toward maximizing that state's interests given the existing distributions of power between states."[6] Nations are unitary sovereign actors who have freedom to choose what they will do, and who do so in an international legal order where there is no centralized authority. The political actors who decide whether to make treaties or not have this authority as a result of being able to articulate the "national interest" cogently. Similarly, nations engage in treaty-making (or not) as the consequence of holding ideological stances. In the realm of international relations, for example, Andrew Moravcsik contends that democratic countries such as the US are more inclined to implement liberal values through making human rights treaties that give priority to the civil and political entitlements of individuals.[7]

Historically, the US has had ambivalent attitudes towards engagement with the international system, changing in how it participates and collaborates with other countries every few decades. At times the US is helping create the United Nations, at other times preferring to be isolationist. In practice, these fluctuations do not necessarily mean much, due to economic and social circulations between the US and the world. More important, such changes are often attributed to shifts in interests and ideologies, as if these were "out there," existing apart from the interpretations of human agents. But once the interpretive dimensions of interests and ideologies are recognized, a constructivist framework shows how these are contingent and changing through how political agents interpret and engage with international obligations.

Broadly, constructivist approaches explore "the practices by which accounts of the world are put together and achieve the status of reality."[8] The institutional and cultural elements engaged in treaty-making are key. The state, moreover, is not unitary or the only actor to study. Peter Haas writes about the role in treaty-making of epistemic communities of scientists and policy-makers who believe that an environmental problem (such

5. *Id.*
6. *E.g.*, S. Krasner, Sovereignty: Organized Hypocrisy (2000); F. Kratochwil, Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs (1989); R. Keohane (Ed.), Neorealism and its Critics (1986).
7. *E.g.*, A. Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 Int'l Org. 513 (1997).
8. S. Jasanoff & B. Wynne, *Science and Decision-making*, *in* S. Rayner & E. Malone (Eds.), Human Choice and Climate Change 3–78 (1998).

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as climate change) exists and who call for a policy response in the form of collective agreement between nations.[9] Rather than interests simply driving treaty-making, it is the knowledge and beliefs of epistemic community members that help decide whether or not treaties are made. Conversely, Sheila Jasanoff stresses the interpretive work that political actors perform when deciding whether an environmental problem warrants action.[10] She contends that agency, or the ability of people to use knowledge and material resources to affect social choices, is mutually shaped by the socio-political context in which they live and work. For example, the ways in which people in a country are willing to accept the decisions of governmental institutions regarding treaties depend on their experiences of risk, views of the institution's trustworthiness and commitments to societal norms.

The ideological positions of the US Government, or its constituents, can be regarded as only one factor in treaty-making. While President George W. Bush has changed the US stance markedly in a short time, the Clinton Administrations also engaged in many dilatory or treaty-weakening activities. President Clinton contemplated unilaterally abrogating the ABM Treaty, but decided to leave the issue to his successor.[11] His Administration also opposed US participation in the International Criminal Court Treaty unless US military personnel were made exempt, though Clinton eventually decided to sign (but not ratify) on the last possible day in January 2001 to allow the US to continue to negotiate.[12] President Bush has simply confirmed this opposition. Thus, the particular ideological stances of US governments do not differ greatly, except in the selection of which obligations to accept.

In turn, assertions of interests are another factor. Ostensibly, the US has rejected the Kyoto Protocol because it would threaten its national interests. In late March 2001, President Bush stated: "We will not do anything that harms our economy because first things first are the people who live in America."[13] The Treaty was seen as potentially undermining the nation by increasing energy costs and weakening employment. The Treaty would also have "exempted" developing countries from controlling their growing emissions, thus giving them a new competitive advantage *vis-à-vis* the US in the world markets. Economic, defense and employment interests are commonly invoked in responding to treaties, but they are rhetorical claims. That is, the more important issue is: who is defining national interests, and

9. P. Haas, *Knowledge, Power, and International Policy Coordination*, 46 Int'l Org. 1 (1992).
10. S. Jasanoff, *Science and Norms in International Environmental Regimes*, *in* F. Hampson & J. Reppy (Eds.), Earthly Goods: Environmental Change and Social Justice 168 (1996).
11. *E.g.*, Editorial Comment, *Modest Gains in Moscow*, The New York Times, 6 June 2000, at A-21.
12. B. Crossette, *Clinton Weighing Options On World Criminal Court*, The New York Times, 11 December 2000, at A-5.
13. D. Bilefsky, *Bush Says Kyoto Deal Would Hit Jobs and Industry*, The Financial Times, 30 March 2001, at 13.

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on what basis? How do specific political actors come to have the power to decide what national interests are? Which rhetorical claims are more likely to resonate in the US? What evidence is used to justify these claims? As I argue below, these involve structural and cultural conditions.

The various treaties that the US has rejected in 2001 could all be evaluated – by many analytical standpoints – as being in its national interests. These interpretations of what interests are at stake are equally rational. Many US scientists, citizen groups and companies contend that cutting carbon emissions would improve national economic performance in the long term. Even if reductions are costly, some likely impacts of climate change would affect the US adversely, notably sea level rise and ecosystem health. The ABM Treaty would be jettisoned for a national missile shield that is already anachronistic in an era of "bioterrorism" and low-profile, large-impact strikes not involving missiles. Yet these divergent viewpoints currently have little influence in the US.

In turn, treaty negotiations inevitably involve contradictory positions. At any time, the US is engaged in numerous international negotiations in arenas ranging from bilateral tax agreements, the North American Free Trade Agreement ('NAFTA'), to the World Trade Organization ('WTO'). Definitions of US interests, then, are likely to differ, even within the environmental field. Thus, there is not always a consensus inside the US as to whether or not specific international obligations should be negotiated, or complied with. The US Government is not a unitary entity. Many different diplomats work on trade and environmental agreements respectively, so their beliefs and capabilities will vary – along with their interests and ideologies. The Departments of State, Transportation, Defense and Energy all have much to say about climate change issues. Christine Todd Whitman, the Environmental Protection Agency Administrator, initially favored ratification of the Kyoto Protocol, but was outweighed at this time by more politically powerful figures in the government, as well as by the efforts of the influential fossil fuel-based power generation and automobile industries. However, she has been able to win presidential approval for other equally controversial, environmentally favorable decisions due to citizen protests later in 2001.

Thus, explanations based on ideology and interests are important but insufficient. Focusing on ideology and interests risks falling into reified analysis. Interests and ideology are often conflated with singular, unitary governmental actors.[14] Acts are thought to merge with actors. If countries are assessed on the basis of their treaty acts, these factors can have a greater asserted influence than is the case. However, an insight in international environmental politics during the 1990s was that treaties are neither simply texts nor final end-points. Rather, treaties should be regarded as a "performance" in progress, emerging through what happens

14. K. Knop, *Re/statements: Feminism and State Sovereignty in International Law*, 3 Transnational Law & Contemporary Problems 293 (1993).

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in the negotiations over time. The texts may not reflect fully what the countries thought they were agreeing to, and may not be the end of the process. Soft law in the form of declarations, resolutions in expert meetings and institutional arrangements for funding and implementation may continue to coalesce around treaties. Though far beyond this essay, the US has played crucial roles in such developments that diverge from its ostensible ideological or interest positions.

In these circumstances, ideology and interests do not clearly pre-determine outcomes. Structural and cultural explanations, then, need to be considered. In practice, these overlap in varying, contingent ways. Both cultural and structural factors interact to shape the fate of a treaty. For purposes of clarity, I draw a distinction between these explanations in this essay.

3. Structural Considerations

If we look carefully at why and how the US responds to treaties, structural factors may come to play much greater roles. Traditionally, the picture of treaty negotiation has been linear. It is the Administration and the Department of State, along with the Pentagon, that determine whether and how the US will negotiate treaties. Non-governmental actors, such as environmentalist groups, are excluded from participation in shaping treaties. While the executive powers of the President to engage in (and sign) treaty negotiations are substantial, he or she must request Congress for authorization to ratify treaties. This differs from the practice in many countries in which the treaty applies inside their jurisdiction once signed and ratified by the executive branch.[15] The process of making and ratifying treaties has been exhaustively investigated in international law reviews.[16] However, what is less explored is how the whole system of government can shape US behavior.

In contrast to most European countries, the US has a distributed federal system of government.[17] Governmental authority is highly decentralized and diffused, with different branches of government being allocated different powers and responsibilities.[18] There are many layers of government. The executive government is separated from the legislature, and the President has the power to veto legislative efforts to ratify conventions. There are also central, highly powerful actors who can act as blockers or facilitators because of their structural position. Conversely, many European

15. *E.g.*, F. Jacobs & S. Roberts, The Effect of Treaties in Domestic Law (1987).
16. *E.g.*, S. Riesenfeld & F. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 Chicago-Kent Law Review 293 (1991).
17. D. Vogel, National Styles of Regulation: Environmental Policy in Great Britain and the United States (1986).
18. R. Brickman, S. Jasanoff & T. Ilgen, Controlling Chemicals: The Politics of Regulation in Europe and the United States (1985).

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countries have governments that directly control the legislature by being the majority party or dominant coalition in power. Governmental authority, moreover, is frequently centralized with few intermediary governmental layers, as with Britain and France. Decision-making may be restricted to a relatively few political actors.

Sometimes, treaties are rejected by the President, but they can also be rebuffed by the Senate, the House of Representatives, many government departments, the Office for Management of the Budget, the Environmental Protection Agency ('EPA') and the courts. Citizen groups and industry may also exert great influence in blocking or advancing treaties. In short, treaties can be held up inside the US governmental process, and because of the nature of political participation in this system. Many more actors than simply the executive government leaders are important. There is no clear single point where treaty decisions are made. The inter-agency process now used in preparing for most major treaty negotiations suggests this decentralized reality.[19] Representatives of many agencies and departments meet to develop a "national" negotiating position, and their discussions can be tense.

The system of government, moreover, builds in many disincentives for even the powerful political actors to avoid trying to take on other actors. If these disincentives exist, then it is much harder to hold to or accept treaties. President Bush believes that the Kyoto Protocol is deeply flawed. The Department of State is not prepared to engage in further negotiations because most of its climate change diplomats have been switched to dealing with terrorist threats.[20] But this is also partly recognition of legislative politics. Because Congress insisted on the responsibility of developing countries for emission reductions, it blocked ratification of the Kyoto Protocol, before the negotiations were concluded. In 1997, the Senate passed the Byrd-Hagel resolution stating that the US should not ratify the Kyoto Protocol unless developing countries had also committed to emission reductions. This is not binding, but is a powerful signal to other governmental actors that ratification by Congress is implausible.

In turn, Congress retains significant powers that it has elaborated and used over the past forty years. Not only does Congress assert its privilege of confirming political appointments (such as ambassadors), it also controls the legislation needed to provide resources for international affairs. Senator Jesse Helms, for instance, has repeatedly obstructed treaty ratification for highly conservative goals. Recently, when Helms announced his retirement in 2003, foreign aid groups were euphoric, anticipating a more congenial approach to treaty-making.[21] But the underlying structural conditions may be more important than ideology alone. Helms was able to behave to

19. R. Benedick, Ozone Diplomacy: New Directions in Safeguarding the Planet (1998).
20. Personal communication by Tom Athanasiou at an Energy and Resources Group colloquium on the Kyoto Protocol, 19 September 2001, University of California at Berkeley.
21. *E.g.*, Editorial, The Boston Globe, 23 August 2001.

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the extent that he did only when he was given the chairmanship of the Senate Foreign Relations Committee in 1994, following the Congressional elections that ceded control to the Republicans for the first time in decades. Congress also works assiduously to oversee treaty-making activities through its committee system. This is important in that the executive branch may seek to implement a treaty informally despite being unratified. Indeed, Congress has held hearings to probe into whether the US EPA has tried to bypass the Byrd-Hagel resolution in its policy-making.

Equally crucial, participation is more decentralized and greater in magnitude than in most other countries. A broader range of actors, both state and non-governmental, can enter deliberations on environmental matters in the US compared to European countries. Citizen and business groups are able to assert legal and administrative rights of input into decision-making on a different scale. They can sue the US Government regarding treaty implementation. Their sheer numbers and resources are generally much greater than elsewhere.[22] These developments reflect the structural features of the US, such as US administrative processes that recognize the rights of non-governmental actors to participate, or the growth and dispersal of organizing resources across the country since the 1960s.[23]

In turn, participation has increasingly become central to environmental policy-making as a structural source of governance. Whereas the US Government once sought to dictate what polluters should do to control emissions, building up a vast command-and-control regime, it now increasingly seeks to play the role of "persuader," creating incentives and processes for non-governmental actors to protect the environment.[24] Firms, citizen groups, state governments, and communities have all begun to assert their own share of decision-making power. Newly empowered groups resist top-down, centralized environmental governance. Many recent innovations in US environmental policy have occurred at the local level. All these actors, especially industry bodies with significant lobbying resources, can directly affect the Bush Administration in contingent, changing ways.

Similarly, at international environmental negotiations, the US delegation frequently includes not simply diplomats but also environmentalists, industry representatives and regulatory agencies that all need to be "brought on board" if the US is to accept a treaty.[25] These groups are not necessarily democratically chosen or even representative, but do underscore the participatory nature of US governance. It is crucial to note that the US delegation is not equivalent to the Bush Administration, but acts on its instructions. In contrast, many European and Latin American delegations continue to have principally diplomats and bureaucratic experts.

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22. A. Szasz, EcoPopulism: Toxic Waste and the Movement for Environmental Justice (1994).
23. *Id.*
24. A. Iles, Learning to Prevent Pollution, PhD Dissertation, Harvard University (2000).
25. *E.g.*, Benedick, *supra* note 19.

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These countries appear less inclined to include business, citizen and other non-governmental actors – though in practice the governments back home consult with industry (more commonly than citizen groups).

However, this difference signals the broader shifts in US environmental and regulatory politics underway since the early 1970s. These shifts are diffusing into the international treaty realm more broadly, not just in the US, with the increasing claims of non-governmental organizations ('NGOs') to be included in treaty negotiations independently of national delegations. If environmental treaties such as the Framework Convention on Climate Change are to be effectively negotiated, US companies and citizen groups increasingly need to be engaged in the process. The state is not as central, yet it retains control over treaty negotiations. The meaning of this greater accessibility of treaty negotiations is that the US negotiators and the Bush Administration are obliged to negotiate with, and through, their own disparate domestic actors as well.

Broadly, then, there are multiple points at which US acceptance of treaties can be undermined or supported, with different actors playing highly influential roles depending on where they are institutionally or socially located. This is especially the case when treaty negotiations are long-running and iterative. This flexibility could help encourage learning and buying-in over time, but can also enable temporary derailing at times. The US, then, is often reluctant, as a result of how its system of government is structured, to incur binding obligations that it may find difficult to implement throughout its multi-layered society. This is the case for environmental treaties, but much less so for national security treaties. Unless there is apparent widespread tacit acceptance of the values being articulated in the treaty (as perceived by institutionally powerful actors), or the latter actors are in concord, complex treaties face an uncertain time.

Numerous other countries, however, share this difficulty. The European Union, moreover, is increasingly more complex than the US in its overlapping and multi-tiered domains of power. Not only do the 15 EU members need to agree broadly on a common negotiating position, the European Commission must support this position. Yet the EU supports the Kyoto Protocol, at least in aspirational form. This suggests that structural conditions alone do not explain US treaty-making behavior fully.

4. Cultural Considerations

In turn, there are other reasons for treaties being held up or rejected. The treaties may be viewed as inadequate or not compatible with evolving US policy preferences. It is necessary to delve deeper and look more carefully at what the US seeks in its treaty negotiations. Rather than looking simply at what the US Government says to audiences inside and outside the country, it is also key to study what negotiators do and what the responses and activities of people inside the US are. For example, the arguments that

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US negotiators make in demanding, modifying or rejecting provisions can provide instructive insights into the political culture in which US interests are interpreted. This political culture can be defined as the world of values, norms and social practices in which people across the country live and act. It is not that the US is antagonistic to international law, but that its political culture embodies norms that affect treaty-making at the start of the 21st century.

These arguments may center on the compliance and enforcement methods being sought; the desired commitments; the ways in which international jurisdiction should, or should not, overrule domestic governance; and who should pay for what activities. Underlying these arguments, though, are widely shared suppositions that characterize political culture in the US. Interestingly, in the US, there was relatively little outcry against the Bush Administration retreats. Many environmentalists and scientists opposed the *volte-face* on climate change, yet most people appear to have taken little notice. European critics have argued that this is to be expected because of the abysmal levels of knowledge by most North Americans of the outside world. But widely held cultural suppositions about what the world should look like may be much more important than geographic mastery per se. In this section, I will look at three examples of such suppositions: the demand for "transparency" in US politics; the perceptions of risk that influence interpretations of problems; and the perceived place of science, technology and economics in solving problems. These affect the fate of individual treaties in contingent, particular ways. They can be rejected, but for different cultural reasons, so that it is important to look at each treaty in its particular circumstances.

The Israeli political scientist Yaron Ezrahi argues that the US historically has developed a democratic politics based on citizens observing political actors perform in public.[26] The credibility and authority of politicians has depended on whether or not they have proven their assertions in ways that citizens can testify to, literally acting as witnesses. Otherwise, citizens might withdraw their authorization from political representatives. Thus, US political culture has emphasized highly visual methods of demonstrating knowledge about the world before a nationwide audience.[27] For political action, as well as scientific and technological knowledge, to be credible and legitimate inside the US, they must be transparent: readily seeable and open to being tested. Nonetheless, this is a highly particular

26. Y. Ezrahi, The Descent of Iscarus: Science and the Transformation of Contemporary Democracy 67 (1990).
27. As Ezrahi explains:

> The intention is not to glorify but to attest, record, account, analyze, confirm, disconfirm, explain, or demonstrate by showing and observing examples in a world of public facts. The stress is on displaying and seeing as elements of the enterprise of persuading critical spectators, not of swaying trusting observers.

Id., at 74.

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view of the world. It is a North American understanding of what counts as "transparent." Many European, Asian and Latin American countries have vastly divergent understandings of what transparency needs, or even of whether transparency is required at all. Even inside the US, there can be great diversity in beliefs about the meanings of transparency.

Over the past two decades, transparency has increasingly come to be defined in terms of quantification in particular. Quantitative discourses carry great persuasive power within the US in comparison to other industrial countries.[28] Numbers are widely seen as objective means of publicly demonstrating that political actions are working (or not). Thus, numerous political actors – in comparison to Europe and Australia – employ quantitative evidence in advocating their political claims or in deconstructing those of others. Industry has moved to use quantitative means to demonstrate its asserted environmental accomplishments.[29]

The implication is that, to be regarded as having authority, President Bush and other US government figures, then, must perform in public. They must provide evidence, often in scientific, economic, or technical form, to support their policy advocacy. Their assertions of knowledge and action are continually measured against what the populace observes them to do. This is shown by the major environmental controversies of the Bush Administration so far. In May, President Bush announced a national energy strategy, but it was immediately assailed by many for having been concocted by an informal group overseen by Vice-President Dick Cheney in a highly secretive manner.[30] The strategy, furthermore, ignored many quantitative studies performed at national laboratories and universities that pointed to the value of renewable energy resources.

In this political culture, President Bush wishes to abandon the ABM Treaty to build a national missile shield. Such a shield would supposedly be a highly visible protection of the nation, just as updating the Biological Weapons Treaty would not (in the view of the US) be an effective, readily provable means of protecting the country because of the porosity of its inspection regime. The ABM Treaty involves an agreement between Russia and the US to avoid making or testing certain kinds of missiles, which is less visible an action.

In contrast, many treaties can be difficult to visualize in practice. They do not often create obvious physical or practical outcomes, but are potentially places of ambiguity and interpretative work. Proof of their effects can be difficult to delineate or obtain. Furthermore, the implementation of environmental treaties now often involves widely dispersed activities

28. T. Porter, Trust in Numbers: The Pursuit of Objectivity in Science and Public Life (1995).
29. The US chemical industry, for example, has relied on emission reductions and downward trends in the Toxics Release Inventory since 1988 to prove that pollution prevention is occurring. Iles, *supra* note 24.
30. *E.g.*, J. Kahn, *Cheney Refuses to Release Energy Task Force Records*, The New York Times, 4 August 2001, at A-10.

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and actors that are difficult to observe synoptically. The Kyoto Protocol exemplifies this lack of demonstrative capacity. It seeks to reduce carbon emissions to mitigate expected impacts that may happen many decades in the future. Such reductions need to be carried out by the work of many millions of actors in the US and around the planet, without any guarantee that they will actually do anything. The Bush Administration has repeatedly argued that there is little – or at best highly uncertain – evidence that incurring costs now would lead to better climate change outcomes later. That is, the evidence of treaty efficacy cannot be readily "seen."

It is harder, then, in the US compared to, say Europe, to use treaties as demonstrations of political activity. Such treaties need to bring about some (supposed) measurable effect. In terms of environmental treaty-making, the US has been more concerned with more politically salient quantitative emission reduction targets and economic analyses rather than policies and measures as such. The US has also continually sought quantitative emission caps for developing countries. This is justified by the argument that it would be unfair, or unworkable, to allow developing countries to emit increasing quantities of carbon. Rising energy costs would also undermine the US' economy. Underlying this position, though, is the US' views of what transparency should mean.

Transparency is often equated to the imposition of standards and predictable treatment. Regulatory standards need to be imposed on everyone in ways that everyone can observe efficiently. Results need to be measurable against some baseline, and need to be quantified in ways that everyone can see. If developing countries do not undertake reductions, the US believes, it may be difficult to make the system fully transparent and enforceable. This does not take account of equity issues, illustrating another example discussed below – that of culturally shaped risk perceptions. In addition, US negotiators have demanded that strong compliance procedures should be enshrined in the Kyoto Protocol system. Similarly, they have engaged in ongoing disputes over whether inspection and enforcement procedures in the chemical and biological weapon conventions are adequate by US norms.

In turn, varying risk perceptions help explain the US' attitudes to treaty-making. Many North Americans may differ from people in other countries in their understandings of what is at risk, and how risks are produced.[31] For example, climate change is often viewed as originating in the "pollution" released by technology like cars or power plants, not in the energy choices that North Americans make in their everyday lives.[32] As a result,

31. S. Jasanoff, *The Songlines of Risk*, 8 Environmental Values 135 (1999).
32. W. Kempton, J. Boster & J. Hartley, Environmental Values in American Culture (1995) (North Americans tend to see climate change as "caused" by industrial pollution); and D. Nye, Consuming Power (1998) (North Americans have repeatedly made many choices about how to use energy, affecting carbon emissions).

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the US may approach treaty-making for the purposes of controlling risks differently from other countries. The consequences of rejecting or modifying treaties may differ in US political culture. If US policy-makers and companies believe that risk assessment tools can effectively manage climate change, they will downplay the need to complete a treaty. Treaties may be seen more instrumentally in the US, as means to channel acts of risk management rather than as declarations about the moral choices embedded in risks. More broadly, the US has historically seemed to be more reluctant to accept international law as an act of normative world-making. International law is more about setting up markets, financial institutions and military alliances as ways to tackle risks.

How risk perceptions may shape US treaty-making behavior is complicated. First, specific policies may be promoted as a result of interpreting risks in culturally contingent ways whereas other countries prefer alternative policies. If these policies are not incorporated in treaties, or are compromised in the US' eyes, the treaties are less likely to be seen as meaningful within the US. In the past 20 years, a new risk discourse has emerged in the US, where market-based instruments are viewed as the ideal way to manage diffused or decentralized risks like climate change. Risk has become defined in terms of economics: how expensive will it be to reduce risk to a politically bearable level, and what costs will policy measures create for the economy? Diffused risks, likewise, are defined in terms applying everywhere – and thus transferable or solvable anywhere. As a result of domestic debates over the use of market-based instruments, the US has been the leading advocate of international tradable emission rights and other so-called "flexibility mechanisms." The rationale for these mechanisms is that they give investors flexibility in deciding how to expend their limited resources. This is a major shift from the command-and-control, technology-based model shaping the environmental laws of the early 1970s.

In contrast to Europe, Japan and Australia, economics has long played a more important role in policy-making and in valuing societal resources. Cost-benefit analyses and, increasingly, econometric or computer modeling are widely used to justify political decisions about climate change policies. Since the 1980s, many US policy-makers have concluded that economic instruments need to be used more in protecting the environment, rather than the traditional command-and-control approaches. It is difficult to change the domestic regulatory structure, but international environmental law is another matter. Institutions and rules are still new, being created, in flux. But other countries, both developed and developing, often do not share this belief in market-based valuation. Ironically, the European Union has become more command-and-control in its increasingly legalistic governance of environmental matters. In other words, contrary to realist arguments about interests and ideologies, interpretation of risks can change over time, along with the favored policy instruments.

Second, US political culture is marked by a reluctance to endorse the

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precautionary principle.[33] In contrast to the environmental law-making activity of the early 1970s, when US politicians were willing to take action without knowing whether it would actually protect human health, the current government does not believe that climate change requires action here and now. In Europe, Germany shares a similar technocratic belief to the US, but differs in holding that the precautionary principle needs to be applied, at least theoretically. Indeed, Germany was one of the first industrial countries to announce a commitment to major emission cuts in the early 1990s. A similar attitude can be witnessed in a significant *lacuna* in international regulation. Currently, the governance of genetically modified ('GM') foods is highly uncertain despite the advent of the Biosafety Protocol, which theoretically permits each country to evaluate the risks of biological products imported from elsewhere. In the US, some key crops have rapidly acquired GM components and have entered the human food chain on a pervasive scale. It has been industry and the market that have largely determined whether or not the risks of "contamination" are to be accepted. Precautionary measures have not been taken. In contrast, many other countries have demanded a strong governmental intervention in deciding on the bearability of GM food risks.[34] The US, then, is less inclined to accept treaties that may contradict its understandings of whether or not risks demand action by the state here and now.

Finally, another dimension of prevailing US political culture is the continuing faith in the capabilities of science and technology to solve environmental, foreign and economic problems. Despite the corroding effects, since the 1960s, of skeptical views of what science can contribute, many North Americans continue to believe that problems can be resolved by technological innovations. As the responses of the US to the terrorist strikes of 11 September demonstrate, "bombing" solutions are valued because they depend on technology. The problem of missile proliferation can be fixed by building a missile shield. The US has promoted carbon sequestration as a new technological solution to mitigate climate change.[35] Instead of changing broad energy policies, power stations could inject their carbon emissions in wells inside the earth or in the sea. Many US researchers believe that their compatriots will be able to adapt to climate change through technology such as water purification. Thus, North Americans are thought to be much less vulnerable to the agricultural, health and sea level rise impacts of climate change than most other nationalities. US negotiators, then, are less concerned with non-technological means of mitigating climate change, let alone mitigation as a strategy. Mitigation does not have the same normative meaning that it may have in many

33. C. Raffensperger & J. Tickner (Eds.), Protecting Public Health & The Environment: Implementing the Precautionary Principle (1999).
34. A. Gupta, *Governing Trade in Genetically Modified Organisms: The Cartagena Protocol on Biosafety*, 42 Environment 22 (2000).
35. *E.g.*, http://www.fetc.doe.gov/publications/factsheets/carbon/carbon_seq.pdf.

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European countries. In contrast, European countries have begun to adopt energy taxes and equipment changes that target the social choices leading to carbon emissions. A mix of technology and social policies is being tested.

5. CONCLUSIONS

What do the observations in this essay imply? Powerful energy industry interests do influence the Bush Administration. President Bush's first proposals for stimulating the economy after 11 September included a tax repeal that would primarily benefit the energy industries, and it is evident that their financial support for his controversial election has been key in shaping US treaty-making behavior. Nonetheless, structural and cultural conditions also act influentially, notably the demands for visible political acts. The US' power is refracted through these conditions. The intersection of the cultural and structural factors with interests and ideology can lead to a more contingent, variable, non-predetermined outcome than might be anticipated. In the Bush Administration, thus far, treaties have fared poorly. But by taking account of cultural and structural factors, treaties could also proceed more successfully. Different treaties, moreover, are affected by different cultural and structural factors. It is not just a matter of rejecting a treaty, but an issue of what interpretive work (and by whom) leads to that particular rejection.

A longer term perspective needs to be taken when negotiating treaties, particularly for complex problems such as climate change. Many climate treaty-making iterations are likely to happen in the next few decades. In these iterations, practitioners need to be mindful of the cultural differences between countries that may underlie seeming international agreement. As Philippe Sands says: "Covenants are adopted on the basis of a range of socio-political, economic and institutional considerations of which environmental threat is but one among many." This is true of every area in international treaty-making. He further concludes: "There may not be room for a single approach […] risk-taking and risk assessment must be determined in the specific cultural and societal context in which they are being applied."[36]

I argue that the existence of structural and cultural factors that distinguish the US from other industrial countries needs to be recognized as part of such analysis. However, other industrial countries have their own structural and cultural features that shape their treaty-making behavior. These are equally important to consider. It is critical to note that the industrial countries share many commonalities despite their differences. The Euro-

36. P. Sands, *Environmental Protection in the 21st Century: Sustainable Development and International Environmental Law*, *in* R. Revesz, P. Sands & R. Stewart (Eds.), Environmental Law, the Economy, and Sustainable Development 361, at 381 and 408 (2000).

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pean Union, Canada, Australia, Japan and Russia all have embraced market-based approaches to mitigation. Their respective political cultures are blurring to some degree. Within the European Union, some member countries have been reluctant to limit their use of emission trades and joint implementation, agreeing with the US position to some extent. Economic and quantitative analysis is coming to be central to international negotiations more widely. A fundamental divide continues to be between industrial countries and developing countries.

There are various approaches that international lawyers could take. Focusing on how North Americans interpret the world, and how other peoples likewise engage in constructing the world through their beliefs and practices, could yield significant results. Instead of simply accepting that treaty-making inevitably reflects the interests and ideologies prevailing in the US and other countries, international lawyers might work to address the structural and cultural conditions of each country. They might tailor proposals to resonate more effectively with US cultural conditions without compromising the substance of treaty-making. In doing so, they could work to change treaty-making outcomes without accepting the predetermined tenor of interest and ideology approaches. They could, for example, work to develop ways in which the workings and outcomes of treaties can be made more readily seeable by every country and by every actor, not just by a few dominant actors who control treaty-making functions. Many innovations in making treaties and treaty workings more visible are possible. Concurrently, international lawyers could show how US unilateral acts, such as abandoning the ABM Treaty, perversely weakens the visibility of national security.

International lawyers could work to develop risk institutions and appraisal procedures that acknowledge the culturally contingent nature of risks, without assuming that risks are universally understood, and that one country's interpretation should always do battle with those of others. Instead of engaging in disputes over whose risks should matter, international lawyers need to build the institutions in which multiple interpretations of risk can co-exist, and in which multiple policy measures can be combined variably. These would target every country, not just the US. Attention could also be given to how developments occurring inside each country with regard to the participation of industry, citizens and other non-governmental actors are relevant to treaty-making. In particular, industry should be encouraged to make commitments to emerging international norms alongside governments and citizen groups. By doing so, international law can continue metamorphosing into more diverse and workable forms that go far beyond simplistic invocations of interests-based sovereignty.

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