

CHAPTER 4

Soft law, hard politics and the Climate Change Treaty

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This chapter offers a critical constructivist interpretation of the legislative phase of international politics and international public law manifest in the treaty making process. Drawing in particular on the critical theory of Jurgen Habermas and the constructivism of Alexander Wendt, I seek to show how treaty making is shaped and constrained, on the one hand, by the deeper constitutional structure and associated norms of international society and, on the other hand, by the particular roles, interests and identities of those state and non-state actors involved in the rule-making process.²

Central to the contributions in this volume is the idea that assumptions made about the nature of politics (including the nature of political community) circumscribe understandings of law, while particular kinds of legal order, in turn, shape and constrain the political understandings and practices of social agents. The central problem with neorealist and neoliberal institutionalist approaches is that they not only tend to reduce law to politics but also tend to employ an unduly limited understanding of politics (which is typically reduced to the play of power and/or national interests). Critical constructivists, in contrast, proceed on the basis of a broader conception of politics that encompasses not only questions of material capability and utility but also questions of morality/justice and identity. Moreover, critical constructivists understand the relationship between law and politics as mutually constitutive and mutually enmeshed. Indeed, this mutual enmeshment of law and politics makes the delineation of any clear practical boundary almost impossible, despite the fact that boundaries are routinely invoked by political actors for justificatory or regulatory purposes.

Using the climate change negotiations as a case study, and focusing in particular on the contrasting roles played by the United States and the European Union (EU) in the negotiations, I highlight this mutual enmeshment of law and politics by exploring the

¹ I must thank Peter Christoff, Bill Hare, Mat Paterson and especially Chris Reus-Smit for valuable critical feedback on earlier drafts of this chapter. I also thank Gerry Nagzdam for research assistance.

² See Richard Price and Christian Reus-Smit, 'Dangerous Liaisons?: Critical International Theory and Constructivism', *European Journal of International Relations* 4:3 (1998), for an analysis of the sympathies between constructivism and critical theory.

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constitutive tensions between the regulative ideals of treaty law and the actual production of treaty law. Such an approach offers both a sociological understanding of the legitimacy of international legal norms as well as a critical framework that enables an evaluation of the *degree* of legitimacy of particular treaty negotiations and outcomes from the perspective of both state *and* non-state actors.

Mainstream rationalist approaches to treaty making take the distribution of material capabilities and/or interests of states in the context of a fixed structure and logic of international anarchy as a sufficient explanation of treaty processes and outcomes. While the structure of international society is anarchic, in the sense that there is no world government to enforce international legal norms, I argue that it is too limiting to assume that there is only one mode or rationality of interaction among states under anarchy (i.e., Hobbesian and Lockean respectively). Instead I suggest that understanding state interaction in international society as multicultural rather than unicultural provides the crucial context for understanding why it is that particular states (as well as particular coalitions of state and non-state actors) are likely to relate to others as enemies, rivals or friends, and why particular agreements are likely to be struck, or come unstuck. That is, different historically specific ‘cultures of relating’ provide the context for understanding the sorts of interaction (i.e. non-cooperation, coercion, bargaining and/or moral argument) that are likely to prevail *within and across* different groupings of actors in the formal and informal discursive processes of treaty making.

Now it might be argued that the climate change negotiations pose an especially hard case for those who seek to resist both the neorealist and neoliberal institutionalist understandings of international politics and law. After all, the negotiations have been characterised by intense political disagreement and self-interested bargaining by states to protect economic and strategic interests, the assertion by the US of its position as a great power, and general delay in terms of concrete outcomes. However, I show that it is possible to criticise these mainstream explanations as unnecessarily reductionist without denying the obvious significance of power and interests, especially the role of the US in the negotiations, and without denying the importance of the sway of domestic factors *vis-à-vis* discursive argument in international meetings in shaping outcomes. After providing a brief overview of the climate change negotiations I therefore launch my defence of critical constructivism by posing some hard questions for neorealists and neoliberal institutionalists arising out of the climate change negotiations. I then seek to show how critical constructivism – in its

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sensitivity to the role of both state and non-state actors in treaty negotiations, and its openness to the play of not only power and interest but also morality and identity – is able to provide a more rounded understanding of the climate change negotiations than mainstream rationalist approaches.

The climate change negotiations: Some hard questions for neorealists and neoliberals

The international climate change negotiations provide an especially graphic illustration of the multifaceted challenges that typically confront attempts to develop common political norms and global environmental regulations. At issue are debates over a highly technical science, different climatic vulnerability and different costs of adaption and capacities to respond on the part of different states, intense debates over the rules of adjustment and burden sharing, and fundamental normative disagreements over environment and development priorities. Moreover, any serious and concerted effort to reduce greenhouse gas emissions necessarily entails measures that strike at the heart of the domestic policies of states, including energy, industry, transport, infrastructure development, taxation and pricing policy. For many states, any attempt to regulate such ‘domestic’ matters is tantamount to an infringement of their sovereignty. Nonetheless, against these enormous odds, a principled agreement to reduce greenhouse gas emissions has been reached by a majority of states, and developed countries have agreed to take the first practical steps to reduce emissions.

The basic objective of the United Nations Framework Convention on Climate Change (UNFCCC), which opened for signature in 1992 at the Earth Summit in Rio de Janeiro, is for the parties to achieve ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’ (Article 2) and within a time-frame sufficient to protect ecosystems, food production and economic development. Moreover, the Convention also established basic principles of equitable burden sharing in Article 3, the most significant being that the parties should protect the climate system ‘in accordance with their common but differentiated responsibilities’; that developed countries should take the lead in combating climate change; and that full consideration should be given to the specific needs and special circumstances of developing countries, especially those that are particularly vulnerable to the impacts of climate change.

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However, the most substantive provision in Article 4 merely required the Parties to ‘adopt national policies and take corresponding measures on the mitigation of climate change ...’ (4[29][a]), leaving considerable discretion as to when and how. At the Earth Summit in 1992, many environmental non-governmental organisations (NGOs) were highly critical of the ‘soft’ legal form in which the commitments were expressed. The notable absence of any binding timetable or targets for greenhouse gas emissions reductions in the 1992 document – an absence largely attributable to then US President George Bush senior – was widely seen as a *failure* of commitment.³ Nonetheless, the UNFCCC established an institutional framework that provided the norms and principles that would guide future negotiations. By the time of the Kyoto meeting in 1997, 167 states and the European Union were parties to the Convention.⁴

Moreover, at the third conference of the parties (COP3) at Kyoto the negotiations had reached a point where the developed countries were able to agree to both timetables and differentiated targets, in accordance with the basic principles laid down at Rio. Essentially, in the Kyoto Protocol the developed countries agreed to reduce their aggregate levels of greenhouse gas emissions below 1990 levels by an average of 5.2 per cent by the staggered time period 2008–2012. The US, under pressure particularly from the EU, moved from its initial negotiating position of stabilisation to a target of a 7 per cent reduction in emissions, while the EU agreed to an 8 per cent reduction. Only three OECD countries (Norway, Iceland and Australia) were able to negotiate an increase in emissions. No commitments were required of developing countries at that stage of the negotiations, consistent with the principle of the UNFCCC that developed countries take the lead.

The Protocol also set down a set of ‘flexibility mechanisms’ designed to enable developed countries to reduce their particular reduction targets at least cost. In particular, targets can be met individually or jointly (‘joint implementation’) by developed countries, accumulated carbon credits can be traded with parties who are unable to reach their targets, and the establishment of a Clean Development Mechanism allows for emission reduction credits for developed countries resulting from projects undertaken in developing countries. Provision was also allowed for the use of carbon sinks (i.e., carbon sequestration schemes, such as forests). However, the details of exactly how and to what extent states were free to use these mechanisms to achieve their targets were left open at Kyoto and eventually became

³ It is said that Bush senior has personally persuaded Helmut Kohl to drop his demand for a stabilisation of emissions in return for Bush’s participation at the Earth Summit. See Porter, Welsh Brown and Chasek, *Global Environmental Politics*, p. 117.

⁴ Sebastian Oberthur and Hermann E. Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century* (Berlin: Springer-Verlag, 1999), p. 33.

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part of what was to prove a highly fraught agenda at the COP6 at the Hague, where a major stand off between the US and EU produced a break down in the negotiations. However, despite the formal renegeing by the US of its Kyoto commitments in March 2001, most of the contentious details were finally resolved by the remaining parties in the compromise reached at the resumed COP6 meeting in Bonn in July 2001, where the rules concerning sinks and compliance were made more flexible (and the use of nuclear power was ruled out as a means of offsetting emissions). This agreement was put into binding legal form at COP7 in Marrakesh in November 2001.⁵

The new concessions mainly worked to the benefit of the so-called Umbrella group (an alliance formed in Kyoto between the US, Canada, New Zealand and Australia, on the one hand, and Russia, Ukraine, Khazakstan, Norway and Iceland, on the other, to pursue the idea of joint implementation). Many environmental NGOs have been mistrustful of the so-called flexibility mechanisms and sink provisions on the grounds that they carried the potential for developed countries to 'trade' or 'plant' their way out of their Kyoto obligations without taking any significant steps to reduce emissions at source in their domestic economies. The Kyoto targets are also well below what is required to achieve the basic UNFCCC objective of a stabilisation of greenhouse gas concentrations in the atmosphere to safe levels. However, these targets must be understood as but the first step in a dynamic process of emissions reduction, with a second round of negotiations over new commitments expected to start by 2005 (which would include developing countries). The Protocol has therefore succeeded in setting up a framework for ongoing action, and much will depend on whether much more stringent targets can be set for future commitment periods.

Nonetheless, the Bonn agreement has been widely hailed as a diplomatic breakthrough, all the more so because it was achieved despite the withdrawal of the US. The Kyoto Protocol and the action plan concluded at Bonn provide the first concrete steps towards the technological and social revolution that is needed over the next 100 years to wean the world economy from fossil fuel dependence. Although the threshold for the Protocol to enter into force is high, it is likely to be cleared. Article 25 provides that the Protocol shall come into force once 55 parties to UNFCCC ratify it, and the ratifying states must together represent at least 55 per cent of the total CO₂ emissions in 1990 stemming from industrialised countries. One hundred states had already ratified by the end of 2002 (with Canada's eventual ratification in December 2002 marking the 100th). The US and

⁵ The major issues at Marrakesh concerned how emissions should be monitored, verified and reported; the

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Australia are the only OECD countries who have not ratified. Russia's ratification would enable the second hurdle to be cleared and the Protocol to enter into force. It is expected that Russia will eventually ratify since it carries surplus emissions capacity resulting from economic downturn and it stands to gain a windfall for these so-called 'hot-air' accounts.⁶

Nonetheless, in view of the enormous challenges confronting this first step towards moving away from fossil fuel energy sources, and in view of the way in which the climate change negotiations have unfolded, it might still be tempting to fall back on the assumptions and explanatory framework of the neorealist framework of international politics and law, according to which 'right is might'. The most salient feature of these negotiations from a neorealist perspective would be the rejection by the United States in March 2001 of the emission reduction commitments it made at the signing of the Kyoto Protocol in 1997.⁷ For neorealists, the content of international law is determined by the most powerful states and the law will not be upheld if it conflicts with their material and strategic interests. The US was able to assert itself as the world's biggest economic and military power – responsible for roughly one quarter of global greenhouse gas emissions – by refusing to cooperate in the negotiations when they conflicted with US economic and strategic interests, without fear of any effective material sanctions from 'weaker' states, thereby putting at risk the entire multilateral effort to reach an agreement over emissions reductions. Indeed, President George W. Bush might be said to have walked out of a traditional realist textbook in his unashamed declaration that agreeing to implement the US Kyoto emission reduction targets did not suit the economic interests of the US, irrespective of whatever common benefits emissions reductions might bring. Despite the last minute rescue of the negotiations at the most recent COP held in Bonn in July 2001, non-cooperation on the part of the US continues to jeopardise ratification of the Kyoto Protocol while some of the concessions granted to members of the Umbrella group on matters such as carbon sinks and the so-called flexibility mechanisms threaten to undermine the basic purpose of the UNFCCC and the Protocol. In short, a neorealist would consider the treaty essentially doomed or severely compromised on account of non-cooperation by the world's most powerful state.

compliance system; and unresolved issues around sinks and other Kyoto mechanisms.

⁶ Russia's delay in ratifying the Protocol has been partly due to the withdrawal of the US, which Russia expected would be a major purchaser of its carbon credits. However, Russia still stands to benefit from the carbon trading arrangements despite the US withdrawal.

⁷ As noted, the US also played a major role in preventing the inclusion of specific timetables and targets in the 1992 UNFCCC, but this initial success has clearly been superseded by events.

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Neoliberal institutionalists, in contrast, would analyse the problem in functional terms as a major ‘collective action’ failure on the grounds that the incentive structures created by the climate regime were not sufficient to induce cooperation of the single biggest greenhouse gas emitter. Neoliberal institutionalists typically determine whether a state will be a leader, a bystander or a laggard in environmental regime negotiations on the basis of relative ecological vulnerability and abatement costs.⁸ So, for example, if abatement costs are too high, then states are unlikely to cooperate in environmental treaties. That is, irrespective of three changes of President (from George Bush senior, to Bill Clinton, to George Bush junior), the fundamental reliance of the US economy on fossil fuels meant that agreeing to binding commitments towards emissions reductions was always going to be an unlikely prospect because it conflicted with US ‘interests’.

In view of the foregoing analyses, the climate change treaty negotiations might appear to pose an easy case for neorealists and neoliberals and an especially hard case for critical constructivists. However, these cursory analyses tell only part of the climate change story while also obscuring a number of weaknesses in the neorealists’ and neoliberal institutionalists’ analysis. Moreover, the highly contingent character of the negotiations is such that the force of the neorealist understanding of law and politics can be found to wax and wane at different points (for example, waxing at Rio in 1992 in the light of the ‘soft’ character of the commitments extracted by the US, waning at Kyoto in 1997 when these commitments ‘hardened’, waxing at the Hague in 2000 when the negotiations broke down, waning at Bonn when the negotiations were rescued despite the absence of the US, and waning as the number of ratifications of the Protocol steadily increase). This precarious neorealist hold on the changing fortunes of the treaty suggests some fundamental limitations in the neorealist analysis. Here I shall single out for attention two questions to which neorealists (and neoliberal institutionalists) do not have easy answers.

First, why did the US move from its negotiating position of stabilisation of emissions to agree to a 7 per cent cut at Kyoto in 1997 and drop its insistence that developing countries should also commit themselves to emissions reductions when neither of these agreements

⁸ Detlef Sprinz and Tapani Vaahtoranta, ‘The Interest-based Explanation of International Environmental Policy’, *International Organization* 48:1 (1994); Hugh Ward, ‘Game Theory and the Politics of Global Warning: The State of Play and Beyond’, *Political Studies* 44:5 (1996); Gareth Porter, Janet Welsh Brown and Pamela S. Chasek, *Global Environmental Politics*, 3rd edn (Boulder, CO: Westview Press, 2000); Yasuko Kawashima, ‘A Comparative Analysis of the Decision-making Processes of Developed Countries toward CO₂ Emissions Reductions Targets’, *International Environmental Affairs* 9:Spring (1997); and Detlef F. Sprinz and Martin Weiss, ‘Domestic Politics and Global Climate Policy’ in Urs Luterbacher and Detlef F. Sprinz (eds.) *International Relations and Global Climate Change* (Cambridge, MA: MIT Press, 2001), pp. 67-94.

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suited its strategic and domestic economic interests? Second, given that moving away from a fossil fuel economy was always going to be a central objective of the climate change treaty, why did the US bother to remain part of the negotiations until as late as March 2001, given that the commitment to negotiate binding targets and timetables was made as early as COP1 in Berlin in 1995?

Now neorealists would probably declare that it was in the ‘strategic interests’ of the US to sign the UNFCCC in 1992 and remain in the negotiations in order to shape them in ways that suited its strategic interests. When the legal text threatened to ‘harden’ in ways that were inimical to US material interests, it walked away. Yet the acceptance by the US negotiators under George Bush senior of the principled commitments (or ‘soft legal norms’) in the UNFCCC in 1992 on the assumption that only binding legal norms are consequential would seem a particularly naïve strategy given the role such principles typically play in guiding and disciplining subsequent negotiations (which is borne out in this case study). In other words, it assumes that the US would be able to engage effectively in subterfuge either in orchestrating ‘non-decisions’ or else in getting other states to agree to legal norms that would undermine the principles of the UNFCCC or the targets in the Protocol – something the US was clearly unable to do at Kyoto in 1997 and at the Hague in 2000.⁹ As it turned out, the US shifted its position substantially at Kyoto, although such a move did raise questions as to how the commitments could be carried through domestically. During the period of the Clinton administration, the then Republican dominated US Senate – sensitive to the concerns of coal producing states in the US – had passed by consensus the Byrd-Hagel resolution making any action by the US legislature conditional on developing states also taking action.¹⁰ Nonetheless, the very fact that the US executive agreed to shift its position at Kyoto despite a hostile Senate resolution cannot be explained as mere strategic power play. Rather, it must be understood in the light of developing countries holding fast to the principle of common but differentiated responsibilities elaborated in the UNFCCC. Admittedly, President Clinton signed the Protocol on the basis of a commitment by Argentina to accept a voluntary emission targets.¹¹ However, it was clear at COP3 that the vast majority of developing countries were opposed to making any commitments (voluntary or otherwise) in the first

⁹ Michael Grubb and Farhana Yamin, ‘Climatic Collapse at the Hague: What Happened, Why, and Where Do We Go From Here?’, *International Affairs* 77:2 (2001).

¹⁰ Peter Newell, ‘Who “CoPed” Out in Kyoto: An Assessment of the Third Conference of the Parties to the Framework Convention on Climate Change’, *Environmental Politics* 7:2 (1998), p.154.

¹¹ Michael Lisowski, ‘Playing the Two-Level Game: US President Bush’s Decision to Repudiate the Kyoto Protocol’, *Environmental Politics* 11:4 (2002), p.111.

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commitment period. Moreover, while the action plan agreed at the Bonn meeting did increase the possibility that some OECD countries (such as Australia) might be able to minimise taking emissions reduction measures by relying on carbon sinks, the agreement nonetheless represented a breakthrough insofar as the parties firmed their resolve to continue the treaty process and undertake binding commitments *in the absence of the US*. All OECD countries, except the US and Australia, have now ratified the Protocol.

Turning to the neoliberal explanation, it might be argued that the details of the incentive structures created by the climate change regime were not sufficient to motivate the US to join, since joining would generate economic losses. The EU, on the other hand, as the ‘green leader’ of the negotiations, stood to gain because it was not only vulnerable to the impacts of climate change (like most countries) but (unlike most countries) it had already geared its economy towards a more energy efficient future relative to other states and stood to reap the economic benefits of being one of the first movers in ‘ecological modernisation’. Indeed, these points were exploited in the negotiations by the Umbrella group, which sought to tarnish the green reputation of the EU by pointing out that its relatively good emissions record has been achieved by coincidental rather than deliberate developments. In particular, the closure of many East German industries following German reunification and the restructuring of the British energy industry, gave Germany and Britain respective relatively impressive emission reductions records.¹²

For neoliberals institutionalists, that the US chose to become involved, and remain in, the negotiations until as late as 2001 may be explained in terms of the US’s concern to shape the UNFCCC and the Protocol (and any subsequent action plans) in a way that gave it maximum flexibility in meeting its targets. The soft-law character of the UNFCCC commitments are not considered significant because, in game-theoretic terms, ‘play is still in the pre-game phase’,¹³ meaning that the ‘real action’ (i.e., the hard bargaining about who pays) has not begun. When the ‘real game’ began, the US made trade-offs at Kyoto that it was unable to fulfil. According to Robert Putnam’s two-level game analysis, the inability of the US to ratify the Kyoto commitments is a case of ‘involuntary defection’.¹⁴ George Bush junior simply turned this into a voluntary defection.

¹² Oberthur and Ott, *The Kyoto Protocol*, p. 16.

¹³ Ward, ‘Game Theory and the Politics of Global Warming’, p. 861.

¹⁴ Robert Putnam, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’, *International Organization* 42:3 (1988), 440, reprinted in Peter B. Evans, Harold K. Jacobson and Robert D. Putnam (eds), *International Bargaining and Domestic Politics: Double-Edged Diplomacy* (Berkeley: University of California Press, 1993), pp. 431-468.

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Yet these neoliberal responses to the two questions only go part of the way to explaining the negotiation processes and outcomes to date. While neoliberalism provides a more plausible explanation than neorealism of the treaty negotiations and outcomes, it nonetheless remains limited since it assumes that state interests remained fixed during the negotiating process and that the regime negotiations and outcomes merely provide incentives that change behaviour but otherwise had no influence on fundamental interests and identities/social roles. Yet the US's social role has not been uniform throughout the negotiations. Rather, it shifted its position in the face of the negotiations at Kyoto in 1997. Moreover, it is too early to judge whether the subsequent withdrawal of the US has in fact led to a 'collective action failure', although the weight of evidence so far suggests that it is not a failure. The entry into force of the Protocol is now imminent, with Russia on the brink of ratification. While it is premature to make any final pronouncements about the success (or otherwise) of the negotiations it is nonetheless possible to offer some alternative reflections on the relationship between politics and law in relation to what has now been over a decade of negotiations. As we shall see, this entails building upon but also reframing the rationalist emphasis on power and interests by drawing attention to the issues of identity, morality and legitimacy that are typically neglected in the rationalist analyses.

Critical constructivism explained and defended

A critical constructivist understanding of international politics and law begins with an understanding of the constitutional structure of treaty making, which constitutes states as juridically recognised entities and structures the norms of recognition and procedural justice that apply in the processes of treaty making. The regulative ideals embedded in this constitutional structure are essentially contractual in that the creation of mutually binding norms and rules follows procedures that are intended to enable common understandings between states to emerge by means of free, not forced, consent. Practical discourse (which includes both strategic bargaining and moral argument) is thus essential to the effectiveness and legitimacy of international treaties. Whereas democratic states are accountable to their societies by a relatively dense set of understandings and obligations that serve to limit state power, the relationships *between* the state actors formally involved in international treaty making and international civil society are relatively thinner and more tenuous. The identities and interests of states are therefore likely to be shaped to a considerable degree by domestic

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factors (an argument that liberals tend to emphasise), *but* that states are nonetheless *also* enmeshed in and shaped by regional, international and global social structures and processes, such as the state system and global capitalism. Moreover, as we shall see, these types of international enmeshment vary from state to state in ways that influence the modes of interaction (for example, moral deliberation, bargaining, coercion and non-cooperation) pursued by states in particular negotiations.

While states are not obliged to participate in treaty making, if they do participate (and, there are significant *social* pressures to participate), the liberal ideals of communicative justice at the international level require that they be formally respected as juridically equal in the negotiations. Indeed, the principle of equal sovereign rights of member states cannot ultimately be realised by states withdrawing and completely isolating themselves from international politics. To safeguard their sovereign rights, states must enter into, and seek to shape, the international conversation – essentially practice their ‘rights of membership’ on the world stage by attending treaty negotiations. This is why, for example, norms such as avoiding deception, avoiding violence and keeping promises, which includes complying in good faith with treaty responsibilities, are generally observed even when observance may be inconvenient or costly or when parties have the power to ignore the rules. These norms, as Friedrich Kratochwil points out,¹⁵ are *constitutive* of international society. Observance of treaties is not simply a case of enlightened self-interest or deferred gratification of self-interest (as neoliberals suggest); rather, it is fundamental to the continued mutual recognition of states as members of an international society.

Neorealists (and neoMarxists) might respond to this very idealised account of international treaty making by pointing to the obvious gap between ideals and practices, particularly the practices of powerful states such as the US. My response to this criticism is to accept, on the one hand, that these liberal regulative ideals are indeed frequently distorted by discrepancies in the negotiating power and capacities of different states, but to insist, on the other hand, that these regulative ideals are not thereby rendered irrelevant. Rather, the regulative ideals remain a *constitutive element* of all treaty negotiations insofar as they continue to inform shared understandings about the norms of recognition, the norms of procedural justice and the *legitimacy* of outcomes. Moreover, these constitutive ideals may be transformed over time by the practices of agents. As we shall see, the ‘critical’ dimension of critical constructivism regards as significant the increasing involvement of non-state actors in

¹⁵ Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning*

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the treaty making process – an involvement that has introduced a challenge to the state-centric character of treaty making, both in terms of the actual negotiations and the regulative ideals. Such an involvement may, over time, possibly lead to more inclusive norms of communicative justice in treaty making.

The critical dimension and the question of legitimacy

Habermas's recent analysis of the relationship between law and politics provides the most extended analysis of the constitutive tensions between the regulative ideals and practices of law making while also providing a critical dimension that transcends the state-centric, contractual regulative ideal of international treaty making and holds out a more inclusive and rational ideal of political communication. For Habermas, in modern times, law has a dual character: it provides the substantive and formal rules to stabilise, integrate and regulate society as well as the procedural requirements to ensure the legitimacy of those regulations. The rationality and legitimacy of legal norms are derived from the mutual respect accorded to the argumentative rules, roles and contexts that define the discussion leading to the creation of legal norms. Although Habermas has directed his study to the democratic legitimation of state legal systems, his reconstruction of law and politics contains significant insights that can be enlisted to illuminate the international legal order.

The first insight concerns his understanding of the unavoidable tensions between law making ideals and practices. For Habermas, 'law has a legitimating force only so long as it can function as a resource for justice'.¹⁶ This is not a wishful normative claim but rather a quasi-empirical claim, reconstructed from the implicit presuppositions of communicative action, most notably, the implicit orientation of actors towards resolving practical disagreements by seeking mutual understanding through discursive argument.¹⁷ While in practice there is typically a gap between 'facts' and 'norms', between the actual production of positive law and its animating rationale, for neorealists merely to expose the obvious lack of fit between the legislative ideals and the practice of treaty making in order to argue that the ideals are weak or irrelevant is to misunderstand the way in which regulative ideals work.

in International Relations and Domestic Affairs (Cambridge University Press, 1989), p. 71.

¹⁶ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg (Cambridge: Polity, 1996), p. 145.

¹⁷ According to Habermas's formal pragmatics, every time a speaker makes a claim, there is an implicit promise that the claim could be redeemed for its truth, sincerity and normative rightness in further argument if challenged. This is not an optional requirement, according to Habermas, since speakers must act communicatively if language is to remain meaningful.

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That is, all communication is implicitly *oriented* towards reaching mutual understanding by means of reasoned argument rather than coercion or bribery, even if such understanding is not *actually* reached. Such an ideal thus remains a constitutive element of every act of communication. Even in highly distorted communicative settings parties can still feel obliged to explain themselves to others by giving reasons for their preferred positions if they are to persuade others of the acceptability of their arguments or simply to be recognised as legitimate participants. Success in such argumentation is a function, inter alia of the degree of trust, truthfulness and respect between the parties and whether parties have the capacity to perform the promises they undertake (the latter was something that the US clearly lacked during its negotiations at Kyoto).

However, it is not only brute power but also practical exigencies that create an enduring tension between the idealised presuppositions embedded in communication and the practical exigencies of real-world communication. Procedural short cuts (decision rules, time limits, delegated authority, limited rights of representation, and so on) are always necessary for efficacious decision making. However, these short cuts cannot be taken too far because *too many* short cuts can render the resulting decisions increasingly contingent and unstable.¹⁸ In this respect, Habermas's communicative ideal serves not as a blueprint but rather as a critical vantage point that provides a basis for evaluating the 'degree of distortion' of particular communicative contexts, while also accepting that all real communicative contexts are at best asymptotic approximations to the ideal. Far from removing power and practical exigencies from the equation, Habermas's regulative ideal enables us to observe the many ways in which the presence of brute power and the pressure of practical exigencies can each distort or short circuit communication. *Yet it also explains how power can be disciplined by moral argument.* In the climate change negotiations, we can find examples of both the unilateral assertion of brute power in disregard of the norms of communicative justice as well as the disciplining of brute power via the enlistment of discursively agreed norms and principles.

While some observers have considered the discourse ethic to be fundamentally at odds with the processes of treaty making between sovereign states in international relations,¹⁹ Habermas's recent discourse theory of law points out that even in this thinnest of common

¹⁸ Jurgen Haacke, 'Theory and Praxis in International Relations: Habermas, Self-Reflection, Rational Argument', *Millennium* 25:2 (1996), p. 286.

¹⁹ For example, Haacke, 'Theory and Praxis in International Relations'; and Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998).

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life-worlds where bargaining usually predominates, moral discourses can still be incorporated into rule making procedures, and, indirectly, into the modes of argument employed by the parties. That is, even in those circumstances where strategic bargaining looms large, the legitimacy of any resulting compromise agreement still turns on the *fairness of the bargaining conditions*. In this context, the discourse principle – normally oriented towards consensus – must be brought to bear indirectly, through fair procedures which regulate the bargaining.²⁰ Moreover, bargaining often relies, in the first instance, on prior understandings about particular facets of the world (such as scientific understandings) that are not value neutral, often uncertain and typically contestable. Establishing the parameters of such understanding for the purposes of bargaining invariably takes the discussion beyond the boundaries of instrumental rationality,²¹ and requires a hermeneutic explication of worldviews and self-understandings on the part of claimants. It is noteworthy that Habermas considers ecological questions to ‘push beyond contested interests and values and engage the participants in a process of self-understanding by which they become reflectively aware of the deeper consonances (*Ubereinstimmungen*) in a common form of life’.²²

A related insight arising out of critical theory’s attention to discursive processes concerns the relationship between the formal processes of law making and the informal processes of political opinion formation in the public sphere. For Habermas, political will formation (i.e. law making) and political opinion formation are mutually informing processes that are shaped by a complex web of political actors, both state *and* non-state. We can also see this on the international stage²³ even though the formal lines of accountability and responsibility between the officially recognised state treaty negotiators and domestic and global civil society remain weak and ill-defined. That is, these lines of accountability and responsibility can still be found to work in diffuse and indirect ways. While states are the only juridically recognised entities in the treaty making process, in practice they are by no means the sole instigators, authors, subjects and enforcers of international law, a recognition that calls for a less state-centric framework for understanding the relationship between international law and international society. Indeed, treaty making has increasingly become a major arena for discursive battles about the future shape of international society for both state and non-state actors.

²⁰ Habermas, *Between Facts and Norms*, pp. 166–7.

²¹ Habermas, *Between Facts and Norms*, p. 160.

²² Habermas, *Between Facts and Norms*, p. 165.

²³ Jurgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, edited by C. Cronin and P. De Greiff (Cambridge, Mass.: MIT Press, 1998), p. 177.

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Clearly, power and self-interest remain crucial to any critical constructivist understanding of treaty making. However, unlike neorealism and neoliberalism, critical constructivism is also sensitive to the sway of moral argument while providing a critical framework for historicising and evaluating the legitimacy of particular negotiations and outcomes. However, Habermas's reconstructive theory does not seek to understand *why* it is that power, interests and/or moral arguments come to prevail at different times. To understand the orientation of particular actors to negotiations, and their preparedness to respond to different types of argument in efforts to negotiate common norms, it is also necessary to explore the ways in which history, tradition, social roles, ideology and practical precedents shape the dialogue and provide the context for those arguments that come to prevail.²⁴

The constructivist dimension and the question of identity

Earlier, we noted that states are enmeshed in different international social structures in varying degrees, and that these types of enmeshment influence the modes of interaction (for example, coercion, bargaining or moral argument) pursued by states in treaty negotiations. Wendt's analysis of the different 'cultures of anarchy' in the international community is especially pertinent in this regard since it explores the sociological phenomenon of relating to others in the context of historical relationships that have helped to produce different social roles and corresponding 'cultures of relating'. In the case study we will see how such an understanding sheds considerable light on the different social roles played by the EU and the US in the climate change negotiations.

Neorealists and neoliberals assume that the anarchic character of international society is such that states will always behave in mistrustful and/or instrumental ways. Against these assumptions, Wendt has argued that just as different social structures can produce different social roles and identities, and different modes of relating, so too can different 'cultures of anarchy' produce different state roles and relationships. For example, Wendt shows how states may relate to other states as enemy, rival or friend and these roles correspond to three different 'cultures' of international politics – Hobbesian, Lockean and Kantian (these are identified by Wendt as 'salient' logics and therefore need not be taken as exhaustive). Moreover, these different cultures of anarchy explain why states, when they inhabit certain roles, conform to certain behaviours. That is, when they relate to other states as enemies they

²⁴ Kratochwil, *Rules, Norms, and Decisions*, p. 33.

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are only likely to ‘cooperate’ with others when implicitly or explicitly coerced; when they relate as rivals they tend to comply mostly out of self-interest; and when they relate as friends they comply principally because of shared and ‘internalised’ understandings. Below, I explain how special considerations apply to powerful states; that is, when they relate to other states in their role of ‘world leader’ they are more likely to set an example by conforming to multilateral norms (both procedural and substantive) than when they relate to other states simply in their capacity as ‘a great power’ (where they can act unilaterally and with impunity). We might also expect that moral reasoning might, potentially at least, play a bigger role than instrumental reasoning in political communication between the ‘friends’, given the greater depth of association and shared understandings, although this point is not explored by Wendt. It is also quite possible, however, that pragmatic reasoning would continue to occur in relation to the minutiae of agreements, albeit against a larger background of shared moral/ethical understandings.

Wendt makes it clear that the existence of a Kantian culture of relating among sovereign states need not necessarily imply that there are not important differences and disagreements among states; rather it simply means that states mostly relate to each other as friends rather than rivals or enemies. Here ‘friendship’ is understood as a ‘role structure’ whereby disputes are settled without war or threat of war *and* mutual aid is provided to members in the face of external threat.²⁵ This relationship of friendship is said to be more enduring than the relationship between allies, which is more contingent and precarious.²⁶ Friendship is based on a shared knowledge and history of the other’s peaceful intentions. In such circumstances, cooperation cannot be reduced to material self-interest but can only be understood in terms of the mutual *internalisation* of shared norms. That is, the conception and welfare of the ‘self’ is taken to include others in the community.²⁷ However, this identification with the other is rarely total since actors, including state leaders, typically have multiple identities²⁸ and this is especially so for the leaders of hegemonic states, as we shall see. We can therefore expect contestation and some resistance to surface among members over shared understandings, including debates about free riding and burden sharing in any negotiations over common problems. Although Wendt restricts his analysis of the ‘culture of friendship’ to collective security communities, we might expect members of a ‘Kantian security team’ (such as the EU) to find it easier to reach agreement about other common

²⁵ Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press, 1999), pp. 298–9.

²⁶ Wendt, *Social Theory of International Politics*, p. 299.

²⁷ Wendt, *Social Theory of International Politics*, p. 306.

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problems, such as environmental problems. Moreover, we would expect the extent to which this might occur to be partly a function of the depth of mutual understanding between negotiators and the openness of the discursive processes *within* the community.

According to Wendt, at this juncture, the international behaviour of states is mostly Lockean (rather than Hobbesian) but with increasing Kantian dimensions.²⁹ This can partly explain why neoliberal institutionalism has become the dominant framework for analysing environmental regimes, while also historicising this dominance and suggesting new directions for political research. Indeed, Wendt's framework can be usefully applied to all three cultures of anarchy in ways that historicise the insights of both neorealists and neoliberals.

Moreover, the general constructivist focus on roles, identities and associated modes of relating can be refined and applied in relation to dominant states such as the US, which is enmeshed in international social structures in unique and contradictory ways. Traditionally, theorists of international relations have assumed that hegemony is simply a function of economic and military material capability, which is understood to determine the degree to which a dominant state can control or influence other states and therefore govern or otherwise hold sway over the system.³⁰ However, Bruce Cronin has drawn an illuminating distinction between a 'powerful state' (defined simply in terms of material capabilities) and a 'hegemon' (defined in terms of international leadership, understood as a *social* property rather than something that arises merely from superior material capability). A hegemonic state is a state that is able to shape the international order according to norms and rules that mostly suit its interests but which are defended and more or less accepted by others as universal in conception. However, in assuming a leadership role in such an order, a hegemonic state is also bound to conform to such norms and rules in order to set an example and uphold the legitimacy of the order, even when they conflict with its short term interests. That is, while leadership provides greater influence on the multilateral norms and rules it also brings with it a greater responsibility to conform to the generalised rules of conduct.³¹ Such social pressures create 'role strain' between a dominant state's positions as powerful state (where it has the capabilities to act unilaterally and appease domestic social forces and interests) and its role as a hegemonic state (where there are social expectations that it will conform to generalised

²⁸ Wendt, *Social Theory of International Politics*, p. 306.

²⁹ Wendt, *Social Theory of International Politics*, p. 43.

³⁰ Bruce Cronin, 'The Paradox of Hegemony: America's Ambiguous Relationship with the United Nations', *European Journal of International Relations* 7:1 (2001), p. 106.

³¹ Cronin, 'The Paradox of Hegemony', pp. 110–12.

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rules of conduct, which suit its longer term interests in maintaining a stable and legitimate international order). Cronin has called this tension ‘the paradox of hegemony’, which he argues helps to explain why dominant states often engage in inconsistent behaviour (i.e. swinging from unilateral and multilateral action) in different settings.

An integrated critical constructivist framework

The insights of Habermas and Wendt (supplemented by Cronin) are complementary and can be usefully combined into an integrated critical constructivist framework that provides a more rounded understanding of the climate change negotiations than either neorealists or neoliberal institutionalists can offer. Habermas offers both a sociological understanding of the legitimacy of treaty negotiations, including the tensions between ideals and practices and the requirements of public justification, as well as a critical framework that enables an evaluation of the *degree* of legitimacy of particular negotiations and outcomes from the perspective of both state *and* non-state actors. This suggests that we should look not only to state behaviour but also to the reasons provided by particular states as well as the *reactions* of other states and global civil society if we are to fully understand the status and sway of legal norms. Wendt’s analysis helps to give this understanding historical specificity by suggesting that the international community should be understood as made up of many different constellations of states with different ‘cultures’ and modes of relating to ‘the other’. This suggests that we need to look at historical patterns of engagement of different states and the associated social roles and forms of interaction before we can understand whether moral arguments (that is, generalisable claims that are acceptable to differently situated parties) are likely to gain any purchase *vis-à-vis* bargaining, coercion or non-cooperation in particular negotiations.

A closer look at the climate change negotiations

To those who might insist that the climate change negotiations can only be understood in terms of power and/or interest, critical constructivists would point to the ways in which power and interests have been *framed and disciplined by moral argument in the negotiations*. As we have seen, critical constructivists understand so-called ‘real world politics’ as typically combining these different modes of interaction, with the consequence that the distinctiveness of any one of these different modes should not be over-emphasised at the expense of

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understanding the various ways in which they may act upon and qualify each other.³² Of particular interest here is the way in which the *form* of the UNFCCC had, initially at least, helped to facilitate a temporal and analytical separation between the negotiation of basic norms and principles in the framework document and the subsequent negotiation of binding commitments and more detailed rules (such as the Kyoto Protocol) in subsequent conferences of the Parties (COPs). Indeed, the Protocol itself required further specification on many contentious matters, specification that the parties were unable to achieve at the COP6 at the Hague but were able to mostly resolve at the Bonn meeting. The degree to which the negotiating parties (particularly the greener states but also many developing states) continued to refer back to the agreed foundation principles in the UNFCCC provides significant evidence of their enduring normative force and legitimacy in the face of attempts to undermine them in the subsequent and more testing negotiations over the details of binding commitments and detailed rules. The core environmental justice principle of ‘common but differentiated responsibility’ and the related principle that the developed countries should take the lead are fundamentally moral norms – a point that is often ignored in the more cynical analyses of the hard-headed politics of adjustment and burden sharing that have subsequently taken place, where selfish haggling has predominated and it is therefore presumed that moral arguments have lost their relevance. Yet moral norms remained a fundamental backdrop for the negotiations, they framed and set limits to the more selfish politics of haggling over burden sharing and adjustment, and they help to explain why certain arguments (including many put forward by countries, such as the US, with a strong fossil fuel dependency) were ruled out. Indeed, there are few better ways of demonstrating the influence of moral norms than when they are agreed to despite the strenuous, self-serving lobbying of powerful states. The attempt by US negotiators at Kyoto to seek greater developing country involvement was effectively rejected because it was outside the basic principles and objectives of the UNFCCC.

For all the shortcomings of the climate change treaty, then, it nonetheless demonstrates – contra neorealists – that treaties are not always *just* a tool for the powerful. While the persuasive force of moral argument is always precarious in the face of the force of brute military and economic power, both weak and strong states need to respect the prevailing norms of communicative justice if they are to be *recognised* as legitimate members

³² Ian Hurd, ‘Legitimacy and Authority in International Politics’, *International Organization* 53:2 (Spring 1999); and Thomas Risse, “‘Let’s Argue!’: Communicative Action in World Politics”, *International Organization* 54:1 (2000), p. 3.

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of the international society of states. This insight applies with equal force to the US as a hegemonic state, whose role as world leader had created expectations that it will set an example and conform to the generalised norms that it has played a major role in creating under the first Bush administration. The refusal by particular states to submit to the discursive processes and outcomes of treaty making can attract strong social censure by both state *and* non-state actors. Moreover, we can expect such censure to be especially strong in relation to hegemonic states. As we have seen, for hegemons, with greater influence over the creation of common norms comes greater responsibility *towards* the international community and greater expectations *by* the international community that such norms will be respected.

In this respect, the Kyoto negotiations are insightful since Clinton's negotiators squarely confronted this paradox of hegemony. Internationally, the US had committed itself to the principles of the UNFCCC and the Berlin mandate that developed states should take the lead and agree to binding targets, yet in response to domestic political pressures it came to the negotiations proposing arguments that were contrary to those agreements. However, these arguments were rejected at the negotiations. At Kyoto at least, the US negotiators chose to resolve this paradox by succumbing to international pressure to respect the prior understanding. Accordingly, it negotiated a compromise (by trading developing country involvement for greater flexibility in meeting its commitments). Enlisting Cronin's analysis, we can say that in this instance the US chose to protect its reputation as a hegemonic leader and uphold the basic rules and norms of multilateralism, rather than exert itself as a great power (by 'walking away'). Those who occupy the role of world leader must act as role models.

However, since the Kyoto meeting, emission growth in the US had made it increasingly difficult for the US to comply with its Kyoto target of a 7 per cent reduction without incurring heavy economic costs.³³ President Bush junior chose to resolve the paradox of hegemony by asserting the US's role as a great power by adopting a unilateral/isolationist posture *vis-à-vis* the negotiations. Unlike great leaders, great powers do not act as role models, they merely assert their will. However, contrary to what neorealists might suggest, *this was not inevitable* in the sense that there were no other plausible options facing the US. Bush's posture cannot simply be deduced from material capabilities or 'objective interests' but rather must be understood in terms of the particular ideological proclivities of the new administration. It was not the US Senate that prompted a *sudden* reversal in US foreign policy

³³ According to Christiaan Vrolijk, 'Introduction and Overview', *International Affairs* 77:2 (2001), 256, US

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in 2001, since this opposition (along with US fossil fuel interests) has been a constant for many years prior to Bush's repudiation.³⁴ In any event, public opinion in the US at the time of the repudiation was in *favour* of ratification.³⁵ Moreover, the costs of meeting the Kyoto targets can be drastically reduced by carefully tailored domestic energy policies that harness cost-effective energy improvements and 'double dividends' from shifting the burden of taxation.³⁶ Rather, it was President Bush's new National Energy Policy, which unashamedly promoted the further rapid exploitation of oil and gas reserves, that made the repudiation necessary, and it has been argued that the basis for this policy of stepping up the production of fossil fuels was mostly politically manufactured.³⁷

Moreover, the isolationist posture has come at a heavy price insofar as it has attracted considerable condemnation not only from many parties to the negotiations but also from US civil society and global civil society. The weight of shared international understandings and expectations of legitimate conduct, stemming from the treaty negotiations (and associated debates within civil society), seems to be clearly *against* the US (and Australia) on this issue.

This social censure also highlights the links between political opinion and political will formation insofar as the role of NGOs and civil society are increasingly significant to the processes of *legitimation* in international negotiations. Indeed, the climate change negotiations have been 'at the forefront of attempts to open up international negotiations to NGO participation'.³⁸ NGOs ranging from environmental NGOs, corporations, the media, scientists, policy think tanks and international organisations have played a crucial role in identifying and publicising the problem (or downplaying it), developing policy relevant knowledge, research and political agenda setting, negotiating policies and rules (sometimes as members of official delegations), monitoring and implementation.³⁹ Moreover, official sessions and selected events at the negotiations are now broadcast live not only to TV screens in the official conference building but also worldwide on the internet, creating high public visibility and high expectations. NGOs have made full use of modern communications

emissions are now around 13 per cent above 1990 levels.

³⁴ Lisowski, 'Playing the Two-Level Game', p.102.

³⁵ According to Michael Lisowski, an ABC News poll released on 17 April 2001 revealed that 61% of Americans supported ratification of the Kyoto Protocol. See Lisowski, 'Playing the Two-Level Game', p. 114.

³⁶ Michael Grubb and Joanna Depledge, 'The Seven Myths of Kyoto', *Climate Policy* 1:2 (2001): 269-72, p. 271.

³⁷ See, for example, Bill McKibben, 'Some Like it Hot', *New York Review of Books* XLVIII:11 (5 July 2001) and Lisowski, 'Playing the Two-Level Game', pp. 101-119.

³⁸ Peter Newell, *Climate for Change: Non-State Actors and the Global Politics of Greenhouse* (Cambridge University Press, 2000), p. 137.

³⁹ See Newell, *Climate for Change*.

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technology such as the internet and mobile phones to stay in touch with relevant delegates and negotiating texts in the formal conference and the reaction of constituents elsewhere in the world. From the perspective of the formal negotiators, the world has been – literally – watching, a fact that can sometimes have a chastening effect on the formal negotiators.⁴⁰ At the same time, however, the use of such technologies has put many state and non-state delegates from developing countries at a considerable disadvantage

In *reducing* politics to brute power or strategic calculation, both neorealists and neoliberals have overlooked the significance of the discursive processes of opinion and will formation in world politics and underestimated the importance of NGOs, both ‘green’ and ‘grey’, in shaping the expectations, behaviour and identities of states in international negotiations – including their preparedness to cooperate in international fora.

These limitations are highlighted when we shift attention to the contrasting role of the EU in the climate change negotiations. While it is certainly true that the EU was much better placed – in terms of socioeconomic and institutional capacity – than the US and other members of the Umbrella group to make moves on emissions reductions, to reduce its role to an instrumental calculator is to overlook the significance of its self-understanding as a green leader seeking to further the cause of *global* emissions abatement. For example, the EU played an influential role at Kyoto in extracting stronger commitments from the US while at the Hague it steadfastly refused to concede to many of the US demands on the grounds that they would undermine the environmental objectives of the Protocol (in this it was strongly backed by many environmental NGOs). Moreover, this green identity of the EU at the Hague was not simply a function of the presence of green party delegates from France and Germany in the EU’s negotiation team. Rather it must also be understood against the deeper legacy of environmental movement activity and green party formation in Europe over the previous three to four decades coupled with the development of a more progressive business community (relative to the US) that is prepared to take a longer term view of the economic benefits of a less fossil fuel dependent economy. That is, the relatively greener identity of the members of the EU (particularly states such as Germany and the Netherlands) cannot be understood without exploring the role and influence of NGOs and green parties in domestic and regional EU politics, its shared history of ecological problems and the emerging understanding about the longer term ecological and economic benefits of eco-efficiency and ‘ecological modernisation’. This identity of the EU contrasts starkly with that of the US,

⁴⁰ See Oberthur and Ott, *The Kyoto Protocol*, pp. 83–4.

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which (particularly under George Bush junior) is driven by US fossil fuel interests and short term economic horizons. The relationship between states in the EU might be said to provide the closest example of a 'Kantian culture' on Wendt's analysis, whereby states see themselves, in certain respects at least, as part of a *team* based on shared understandings, concerns, histories and institutional legacies. This does not mean that there were not important differences among community members; however, it does provide a more cooperative framework for resolving these differences. In the climate change negotiations, the EU resolved many of its own benefit and burden sharing conflicts through its united 'bubble proposal', which set an overall EU target but allowed differential targets within the EU to account for differing economic circumstances and costs of adjustment among member states. Nonetheless, the EU's identity as a green leader sought not only to promote the good of the European region but also a more general notion of collective wellbeing – an identity that cannot simply be explained in terms of the national interests of the member states.

However, that the EU members tended to spend more time talking among themselves than to other states in the climate changing negotiations is testimony of the demands of reaching a regional consensus among the members.⁴¹ Ironically, the relatively greener identity of the EU and its preoccupation with its internal communicative processes may also have precluded the EU (both as a unit and also in terms of individual members) from engaging more extensively with countries *outside* the EU (other than the US), particularly developing countries, which might have been able to play a more constructive role in the negotiations had they been afforded a better opportunity to be involved.

For critical constructivists, the shared ideas in any political community form a *social structure*, which may be reproduced over time by coercion, self-interest and/or legitimacy. In this respect, the discursive processes (which includes the influence of green and grey NGOs) within the EU may be contrasted with those operating in the federal structure of the US. At the national level, the US fossil fuel lobby vastly outweighs the environment lobby in terms of money, power and strategic influence, and it has played a significant role in shaping public expectations, opinion and American lifestyles and identity around, for example, a car and freeway culture.⁴² In particular, the fossil fuel lobby proved to be a major force behind the Byrd-Hagel resolution and it launched a US\$13 million advertising campaign after the

⁴¹ This arises mainly because the competencies of the European Commission as representative of the EU as a whole are limited in the field of climate negotiations. Instead, a position must be agreed by consensus among the fifteen EU members.

⁴² Bill Clinton had unsuccessfully tried to challenge this ideology through his White House Initiative on Global Climate Change in 1997.

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resolution in the lead-up to the Kyoto meeting warning Americans of the economic costs of implementing the mooted Protocol.⁴³ More significantly, George W. Bush's abrupt decision in 2001 to repudiate America's Kyoto commitments (which represented a retraction of election campaign promises) has also been attributed in no small measure to the political influence of the oil, coal and gas interests in the US.⁴⁴ Against this background, the main policy objective of the US – 'flexibility' – suited what Michael Grubb has called 'the confluence of political interests and economic ideology' in the US.⁴⁵ Whereas participation in the international climate change negotiations has further enhanced the identities of the members of the EU as good regional *and* international citizens (at least *relatively* speaking – there are no ideal green states), the negotiations have had no such effect on the US. Rather, the non-cooperation of the second US administration has been overwhelmingly shaped by powerful domestic economic interests and arguments that happen to suit a Republican ideological framework that is largely resistant to alternative environmental discourses, including the 'win-win' discourse of 'ecological modernisation'.

Conclusion

The climate change case study supports the critical constructivist claim that not only are politics and law mutually enmeshed, so too are strategic bargaining and moral reasoning. Moreover, it demonstrates that treaty making is possible without a hegemon, that the identities and interests of states can be shaped by both domestic and transnational discursive practices, and that NGOs are increasingly significant to any understanding of the discursive processes and legitimacy of multilateral agreements. Moreover, critical constructivism provides a rational reconstruction of the discursive and procedural requirements for a legitimate legal order in a modern, pluralistic world that goes beyond the dominant state-centric requirements of procedural justice. After all, legitimacy is always a question of degree. Given that the political community affected by global warming is far more extensive than the society of states, then critical constructivists would consider the ideals and practices of treaty making to be *more* legitimate if they were to rest on an inclusive, cosmopolitan

⁴³ Oberthur and Ott, *The Kyoto Protocol*, p. 72.

⁴⁴ McKibben, 'Some Like it Hot'.

⁴⁵ Michael Grubb with Christiaan Vrolijk and Duncan Brack, *The Kyoto Protocol: A Guide and Assessment*

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regulative ideal that is more commensurate with the global reach of the problem confronted.⁴⁶

Yet critical constructivism is also able to shed sociological light on the enduring tensions between the prevailing communicative ideals and the actual production of positive law. And in directing attention to the importance of history, culture and social roles/identities, it can shed light on the preparedness of different parties to respond to different kinds of argument in the actual production of treaties.

Finally, critical constructivism is able to draw attention to the social ambiguity of existing international law (both soft and hard) in the way it can sometimes be used to discipline powerful actors from a moral point of view while also serving as a tool to legitimate more narrowly conceived national interests on the part of more powerful states. Soft legal norms, such as those in the UNFCCC, can play a crucial role in legitimising and delegitimising particular claims and behaviour, irrespective of whether they find refinement in specific rules, practical achievements and compliance standards. If there is a political lesson to be had from these insights, it is that even existing international law ought not to be entirely dismissed as a vehicle for progressive social change.

(London: Royal Institute of International Affairs and Earthscan, 1999), p. 112.

⁴⁶ See, for example, Barry Holden, 'Democratic Theory and the Problem of Global Warming', in Barry Holden (ed.), *The Ethical Dimensions of Global Change* (Houndsmill, Basingstoke: Macmillan Press, 1996).



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Title:

Soft law, hard politics, and the Climate Change Treaty

Date:

2004

Citation:

ECKERSLEY, R. W. (2004). Soft law, hard politics, and the Climate Change Treaty. REUS-SMIT, C (Ed.). The politics of international law, (1), pp.80-105. Cambridge University Press.

Publication Status:

Published

Persistent Link:

<http://hdl.handle.net/11343/33432>

File Description:

Soft Law, Hard Politics, and the Climate Change Treaty