

# WHY STATES FOLLOW THE RULES: TOWARD A POSITIONAL THEORY OF ADHERENCE TO INTERNATIONAL LEGAL REGIMES

SARAH ELIZABETH KREPS\*

ANTHONY CLARK AREND\*\*

## INTRODUCTION

*There is not and never will be a “field theory” of international law and relations that succeeds in explaining individual or state conduct so completely as to permit the reliable prediction of specific state actions that will occur in distant, concrete circumstances. We cannot know whether the conditions necessary for cooperation will be present in the future, or how states will respond to the conditions that do exist.*<sup>1</sup>

So opined Professor Michael J. Glennon in his recent article *How International Rules Die*.<sup>2</sup> Given the messy reality of international relations, Glennon argues that we can never really know why states follow rules of international law, which is true enough.<sup>3</sup> We cannot enter into the minds of the policymakers. We can never know with absolute certainty why decision makers chose to sign, ratify, and follow the provisions of international legal regimes. But if international relations theory is to serve any useful purpose, it must seek to make some kind of evaluation—even if it is a contingent, imperfect one—of why states act as they do. Without such evaluation, there can be no framework for understanding the behavior of international actors and no guidance for policymakers.

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\* Senior Fellow, Institute for International Law & Politics, Georgetown University; Adjunct Professor of Political Science, George Washington University; Intelligence Officer, United States Air Force Reserve.

\*\* Professor of Government and Foreign Service and Director, Institute for International Law & Politics, Georgetown University; Member, Council on Foreign Relations.

1. Michael J. Glennon, *How International Rules Die*, 93 GEO. L. J. 939, 988 (2005).
2. *Id.*
3. *See id.*

We believe that the problem lies not so much in the general project of political science, but rather in the nature of existing theories of international relations and international law. Each of the major theories—structural realism, modified structuralism, neoliberal institutionalism, and constructivism—offers some insights into state behavior, but none is able to provide a comprehensive framework for understanding state behavior regarding international legal regimes. What is needed is a better theory, and that is what we have sought to formulate.

To respond to the failure of existing theories, we have developed a new theory that we refer to as the “positional theory of adherence.” This theory provides a much stronger basis for understanding why states adhere to international legal regimes. This positional theory has been developed inductively through an examination in which we explore the participation of nineteen global and regional powers in four prominent treaty regimes: the Comprehensive Test Ban Treaty (CTBT), the Land Mine Treaty, the Kyoto Protocol, and the Agreement Establishing the World Trade Organization. Based on this examination, we conclude that the most significant determinants of behavior are the position of that state in the international system as well as the nature of the treaty regime, the extent to which the regime infringes on state sovereignty, the nature of verification/enforcement arrangements of that regime, and the normativity of the treaty regime.

This Article seeks to lay out the nature of our empirical study and to set forth the basic elements of this new theory. Part I develops the concept of “adherence” and explore insights from traditional international relations theory and international legal theory relating to adherence. Part II discusses the methodology used in our investigation, including the case and country selection. Part III then provides a detailed examination of the motivations given by these states for adherence with respect to the four treaties. Concluding that traditional theories by themselves fail to predict adherence, Part IV lays out the contours of our positional theory of adherence. Finally, Part V examines the implications of this theory for foreign policymaking.

## I. ADHERENCE THEORY

### A. The Concept of Adherence

Many international legal and relations scholars<sup>4</sup> have written about the concept of “compliance.”<sup>5</sup> Compliance is meant to reflect the actions of a state to follow the provisions of a particular treaty or rule of customary international law.<sup>6</sup> A state is said to be complying with a treaty or rule of customary international law if it is acting in accordance with the legal obligations established in that particular source of law. But state participation in an international legal regime is actually more complex. For example, the United States decided in 1982 to neither sign, nor ratify the Law of the Sea Convention,<sup>7</sup> but to abide by it in part.<sup>8</sup> President Reagan announced in 1983 that the United States would accept and abide by the provisions of the Convention dealing with “traditional uses of the ocean” including navigation over-flight vis-à-vis other states that agree to follow those provisions.<sup>9</sup> Reagan’s primary reservation was with regard to the

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4. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS passim* (Harvard Univ. Press 1995) (developing a theory of compliance); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS passim* (Clarendon Press 1995); Claire R. Kelly, *Enmeshment as a Theory of Compliance*, 37 N.Y. U. J. INT’L L. & POL. 303 (2005); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)); Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 YALE J. INT’L L. 323 *passim* (2000); Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 *passim* (2002). See also ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY passim* (Oxford Univ. Press 1999); Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT’L L. 107 *passim* (1998).

5. Professor William Bradford has argued that there is a growing “subfield” of international law that addresses the issue of compliance. William Bradford, *International Legal Compliance: Surveying the Field*, 36 GEO. J. INT’L L. 495 *passim* (2005).

6. Kal Raustiala notes that “[c]ompliance generally refers to a state of conformity or identity between an actor’s behavior and specified rule.” Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT’L L. 387, 391 (2000).

7. United Nations Convention on the Law of the Sea, art. 136, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter Law of the Sea Convention].

8. Much has been written on the United States and the 1982 Convention on the Law of the Sea. See generally ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEANS REGIME* (Univ. of S.C. Press 1993) (providing general background information on the Law of the Sea Convention); *THE LAW OF THE SEA: U.S. POLICY DILEMMA* (Bernard Oxman et al. eds., Inst. for Contemp. Studies 1983).

9. In his statement released on March 10, 1983, Reagan explained that “the United States will recognize the rights of other states in the waters off their coasts, as reflected in the [Law of

provisions for deep sea bed mining (Part XI),<sup>10</sup> which he did not consider to be customary law. His policy adhered to most but not all of the Law of the Sea Convention, suggesting the non-binary nature of participation in an international legal regime.

Given this non-binary nature of participation and the problematic implications of the term “compliance,” a better word to describe the relationship between a state and a treaty regime—or rule of customary international law—might be “adherence.” “Adherence,” as the term is used here, means the level of participation of a state in the treaty regime. Adherence is not a binary concept.<sup>11</sup> There is a spectrum along which participation in a regime takes place. States may sign a treaty, ratify, fulfill the provisions in varying degrees, and demonstrate varying degrees of commitment to the treaty based in part on their institutional investment, participation in the regime, and advocacy. They may also sign or ratify as an expression of commitment, but not effect real changes in their behavior.<sup>12</sup> States may even fail to sign or ratify, yet exhibit some level of adherence to provisions of the agreement. Any state, at a given point in time, will fall somewhere along the spectrum of adherence. By examining a variety of indicators, a general evaluation of the level of adherence of that state can be determined.

In order to develop a new theory of adherence, it is necessary to look at the reasons why states engage in these different levels of participation. From a theoretical and empirical perspective, what factors affect states’ decisions to participate along this spectrum? A good starting point for this evaluation of state behavior and

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the Sea] Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.” United States Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383-84 (Mar. 10, 1983).

10. Law of the Sea Convention, pt. XI (establishing a legal regime for the mining of deep seabed nodules).

11. Using the term compliance, Chayes and Chayes clearly recognize this problem:

Compliance is not an on-off phenomenon. For a straightforward prohibitory norm like a highway speed limit, it is in principle a simple matter to determine whether any particular driver is in compliance. Yet there is a considerable zone within which behavior is accepted as adequately conforming. Most communities and law enforcement organizations with the United States, at least, seem to be perfectly comfortable with a situation in which the average speed on interstate highways is perhaps ten miles above the limit. The problem for the system is not how to induce all drivers to obey the speed limit, but how to contain deviance within acceptable levels. And, so it is for international treaty obligations.

CHAYES & CHAYES, *supra* note 4, at 17 (internal citations omitted).

12. See, e.g., Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1962-63 (2002).

motivations is an exploration of the traditional international relations and legal theories.

## B. Traditional Theories and Adherence

Over the years, scholars of both international relations and international law have developed a wide variety of theories that can offer insights about adherence. Using the basic assumptions and arguments from several of the most prominent theories<sup>13</sup> such as (1) structural realism, (2) modified structuralism, (3) neoliberal institutionalism, (4) hegemonic stability theory, and (5) constructivism, certain propositions about adherence can be developed.<sup>14</sup>

1. *Structural Realism*. One of the most persistent theories of international relations is structural realism.<sup>15</sup> Structural realists begin with the assumption that states are the primary actors in the international system, and that this system is “anarchic.” This does not mean that there is total chaos in the relations among states, but rather that there is “no common power,” no centralized governing system on the international plane to establish order. This lack of a centralized enforcement system means that states cannot trust other states to behave in a way that will not threaten their security.<sup>16</sup>

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13. At the outset, it should be noted that many international relations scholars do not explicitly explore the relationship between international legal rules and state behavior. Instead, these scholars often refer to the role of norms and institutions. Nonetheless, the basic contours of these theories can also be applied specifically to international legal regimes as well.

14. Mainstream international relations literature has typically fallen into these five theoretical camps. Although more recent works have tended to focus around specific issues rather than theoretical schools, these theories are still considered the mainstream international relations theories and offer a useful point of departure for our analysis. For more on the use of mainstream theories as a framework for analysis, see Ole R. Holsti, *Models of International Relations and Foreign Policy*, in *AMERICAN FOREIGN POLICY: THEORETICAL ESSAYS*, (G. John Ikenberry ed., 2005).

15. While the theory of realism is often linked to Thucydides, in contemporary scholarship, mid-twentieth century writers such as Hans Morgenthau, George Kennan, Reinhold Niebuhr, and E.H. Carr are generally regarded as the founders of “classical realism.” See E.H. CARR, *THE TWENTY-YEAR CRISIS, 1919-1939 passim* (2d ed. 1946); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE passim* (5th ed. 1978); GEORGE F. KENNAN, *AMERICAN DIPLOMACY, 1900-1950* (1951); REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* (1932). Structural realism is most closely associated with the work of Kenneth Waltz. KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (Addison-Wesley 1979). Structural realism is also referred to as “neo-realism.”

16. This is drawn from title of Professor Robert J. Lieber’s book. ROBERT J. LIEBER, *NO COMMON POWER: UNDERSTANDING INTERNATIONAL RELATIONS* (4th ed. 2001).

In game theory terms, structural realists see international relations as inherently conflicting as in a game of Prisoner's Dilemma.<sup>17</sup> Because anarchy creates uncertainty about the other side's motives, the precautionary move is to defect from the rules to preempt the other side from doing so first. Accordingly, a structural realist would predict that international legal rules would not alter states' behavior and independently induce cooperation. In a system in which states struggle for power and security, states will be concerned not just with their absolute position in the system, but also with their position relative to other states.<sup>18</sup> Gain is zero-sum and relative: advancement for one state means a relative loss for another, making prospects for cooperation—in which all states might actually gain—more difficult. The fear of defection is always present, creating disincentives for states to modify their behavior to participate in international treaty regimes. In the realist framework, institutions, and thus international legal rules, are epiphenomenal and do not independently “cause states to behave in ways they would otherwise *would not* behave—for example, foregoing short-term, self-interest in favor of long-term community goals.”<sup>19</sup>

Not only do institutions “matter only on the margins” according to realists, but their development and composition are reflective of the international distribution of power.<sup>20</sup> International agreements are struck by the most powerful states in the system and are favorable

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17. William Aceves provides a succinct explanation of the game of Prisoner's Dilemma: The Prisoner's Dilemma provides an even more formal model of the international system and its effect on state behavior. The Prisoner's Dilemma illustrates how competing interests between two egoistic actors can lead to sub-optimal behavior. The Prisoner's Dilemma is typically modeled as a 2 x 2 matrix. Each player has two options: cooperate or defect. The respective payoffs received by the players will depend upon the opposing player's actions. The highest payoff for each player is gained if she defects and the opposing player cooperates. Similarly, the lowest payoff, referred to as the “sucker's payoff,” is gained if she cooperates and the opposing player defects. The Prisoner's Dilemma contains four additional elements. First, there is no mechanism for making enforceable threats or commitments. Second, there is no way to ascertain what the other player will do. Third, there is no way to avoid interaction with the other player. Fourth, the payoff structure cannot be altered.

William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U.J. INT'L & POL'Y 227, 238-39 (1997) (internal citations omitted).

18. There is much in the international relations literature on the absolute gains versus relative gains debate. See, e.g., Robert Powell, *Absolute and Relative Gains in International Relations Theory*, 85 AM. POL. SCI. REV. 1303, 1303-20 (1991).

19. Randall Schweller & Daryl Preiss, *A Tale of Two Realisms: Expanding the Institutions Debate*, 41 MERSHON INT'L STUD. REV. 1, 3 (1997).

20. John Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5, 7 (1995).

to that set of actors.<sup>21</sup> Realists see institutions as only temporarily useful for achieving coordinated responses, such as NATO during the Cold War. Once the *raison d'etre* behind the agreement disappears, adherence will dissipate commensurately. Similarly, if state interests change and become opposed to a particular agreement, adherence will drop. States are under no obligation to cooperate longer than their rational self-interest dictates.<sup>22</sup>

In short, a structural realist would predict that states would be less inclined to adhere to international legal regimes,<sup>23</sup> for fear that there is no common government to monitor and enforce rules. In this Hobbesian<sup>24</sup> world, states are particularly ill-advised to adhere to regimes that put a constraint on their ability to maximize security. Autonomy to pursue state security is paramount interest, and any agreement that infringes on their ability to do so is not advantageous and should not be approved. In this sense, regimes that limit a state's ability to defend itself, such as constraints on a state's ability to test new weapons, or to use weapons that are considered by some parties in the international system to be inhumane, will elicit low levels of adherence. While structural realists would recognize that states might sign and ratify an agreement for the sake of appearance, they would predict that states will not follow the provisions of the agreement when they perceive them to be inconvenient.

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21. *Id.*

22. See John Mearsheimer, *Back to the Future: Instability in Europe after the Cold War*, 15 INT'L SEC. 5, 5, for a discussion of his realist views towards international institutions, in which he argues that the institutionalized alliances of the Cold War only stuck together because of rational self-interest.

23. One of the earliest definitions of regimes as the term has been used in the international relations theory community comes from John Gerard Ruggie. Ruggie defined a regime as "a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states." John Gerard Ruggie, *International Response to Technology: Concepts and Trends*, 29 INT'L ORG. 557, 570 (1975). Perhaps the most common definition used in the literature today was developed by Stephen D. Krasner. He defines regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982).

24. In his classic work, *The Leviathan*, Thomas Hobbes described the state of nature as one of war of all against all in which life was "solitary, poore, nasty, brutish, and short." THOMAS HOBBS, *THE LEVIATHAN* 65 (Dent 1973) (1651).

2. *Modified Structuralism.* Modified structural realists,<sup>25</sup> unlike the structural realists, stake out a less extreme approach. While they understand the problems inherent in anarchy, they believe that institutions offer a degree of order and predictability that is preferable to a completely unregulated international system. As a consequence, states have incentives to bind themselves to international legal regimes.<sup>26</sup> Some scholars have argued that a major factor affecting adherence is the nature of the issue area addressed by the regime. Adherence to security regimes is less likely because the costs of defection are potentially immediate and grave. In contrast, economic or environmental regimes offer opportunities for joint gains that would be difficult to achieve on a bilateral basis due to higher transaction costs. Moreover, in the economic or environmental realm, the cost of defection may be financially or environmentally destructive, but not directly threatening to state survival. This distinction between security regimes on the one hand, and economic and environmental regimes on the other, has been referred to as “high” and “low politics.”<sup>27</sup> Modified structural realists would predict a higher likelihood of adherence in low politics than in high politics.<sup>28</sup>

In addition to seeing a higher degree of institutionalized behavior than structural realists, modified structural realists make a distinction between the strongest states and either rising or weaker states. Joseph Grieco has advanced a “voice opportunities” thesis in which weaker states might enter into institutionalized agreements in order to give them an opportunity to voice concerns, influence the agenda, and have some impact on stronger states.<sup>29</sup> This thesis might

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25. Stephen D. Krasner introduces the idea of “modified structural realism” to contrast with structural realism. Krasner, *supra* note 23, at 185-86. Randall Schweller and Daryl Preiss add to this debate, bringing to bear the characteristics of states as a determinant of whether global institutionalization can be attained. Schweller & Preiss, *supra* note 19 *passim*.

26. Krasner notes that regimes are more likely to emerge and elicit adherence than structural realists would predict. Krasner, *supra* note 23, at 191-93. He notes, however, that such behavior is contingent on the issue area that has been institutionalized, with security issues acting more like the Prisoner’s Dilemma construct than economic issues. *Id.* at 195-96.

27. Matters of “high politics” are those that touch at the core security concerns of a state—thus, security regimes would fall squarely into the realm of high politics. Matters of “low” politics are those that do not relate to the core security concerns of a state. Typically, economic, trade, and environmental issues are considered to fall within the realm of low politics.

28. See generally Robert Jervis, *Realism, Neoliberalism, and Cooperation: Understanding the Debate*, 24 INT’L SEC. 42 (1999); Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984).

29. Joseph M. Grieco, *State Interests and Institutional Rule Trajectories: A Neorealist Interpretation of the Maastricht Treaty and European Economic and Monetary Union*, 5 SEC. STUD., 261, 286-89.

explain why weaker members of a group of strong states would choose to bind themselves to international rules, while the strongest states would hold out given that their power speaks strongly enough.

Accordingly, a modified structural realist might predict that States would be more inclined to adhere to international agreements in areas that fall more in the low politics range of the spectrum than those that fall in the high politics range. They might also predict that less powerful states might be more inclined to adhere to international agreements if these agreements appear to grant “voice opportunities.”

3. *Hegemonic Stability Theory.* Hegemonic stability theory suggests that regime creation, maintenance, enforcement, and durability are directly linked to a dominant power. Whether regarding security or trade regimes, hegemonic stability theorists argue that the concentration of power in one state means that the hegemonic state can use its power to create institutions, use a combination of carrots and sticks to gain cooperation from the periphery, and generate order, so long as its own hegemony endures.<sup>30</sup> As a consequence, if a state—or even non-state actor, such as the European Union—were behaving as a hegemon, this theory would predict that the hegemonic state would adhere to regimes to mold them into instruments through which to assert its power.

The theory has had traction with both classical and structural realists. E.H. Carr noted that great power concentrated in one state can create an international order, as the way the British Empire created a period of *pax Britannica*.<sup>31</sup> Charles Kindleberger echoed a similar argument, but with respect to economic stability. Noting that

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30. Some observers have claimed that this take on hegemonic stability offers an insufficient explanation of hegemonic leadership, arguing that institutions endure longer than the perpetuation of the hegemony itself. How else can the enduring institutional salience be explained other than that non-structural, non-materialist factors play an important role in facilitating cooperation? A liberal, benign hegemony, some have argued, may reduce the competitive fears sparked by anarchy and promote adherence, credible verification and enforcement. Randall L. Schweller & David Priess, *supra* note 19, at 16-18. Several scholars have suggested that a “black box” approach to the state ignores important characteristics about the state’s character; these characteristics are important variables in explaining the nature of international order, adherence to this order, and durability of that order. See, e.g., G. John Ikenberry, *Institutions, Strategic Restraint, and the Persistence of American Postwar Order*, 23 INT’L SEC. 43 *passim* (1999).

31. E.H. CARR, *supra* note 15, at 82-83. The realist Robert Gilpin similarly maintains that the hegemony is responsible for creating the international order, including the system of trade, rights, and political relations. See ROBERT GILPIN, *WAR & CHANGE IN WORLD POLITICS* 135 (1981).

the Great Depression resulted in part because of a global power vacuum, he concluded that the maintenance of markets, stable exchange rates, and policy coordination created the need for one powerful country to assume responsibility.<sup>32</sup>

In international legal literature, several scholars have written about the existence of hegemonic international law.<sup>33</sup> This approach seems consistent with hegemonic stability theory, but is more willing to suggest that a hegemon may choose not to participate in certain treaty regimes. In explaining this approach, Detlev Vagts has noted that hegemonic states

[W]ould avoid agreements creating international regimes or organizations that might enable lesser powers to form coalitions that might frustrate the hegemon. . . . [but] a hegemon can use an international organization to magnify its authority by a judicious combination of voting power and leadership, as the United States has often done.<sup>34</sup>

Vagts also suggests that a “dominant power can minimize the problem [of being held to troublesome treaties] by refusing to enter into treaties it finds inconvenient; one need not call the roll of these agreements, starting with the Law of the Sea Convention and the Vienna Convention on the Law of Treaties and running to the convention on land mines.”<sup>35</sup>

In sum, hegemonic stability theory predicts that a hegemon would be likely to adhere to an international agreement if the agreement appears to magnify the power of the hegemon. Conversely, a hegemon would be less likely to adhere to an international agreement if the agreement seems to restrict the freedom of behavior of the hegemon.

4. *Neoliberal Institutionalism.* Neoliberal institutionalists<sup>36</sup> also assume that the international system is anarchic but believe that there are significant reasons for participation in international legal regimes. Regimes, they argue, help create transparency in the motives and

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32. CHARLES P. KINDLEBERGER, *THE WORLD IN DEPRESSION, 1929-1939 passim* (1973).

33. Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 843 (2001).

34. *Id.* at 846.

35. *Id.*

36. Some of the literature refers to these scholars as “rationalist institutionalists.” See, e.g., Robert Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379, 381 (1988). The rationalist approach to cooperation suggests that states behave in a way that maximizes their utility functions. It seeks to explain the conditions under which states will cooperate through institutionalized arrangements. See *id.* at 381.

decision making of the other parties, alleviating the uncertainty inherent in anarchy. They also reduce transaction costs associated with ad hoc exchanges in the international system, monitor and contribute to enforcement, and impose sanctions for violation, all of which modify the payoff structure in favor of cooperation. Moreover, institutions lengthen the so-called “shadow of the future,” the likelihood and importance of future interaction.<sup>37</sup> Expecting future iterations of the exchange may mean that one party is less likely to be “tempted by immediate gains brought by unilateral defection,” thus increasing the likelihood of cooperation.<sup>38</sup>

Neoliberals would not suggest that actors enter into a regime that do not advance their interests. But they recognize that states would benefit from such regimes. Indeed, neoliberals would not expect regimes to arise unless those regimes allowed “states to do things they otherwise *could not* do, that is, achieve mutual gains from cooperation.”<sup>39</sup> In this Lockean<sup>40</sup> context, states are not motivated by altruism, but by gain. Neoliberals, unlike realists, are not concerned with relative gain, however. The prospect for absolute gain is a

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37. Robert Axelrod discusses the emergence of cooperation as dependent on what he refers to as the “shadow of the future.” See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 3-27 (1984). The shadow of the future can also be conceived as follows: “If a state knows that it will interact with another state only once, the shadow of the future is nonexistent and the state can pursue its short-term goals without considering the need to interact with the other state on subsequent occasions. Institutional arrangements, however, facilitate repeated interactions among states and thus lengthen the shadow of the future. If a state knows that it will engage in many transactions over time through such an institutional arrangement, it will be concerned about its long-term relationships with other states and will thus have a motive to cooperate.” Arend, *supra* note 4, at 121.

38. Kenneth Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, 38 *WORLD POL.* 1 (1985).

39. Robert Keohane and Lisa Martin rebut Mearsheimer’s claim about the ineffectiveness of institutions, arguing that institutions may harness overlapping state interests and facilitate cooperation. Robert Keohane & Lisa Martin, *The Promise of International Institutions*, 20 *INT’L SEC.* 39, 39-41 (1995). Specifically, Keohane and Martin take issue with Mearsheimer’s assertion, *see supra* note 20, at 7, that “institutions have minimal independent effect on state behavior.” *See id.*

40. A Lockean international system would be one in which states—while still seeking to promote their own interests—would not exist in a constant state of fear. Instead, they would be able to pursue their interests through cooperative means. Alexander Wendt discusses the potential movement of the international system “into a Lockean world of (mostly) mutually recognized property rights and (mostly) egoistic rather than competitive conceptions of security, reducing the fear that what states already have will be seized at any moment by potential collaborators, thereby enabling them to contemplate more direct forms of cooperation.” Alexander Wendt, *Anarchy Is what States Make of it: The Social Construction of Power Politics*, 46 *INT’L ORG.* 391, 415-16 (1992).

sufficient motivation for a state to bind itself to international legal regimes.

In defense of the assertion that states are more motivated by absolute gains conferred by institutions rather than relative gains pursued in the absence of institutions, some neoliberals cite states' financial investment in particular regimes.<sup>41</sup> Unless institutions impact state behavior, some scholars question why states would "invest resources in expanding international institutions."<sup>42</sup> Investment is but one indicator of states' commitment to the principles and benefits of institutionalized behavior. As later sections will discuss, it is also one measure of state adherence.

In sum, neoliberals would predict that states will be more likely to adhere to an international agreement if the agreement appears to grant long-term benefits to the states by reducing transaction costs, improving transparency, and allowing for the pooling of common resources. It would also seem that states will be more willing to adhere to an international agreement if they perceive that there will be reciprocal benefits from membership in the regime.

5. *Constructivism*. Constructivism is one of the more recent additions to the mainstream of international relations theory.<sup>43</sup> A self-styled sociological theory, constructivism<sup>44</sup> makes two major assumptions about the nature of the international system.

First, it asserts that the structure of the international system is a "social structure." As a social structure, the international system has both material and non-material elements (which the realists and neoliberals already claim). Constructivists would argue that material conditions such as weapons, oceans, geography, and people are major elements of the international system. What is different about the

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41. Keohane & Martin, *supra* note 39, at 40.

42. *Id.*

43. There has been much recent scholarship on constructivism. See, e.g., Martha Finnemore, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY *passim* (1996); Margaret Keck & Kathryn Sikkink, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS *passim* (1998); NICHOLAS G. ONUF, WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS *passim* (1989); JOHN GERARD RUGGIE, CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION *passim* (1998); ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS *passim* (1999)

44. In some of the early literature, what has come to be called constructivism was referred to as "reflective approach." See, e.g., Keohane, *supra* note 36, at 379; Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in REGIME THEORY AND INTERNATIONAL RELATIONS 49 (V. Rittberger ed., 1993).

constructivist approach is that constructivists claim that these material elements have no inherent meaning apart from the interactions of international actors. These elements are given meaning as states and other actors interact and establish relationships with each other. Alexander Wendt, for example, has explained that even the significance of state possession of nuclear weapons is not set. In an often-cited example, Wendt contends that “500 British nuclear weapons are less threatening to the United States than 5 North Korean nuclear weapons, because the British are friends of the United States and the North Koreans are not, and amity or enmity is a function of shared understandings.”<sup>45</sup> In other words, even hard, material elements are meaningless in the absence of social relationships. In addition to these material elements, constructivists would argue that there are also non-material elements in the international system. States and other international actors create a variety of norms, including legal norms. Like the material elements, these non-material elements also form a part of the structure of the international system.

Second, constructivism claims that there is a “mutually-constitutive” relationship between actor and structure. On the one hand, the actors in the international system—states, intergovernmental organizations, non-governmental organizations, corporations, and a variety of other non-state actors—create or constitute the structure of the international system. The actors, through their interactions, create the non-material elements in the international system and give meaning to the material elements. But on the other hand, the structure also *constitutes* the actors. As the actors interact with each other in a given international system, the structural elements affect how the actors see themselves.<sup>46</sup>

An example of this mutually constitutive relationship can be seen in the creation of the European Union.<sup>47</sup> In the 1950s, a number of European states created the various institutions of European

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45. Alexander Wendt, *Constructing International Politics*, 20 INT’L SEC. 71, 73 (1995).

46. How the structure creates the agent and how the agent acts as a force behind outcomes in the international system is at the heart of the agent-structure discussion in constructivism. Understanding the mutual constitution between agent and structure is integral to constructivism but often underdeveloped. For more discussion on the agent-structure debate, see David Dessler, *What’s at Stake in the Agent-Structure Debate*, 43 INT’L ORG. 441, 443 (1989).

47. For a discussion of the European Union and state identity, see Thomas Banchoff, *National Identity and EU Legitimacy in France and Germany*, in LEGITIMACY AND THE EUROPEAN UNION: THE CONTESTED POLITY 180 (Thomas Banchoff & Michael P. Smith ed., 1999).

integration—initially the European Coal and Steel Community and the European Atomic Energy Community. In doing this, they were creating a new structure for the European system. But as time progressed, and the European states interacted with each other in the context of this structure, the structure has affected the nature of the actors and altered their identity. What it means to be an individual state in Europe in 2005, for example, is very different than what it meant to be one in 1956. The participation of those states over a period of years has thus affected the very identity of the individual states in Europe based on the evolution and interaction of ideas and states across time.<sup>48</sup>

But while constructivism argues that the structure of the international system *can* alter the identity of actors, the structure does not inevitably have that effect. In other words, it is entirely possible that states could create a particular structure—an international organization, or legal regime for that matter—that would have no real effect on the actors due to the nature of their interactions. A treaty, for example, might be adopted by states but may not ultimately alter the identity of those states. One of the problems with constructivism is that it has yet to develop a clear theory to determine the circumstances under which identity change will take place.

What predictions would constructivism make about adherence to international regimes? First, following the structural realists, constructivists would assert that it is possible that the states may sign, ratify, and even follow treaty provisions as a mere convenience. When confronted with a national goal that seems to contradict the treaty obligation, the state will feel no sense of obligation. In short, the rule would be merely epiphenomenal—having no real effect on the behavior of states. Second, just as the neoliberals claim, a constructivist would recognize that states might adhere to an international regime because of expectations and, in fact, the reality of reciprocal gain. Third, and most important, constructivists would argue that it is possible that adherence may be connected to perceptions that the treaty regime defines the identity of the state. This can happen either from the outset or as the state participates in the treaty regime over time. On the one hand, it is possible that when initially joining the treaty regime, the state will perceive the regime to

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48. See Craig Parsons, *Showing Ideas as Causes: The Origins of the European Union*, 56 INT'L ORG. 47 *passim* (2002), for a discussion on the role of ideas and identities in the European Union.

be in accordance with its identity and will comply. Alternatively, it is also possible that the state will sign and ratify the agreement without any such perception, but will eventually come to see its identity defined by the treaty regime. If this were to occur, the regime would have had a significant effect in altering the identity of the state. Unfortunately, as noted earlier, constructivists are not quite able to predict when this change in identity will take place, but they argue that this can happen and would point to historic examples where it has happened.

## II. METHODOLOGY

To explain state behavior relating to the participation of states in international legal regimes, this Article examines how states have acted with respect to several multilateral treaties. While there is an extraordinarily wide range of both states and treaties to choose from, we selected states *and* treaties that would offer significant insight into state motivations.

### A. State Selection

In choosing states, we selected states that would be generally considered great powers either at the global or regional level. These states were selected for two primary reasons. First, in order for treaty regimes to be effective instruments, it is often necessary to have the participation of the global and regional powers. Because these states play major roles on the military, political, and/or economic planes, a treaty is less likely to achieve its goals if these states are outside the regime. Second, the states selected are thought to cover the different positions identified in this study, offering a lens through which the motivations and adherence of different regional or global positions can be analyzed.

These states can be classified as falling into one of four “positions” in the international system: hegemon, partner, competitor, and adversary.<sup>49</sup> The hegemon is an actor that can exercise significant, if not dispositive, influence in either the global or regional system. Robert Keohane defines a hegemon as a state that is “powerful enough to maintain the essential rules governing interstate

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49. This framework has been developed based on Alex Wendt’s “three cultures of anarchy” construct that discusses Hobbes, Locke, and Kant (enemy, rival, and friend, respectively). See ALEX WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 246-312 (1999).

relations, and willing to do so.”<sup>50</sup> In the treaty regimes explored in this Article, the United States clearly is the hegemon, but, as will be noted below, the European Union also seems to play that role in the WTO. A partner is a state that generally has collaborative relations with other states in a particular system—whether global or regional. France and Germany, for example, are partners in the European system. Their relationship is fundamentally collaborative, as they share common goals and visions for international politics. Another way to conceptualize this relationship is to conceive a partner as existing in a Kantian<sup>51</sup> relationship of amity with other states. A competitor is a state that has rivalries with other states in particular systems but is able to work out certain levels of cooperation. For example, Argentina and Brazil are competitors of Latin America because they compete for economic resources and in the area of international trade. Despite the areas of disagreement, there is a Lockean<sup>52</sup> relationship that permits collaboration through negotiations. An adversary is a state that is generally in a non-collaborative, enmity-like relationship with one or a number of other states. Because of the Hobbesian<sup>53</sup> nature of its relationships, cooperation with other states is extraordinarily difficult. This was the classic relationship between the United States and the Soviet Union during the Cold War. These positions can exist on either the global or regional level.

Based on these classifications, the nineteen states under examination can be depicted on the following chart—with the caveats that states may fall into different positions in different contexts and some non-state actors, such as the European Union, may also fall into certain positions.

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50. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 34-35 (1984).

51. IMMANUEL KANT, *TO PERPETUAL PEACE: A PHILOSOPHICAL SKETCH*, IN *PERPETUAL PEACE AND OTHER ESSAYS* (TED HUMPHREY trans., 1983). International relations scholars have used Kant’s work as a basis for a particular understanding of international order. *See, e.g.*, BULL, *supra* note 25, at 23-25. We use the concept of a Kantian system to indicate one in which the states share common goals and common norms. In such a system, the basic mode of behavior is highly cooperative.

52. *See* Wendt, *supra* note 45.

53. *See supra* note 27.

**Table 1.**  
**State Selection: Regional and International Power Comparison**

<b>State</b>	<b>Region</b>	<b>Position</b>	<b>Regional or Global Pairing</b>
Argentina	Latin America	Competitor	Brazil
Australia	Pacific	Partner	United States, Commonwealth Countries
Brazil	Latin America	Competitor	Argentina
Canada	North America	Partner	Atlantic Region
China	East Asia	Competitor	Japan, Russia, United States
Egypt	Middle East	Adversary	Israel
France	Europe	Partner	Europe
Germany	Europe	Partner	Europe
India	South Asia	Adversary	Pakistan
Iran	Middle East	Adversary	Israel
Israel	Middle East	Adversary	Iran, Egypt
Japan	East Asia	Partner	United States
Nigeria	Africa	Partner	Africa
Pakistan	South Asia	Adversary	India
Russia	Eurasia	Competitor	United States, China
South Africa	Africa	Partner	Sub Saharan Africa
Ukraine	Europe	Partner	Europe, Russia
United Kingdom	Europe	Partner	Atlantic Region
United States	North America	Hegemon	China, Russia, Europe

## B. Treaty Regime Selection

To examine state motivation for adherence to international agreements, we selected a range of treaty regimes that would allow us to test hypothesized reasons for participation. As a way of clarifying any distinction between high and low politics international regimes,

we selected two treaty regimes that exemplified the consummate issue of high politics—security—and two that represent the realm of low politics—trade and the environment. Looking at four regimes that span the high-low politics continuum allows for a better understanding of whether states are motivated differently by security and trade issues. That is, whether states view participation differently for different issue areas, and whether they are disproportionately concerned with relative gains in one set of issues compared to another.

The treaty regimes also vary in other ways that we suspect might influence adherence behavior. First, the regimes vary in the nature of their enforcement mechanisms. If, as we expect, states' concerns about violations by other states would be assuaged by a regime with an ability to verify adherence more credibly, we might see a higher propensity to participate in those regimes.

Second, the treaty regimes vary in the degree to which they may be seen to infringe upon the sovereignty of state, or to put it another way, compromise the autonomy of states.<sup>54</sup> On the low end, the treaties may modestly impose on autonomy, by affecting how a domestic audience regards legitimate policy. A more intrusive regime may introduce inspectors into a country suspected of violation and may alter domestic institutional arrangements or policy. We select treaties that vary in the degree to which they might interfere with domestic sovereignty. Treaties with greater potential for intrusiveness might be associated with a state's reluctance to ratify.

Third, the treaty regimes also vary with respect to their degree of normativity. While the term normativity has been variously used in international relations and international legal literature, we used the term to indicate the degree to which states and other actors in the international system perceive the obligations and institutions established by a particular legal regime to be efficacious. Regime normativity can be thought of along a continuum running from "low" to "high." Low normativity would exist when there is little consensus among states and other relevant actors about the value of the regime. High normativity, on the other hand, exists when there is a very broad consensus in support of the value of the regime. In such a

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54. Stephen Krasner defines autonomy such that "no external actor enjoys authority within the borders of the state." Stephen Krasner, *Compromising Westphalia*, 20 INT'L SEC. 115, 116 (1996). If the treaty requires modification of state policies, this results in an infringement of state autonomy. *See id.*

circumstance, there would be a general belief that the regime is efficacious.

Various factors seem to contribute to the normativity of a legal regime. Without providing an exhaustive list, some of these factors are as follows: moral efficacy, fairness, and authoritativeness. Moral efficacy would mean that states—and perhaps other international actors—perceive the provisions and institutions embodied in the regime to have a large degree of ethical “goodness.” The Slavery Convention,<sup>55</sup> for example, would likely be seen as having moral efficacy because it embodies a prohibition against something that is nearly universally seen as morally repugnant.<sup>56</sup> Fairness would embody two basic principles: procedural fairness and just distribution.<sup>57</sup> If a treaty regime has both procedural fairness and is seen as providing a just distribution it would be seen as fair. Authoritativeness would refer to the degree to which the treaty regime is perceived to see to possess legal authority, the degree to which it is perceived to be the law.<sup>58</sup> A treaty regime may have high authoritativeness if the regime were codifying a pre-existing rule of customary international law that had high authority. For example, when the Vienna Convention on Diplomatic Relations codified the concept of diplomatic immunity in 1961, the treaty had high authority because the pre-existing rule was well-established as highly authoritative. A treaty regime could also enjoy high authority if it were produced at a conference that enjoyed a wide level of support. Certain provisions of the 1982 Convention on the Law of the Sea, such as the 12-nautical mile territorial sea, received such a level of support that they would enjoy very high authority.

With these hypothesized explanatory variables in mind, we selected the following four international regimes: The Comprehensive

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55. Slavery Convention, Sept. 25, 1926, 212 U.N.T.S. 17, amended by Protocol Amending the Slavery Convention, Dec. 7, 1953, 182 U.N.T.S. 51.

56. For a discussion of the evolution of the norm against slavery, see Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT'L L. REV. 883 *passim* (2004).

57. FRANCK, *supra* note 4, at 7. Professor Franck explains that “procedural fairness” is the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process. *Id.* When international actors perceive that the rule functions to produce a “just” allocation of resources, it possesses the second element of fairness. *Id.* at 8.

58. A putative rule is perceived to be authoritative if the decision-making elites in states perceive the rule to be law. In traditional legal parlance, a rule is authoritative if it has *opinio juris*. This concept has been previously developed. See AREND, *supra* note 4, at 87.

Test Ban Treaty (CTBT); the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997 Land Mine Treaty); the World Trade Organization; and the Kyoto Protocol. As the table below shows, the regimes were all developed around the same time period, but vary in where they fall on the high/low politics distinction, their potential to infringe on a state's sovereignty, verification and enforcement, and normativity.<sup>59</sup>

<b>International Regime</b>	<b>Year Open for Ratification</b>	<b>High/Low Politics</b>	<b>Infringement on Sovereignty</b>	<b>Enforcement</b>	<b>Normativity</b>
Comprehensive Test Ban Treaty (CTBT)	1996	Very High	High	Moderate	Medium
Land Mine Treaty	1997	High	Moderate	Moderate	High
World Trade Organization (WTO)	1995	Low	Moderate	High	Uncertain
Kyoto Protocol	1997	Low	Moderate	Low	Mixed

### C. Evaluating Adherence

While it is easy to determine if a state is a party to an international agreement, it is much more difficult to determine the precise level of state adherence to a treaty regime. As a consequence, we will examine a variety of factors to evaluate the level of adherence. First, and foremost, we will explore the degree to which the state in question carries out the legal obligations contained in the treaty—bearing in mind that a state may carry out the obligations of a treaty whether or not it is a formal party.<sup>60</sup> In addition to looking at

59. See *infra* Part III for a discussion of these factors and the specific treaty regimes.

60. The most obvious and often-cited indication of adherence is whether a state is fulfilling the provisions included in the treaty. For example, in the case of the Land Mine Treaty, has a state party destroyed all stockpiles and all landmines under their jurisdiction, while also terminating the production and exportation of landmines? Given that each treaty has a number

the degree to which a state follows the explicit obligations of a treaty, we will also examine a variety of other factors that indicate adherence. One of these factors is institutional investment, or the willingness of the state to expend funds or establish domestic institutions for purposes of supporting the treaty regime. Another factor is domestic embedding, which refers to the degree to which a state has adopted legislation to implement provisions of the treaty within that state's domestic legal system. In the United States, for example, congressionally enacted legislation that executes provisions of a treaty that is not self-executing is the most obvious example.<sup>61</sup> Yet another factor is the willingness of the state to accept any dispute settlement mechanisms established by the treaty regime. This would mean both the state's willingness to participate in the proceedings of any such mechanisms and its willingness to accept and abide by decisions of such proceedings. Finally, we will also explore the willingness of states to participate in conferences or other negotiations connected to the treaty regime. In short, while there is no scientific method for determining adherence with precision, examining factors such as these and others that may be specific to a particular treaty regime should provide substantial information on which to make judgments about levels of adherence.

#### D. Determining State Motivations

Just as there is no precise method for determining adherence, so too is there no perfect method for determining why a state adheres to a particular international legal regime.<sup>62</sup> Short of entering the minds of the decision-making elites that act for the state, any method will provide only a limited vision of state motives. Nonetheless, one of the tasks of contemporary political science is to offer a window into the motives of decision makers. One way to do this is to examine

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of provisions, it is conceivable that states may adhere to several provisions, one provision, or even part of one provision, but not the treaty in its entirety.

61. For example, it is common practice in the United States to enact legislation for treaties that are not self-executing. The United States passed the Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-1093 (2000), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 U.S.C. §§ 2340-2340B (2000), both of which were congressionally-enacted for the purpose of executing those two particular non-self-executing treaties.

62. As noted at the outset of this article, Professor Michael Glennon has eloquently commented on the problem of assessing causation in international relations and has expressed profound skepticism about efforts to determine the motivations of policymakers. Glennon, *supra* note 3, at 987-89 (arguing that it is impossible to know the motives of decision makers).

what these decision makers say about their motivation for adhering to international agreements. By looking at official documents, speeches, and statements, an investigator can glean a basic understanding about the justifications states give for their adherence behavior.<sup>63</sup> While undoubtedly these official statements are imperfect,<sup>64</sup> they still provide an important indicator of motivation.<sup>65</sup> Accordingly, this Article will explore a variety of statements made by decision making elites in the public fora. We believe that these public proclamations will provide significant insight into motives for adherence.

### III. APPLICATION

#### A. The Comprehensive Test Ban Treaty

##### 1. *Background of the Treaty Regime.*

*a. Background.* Supported strongly by the U.N. General Assembly, negotiations to proscribe nuclear testing in all environments began in 1993. Between 1993 and 1996, the treaty was drafted and ultimately opened for signature on September 10, 1996. At that time, 71 states, including the 5 nuclear weapon states, signed the treaty in New York. At present, 176 have signed the treaty, 131

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63. Professor Jeffrey Frieden in his discussion of state preferences calls this method “observation.” Jeffrey A. Frieden, *Actors and Preferences in International Relations*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 39, 40 (David A. Lake & Robert Powell eds., 1999).

64. Frieden points out the difficulty of this observational method for determining state motivations:

All these ways to pin down the preferences imputed to nation-states for use in further analysis share a major problem, common to the investigation of anything that cannot be directly observed. The attempt to “induce” preferences by observation risks confounding preferences with their effects. The behavior observed—policies, statements, responses to surveys—is used “inductively” as indicative of preferences. Yet, in all these instances it may well be that this behavior results only partially, perhaps misleadingly, from underlying preferences. Perhaps the environment within which the behavior takes place is responsible for it in important ways that make it impossible to “read back” from behavior to preferences. The problem is well understood by survey researchers, who spend a great deal of time trying to make sure that the observation (the answer) is as true a reflection as possible of the individual’s beliefs (the opinion).

*Id.* at 59.

65. Even though Frieden points out the pitfalls of this approach, he acknowledges that “[i]n many instances, [the observational approach] may be the best research strategy available.” *Id.* at 60.

of whom have ratified.<sup>66</sup> Because the CTBT addresses nuclear weapons and their effects on war and peace, it and other treaties designed to control proliferation fall under the category of high politics.<sup>67</sup>

*b. Legal Obligations.* The Comprehensive Test Ban Treaty<sup>68</sup> requires that each state party not “carry out any nuclear weapon test explosion or any other nuclear explosion, and . . . prohibit[s] and prevent[s] any such nuclear explosion at any place under its jurisdiction or control.”<sup>69</sup> The Treaty’s provisions prevent testing nuclear weapons in *all* environments. Although all nuclear states have signed the CTBT, it has not yet entered into force because not all of the forty-four states known to possess nuclear weapons or reactors have ratified the treaty. To date, only thirty-three have done so, including Russia, the United Kingdom, and France. Other key nuclear states, including the United States, India, Pakistan, Israel, and China have not ratified.<sup>70</sup> Nonetheless, several of the nuclear states—the United States and China—have signed a moratorium on nuclear tests, indicating their intent not to test nuclear weapons.<sup>71</sup>

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66. For ratification data on the CTBT, see CTBTO Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, <http://www.ctbto.org> (last visited Mar. 8, 2006).

67. There is a rich literature on arms control. See MICHAEL A. LEVI & MICHAEL E. O’HANLON, *THE FUTURE OF ARMS CONTROL* (2005); CONTEMPORARY NUCLEAR DEBATES: MISSILE DEFENSE, ARMS CONTROL, AND ARMS RACES IN THE TWENTY-FIRST CENTURY (Alexander T.J. Lennon, ed. 2002); Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 *Berkeley J. Int’l L.* 405 (2003).

68. Comprehensive Nuclear Test Ban Treaty, U.N. Doc. A/50/1027/Annex, 35 I.L.M. 1439 (1996) [hereinafter CTBT]. For further background on the CTBT, see ROBERT KIRK, *A COMPREHENSIVE TEST BAN TREATY: A NEW VERIFICATION ROLE FOR THE INTERNATIONAL ATOMIC ENERGY AGENCY passim* (1995).

69. CTBT, *supra* note 68, art. 1.

70. *Id.* art. XIV. Of these forty-four states, the following have signed and ratified: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, Democratic Republic of the Congo, Finland, France, Germany, Hungary, Italy, Japan, Mexico, the Netherlands, Norway, Peru, Poland, Republic of Korea, Romania, Russian Federation, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, and United Kingdom. The following have signed, but not ratified: China, Colombia, Egypt, Indonesia, Iran, Israel, United States of America, Vietnam. The following have neither signed nor ratified: Democratic People’s Republic of Korea, India, and Pakistan. See Status of Signature and Ratification, <http://www.ctbto.org> (select “Signature and Ratification” hyperlink; then select “Status” hyperlink; then select “Go” button) (last visited Feb. 2, 2006).

71. Reference to China’s moratorium is included in the Chinese official statement at the 2003 Entry into Force Conference in Vienna. See H.E. Ambassador Zhang Yan, Head of the Chinese Delegation, Statement at the Conference on Facilitating the Entry into Force of the

c. *Enforcement Mechanisms.* The CTBT includes a verification regime intended to monitor and detect any nuclear test around the globe. The International Monitoring System (IMS) includes 321 monitoring stations and sixteen laboratories intended to collect evidence of nuclear tests.<sup>72</sup> The system monitors global activity, which is then processed and recorded by CTBT Organization (CTBTO) analysts. IMS data is sent to state signatories, who can respond by requesting clarification of possible non-adherence. State parties that receive requests must provide clarification within forty-eight hours. If information provided for clarification is not satisfactory to the state that requested information, an on-site inspection (OSI) may be requested. The intent of the inspection would be to ascertain any violation of the Treaty, “gather any facts which might assist in identifying any possible violator,”<sup>73</sup> and to provide a final verification measure. Only after the Treaty enters into force, however, would OSIs be conducted. Thus, no inspections have occurred to date. In sum, the verification/enforcement arrangements of the CTBT would seem to be “low.”

d. *Effect on Sovereignty.* By itself, the International Monitoring System (IMS) is not intrusive. Its monitoring of global events is more surveillance of all global activity rather than of specifically targeted states. What may be perceived by some states to be intrusive are the next verification and enforcement steps. Although the CTBTO asserts that the inspection “would be conducted in the least intrusive manner to protect the national security interests of the Inspected State Party” and that “the disclosure of confidential information unrelated to the purpose of the inspection would be prevented,” the net effect is that the suspected state must admit inspectors into its country.<sup>74</sup> Accordingly, the CTBT

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Comprehensive Nuclear-Test-Ban Treaty (Apr. 9, 2003), <http://www.china-un.ch/eng/gjhyfy/hy2003/t85267.htm> [hereinafter Statement by H.E. Ambassador Zhang Yan]. See THE NAT'L ACADEMIES (July 31, 2002), *Academy Addresses Technical Issues in Nuclear Test Ban Treaty: Verification Capabilities Are Good, Cheating Possibilities Are Limited, and Safety and Reliability of U.S. Weapons Can Be Maintained Without Nuclear Tests*, <http://www4.nationalacademies.org/news.nsf/isbn/0309085063?OpenDocument> for historical reference to the American moratorium.

72. The verification regime is established by art. IV of the CTBT and elaborated upon in the Protocol to the Comprehensive Test Ban Treaty. CTBT, *supra* note 68, art. IV; see also *id.*, Protocol.

73. *Id.* art. IV, sec. D, para. 35.

74. CTBTO, OVERVIEW OF THE VERIFICATION REGIME, <http://www.ctbto.org/verification/onsiteinspection.html> (last visited Mar. 3, 2006).

regime infringement on sovereignty would be rated at the “high” level.

*e. Normativity.* In light of what some commentators have called the “nuclear taboo,”<sup>75</sup> it might seem at the outset that the normativity of the CTBT would be very high. But there is still a strong sense by states such as the United States and China that certain testing of weapons is necessary to maintain the reliability of the nuclear stockpiles.<sup>76</sup> Moreover, states like India and Pakistan seem to believe that a regime that prohibits testing for all states operates in an unfair manner for those states that do not have a well-developed nuclear stockpile.<sup>77</sup> Because of these varying beliefs about the regime, it will be rated at a “moderate” level.

2. *Adherence Behavior.* Given this analysis, states seem to fall into three categories: high, medium, and low adherence. Eight states fall into the high range: Argentina, Australia, Brazil, Canada, France, Germany, Japan, Ukraine, and the United Kingdom. Four states fall into the medium category: Nigeria, Russia, and South Africa. And seven states fall into the low area: China, Egypt, India, Iran, Israel, Pakistan, and the United States.

Of the states that have technically fulfilled the provisions of the treaty—all states except Pakistan and India—adherence behavior has been variable. What may explain the variance are states’ historical ambitions regarding nuclear weapons. Some states, such as Canada, have never seriously considered a nuclear program and required little deliberation before ratifying and fulfilling the provisions of the treaty regime. These states tend to adhere more closely to the regime in part because doing so requires no deviation of their current policy.

Other CTBT states such as Argentina, Brazil, and South Africa, had at one time considered nuclear programs but had already agreed to restrict their nuclear development with the ratification of the Nuclear Non-Proliferation Treaty. Since testing a nuclear device is a key component of nuclear development, fulfillment of the CTBT provisions is almost a de facto prerequisite for NPT ratification by non-nuclear states. Nonetheless, these states not only have fulfilled the provisions but have been consistent participants in the regime and

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75. See, e.g., NINA TANNENWALD ET AL., *THE NUCLEAR TABOO: THE UNITED STATES AND THE NON-USE OF NUCLEAR WEAPONS SINCE 1945 passim* (2005).

76. See *infra* notes 80-82, 91-93 and accompanying text.

77. See *infra* note 95 and accompanying text.

advocates of the universalization of the treaty. South Africa has gone even further and hosted workshop and training programs on the CTBT for African states, acting almost as a CTBT ambassador to its region.<sup>78</sup>

Since the NPT allows nuclear states to retain their inventories, the nuclear states represent more difficult cases when looking at the effect of the treaty on state behavior. Of the internationally recognized nuclear states, three have ratified the treaty, but none of the states, even those that have not ratified (China and the United States), have confirmed tests. France, which was actively testing during the CTBT negotiations of 1995, advocated the zero option prohibiting any level or circumstance of testing. After completing final testing in January 1996, France dismantled its Pacific test site and was one of the first states—along with the U.K., another nuclear state—to ratify the CTBT in April 1998.

China, Russia, and the United States each present different permutations on the ratification and adherence combination. China was one of the first states to sign the treaty in September 1996 but has not yet ratified; nonetheless, it issued a moratorium on testing in July 1996 and reasserted its commitment to that moratorium in 1999. It also has plans to establish twelve International Monitoring Stations (IMS) on its territory, has been an active participant in the Conferences, and has established a National Preparatory Authority for Implementation of CTBT that is in charge of Treaty implementation in China. China has urged other nuclear states to continue observing their moratoria on testing and a timely universalization of the treaty, particularly by those countries whose erroneous position on the treaty have prevented ratification.<sup>79</sup>

China, however, continues to have unresolved reservations about the Treaty. First, China retains its early concern about the zero yield circumstance, which would prohibit “peaceful nuclear explosions”

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78. “South Africa concluded ‘facility agreements’ with the CBTO permitting it to establish, in terms of the Treaty, International Monitoring System (IMS) stations within South Africa at Boshof, Marion Island, Sutherland and at the SANAE base in Antarctica.” Department of Foreign Affairs, Republic of South Africa, Comprehensive Nuclear Test-Ban Treaty, *available at* <http://www.dfa.gov.za/foreign/Multilateral/inter/ctbt.htm> (last visited Mar. 3, 2006).

79. See H.E. Ambassador Shen Guofang, Head of the Chinese Delegation, Statement at the Conference on Facilitating the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty (Nov. 12, 2001), <http://www.un.org/webcast/ctbt/statements/chinaE.htm> [hereinafter Statement by H.E. Ambassador Shen Guofang].

(PNEs).<sup>80</sup> While China has dropped its earlier insistence, it has asserted the need to address PNEs ten years after entry into force; China appears to believe that PNEs may be necessary for the maintenance and modernization of its inventory, which suggests that even if China were to ratify, its future adherence is uncertain. Second, China objects to using National Technical Means (NTM)—overhead reconnaissance satellites—for verification of adherence behavior. They argue that using NTM gives a monitoring advantage to Russia and the United States, who have a comparative advantage in reconnaissance technology. Moreover, they have continued to oppose allowing NTM as part of the verification regime, specifically with the triggering of on-site inspections (OSI), which are considered intrusive and an infringement on sovereignty.<sup>81</sup> In spite of these reservations, China publicly endorses the treaty and indicates that it “attaches importance to the treaty and has been working unswervingly for its early entry into force.”<sup>82</sup>

Russia was an early signatory of the CTBT and ratified the treaty, but its adherence has been more circumspect. The Russian nuclear test site, Novaya Zemlya, has sparked suspicion for several reasons. First, the Russian government has asserted the importance of maintaining the test site as a matter of national security and pride as a nuclear state. Second, the northern facility lacks transparency, and open source details of nuclear testing are controvertible, making CTBT violations difficult to discern. The Russian government has acknowledged that they maintain and even upgrade the site, that they have conducted subcritical tests—allowed under the Treaty—and that they may need to resume testing in the future depending on political

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80. In earlier negotiations, China argued that PNEs were necessary for the development of peaceful nuclear energy. China used its status as a “developing country” to argue that it would suffer a disadvantage were it not allowed to explore advanced nuclear technology. The CTBT, China argued, would limit scientific and technological development. See The Chinese Delegation, Statement on the “Peaceful Use of Nuclear Energy and Peaceful Nuclear Explosion” Before the NTB Ad Hoc Committee, Working Group II, (Mar. 9, 1995), *available at* <http://www.nti.org/db/china/engdocs/ctbt0395.htm>.

81. One of China’s consistent reservations regarding the CTBT has been the use of NTM for inspections. See NTI AND CENTER FOR NONPROLIFERATION STUDIES, COMPREHENSIVE TEST BAN TREATY (CTBT), <http://www.nti.org/db/china/ctbtorg.htm>; see also NTI AND CENTER FOR NONPROLIFERATION STUDIES, CHINA’S ATTITUDE TOWARD NATIONAL TECHNICAL MEANS (NTM) OF VERIFICATION, <http://www.nti.org/db/china/ntmpos.htm> (last visited Feb. 6, 2006). See also Sha Zukang, Chinese Ambassador to the Conference on Disarmament (Aug. 1, 1996), <http://www.nti.org/db/china/engdocs/sha0896.htm>.

82. See Statement by H.E. Ambassador Zhang Yan, *supra* note 71.

developments.<sup>83</sup> The rhetoric, subcritical tests, and active maintenance of the facility call into question Russia's commitment to the moratorium. If Russia determined the need to resume nuclear tests, it would be required to test subcritically, test clandestinely, or withdraw from the treaty. For now, however, Russia maintains that it is committed to the treaty and its moratorium and that the U.S. media and government has charged Russia with violations of the CTBT only to distract international attention away from its own failure to ratify the treaty.<sup>84</sup>

Although the United States contributes financially to the CTBTO, its overall adherence appears to be waning.<sup>85</sup> President Clinton signed the treaty in 1996 and submitted it for advice and consent by the Senate in 1997.<sup>86</sup> On October 13, 1999, the Senate failed to approve the treaty by a vote of 51-48.<sup>87</sup> President Bush, though he has applauded states such as Libya for committing to the CTBT, has been loath to bind the United States to the treaty, arguing instead the modernization of the U.S. nuclear arsenal is necessary for dealing with new threats and requires testing as part of the development.<sup>88</sup> Thus far, the United States has gone about

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83. See NTI AND CENTER FOR NONPROLIFERATION STUDIES, RUSSIA: ARCHIVED CTBT RATIFICATION AND NUCLEAR TESTING DEVELOPMENTS; NOVAYA ZEMLYA TEST SITE TO BE MAINTAINED; RUSSIA COMPLETES PLANNED SERIES OF SUBCRITICAL NUCLEAR TESTS IN ACCORDANCE WITH CTBT STANDARDS; <http://www.nti.org/db/nisprofs/russia/treaties/ctbt2.htm> (last visited Mar. 9, 2006).

84. Comparisons of the Russian and American nuclear programs have been documented by numerous analysts, including those at the Center for Nonproliferation Studies at the Monterey Institute of International Studies, which has compiled evidence and analysis from open-source materials regarding the Russian and U.S. nuclear development programs. See, e.g., CENTER FOR NONPROLIFERATION STUDIES, RENEWED U.S.-RUSSIAN CONTROVERSY OVER NUCLEAR TESTING (May 27, 2002), <http://cns.mii.edu/pubs/week/020527.htm>.

85. The United States has typically been a substantial contributor to the treaty regime but in recent years has decreased its contribution. It continues to support monitoring activities through the International Monitoring System but has limited its financial support to the regime, earmarking funding only for the monitoring system. See, e.g., Daryl Kimball, Arms Control Association, *Maintaining U.S. Support for the CTBT Verification System*, (2002), <http://www.armscontrol.org/aca/ctbtver.asp>.

86. Marion Nash Leich, *Contemporary Practice of the United States Relating to International Law* 92, AM. J. INT'L L. 44, 59 (1998).

87. See <http://foreign.senate.gov/treaties.pdf>, for the legislative history of the CTBT in the U.S. Senate.

88. See, e.g., George Perkovich, *Bush's Nuclear Revolution: A Regime Change in Nonproliferation*, FOREIGN AFFAIRS (2003), available at <http://www.foreignaffairs.org/20030301facomment10334/george-perkovich/bush-s-nuclear-revolution-a-regime-change-in-nonproliferation.html>. The Bush administration has asserted the goal of maintaining primacy, which it argues may require modernization of its existing capabilities. See *id.*

maintaining and modernizing its nuclear inventory by conducting sub-critical tests, which are periodically conducted by the National Nuclear Security Agency (NNSA).<sup>89</sup>

United States government policy statements, however, have hinted at the need for more robust testing in the future. The 2002 Nuclear Posture Review (NPR) states the need for a responsive infrastructure, one that is capable of maintaining confidence in the existing inventory and developing new capabilities for the purpose of addressing future security threats.<sup>90</sup> The briefing associated with the NPR indicated that significant investment and modification to the existing force would be required to meet the requirements for a responsive infrastructure.<sup>91</sup> Also associated with the NPR has been an increase in funds to study the modernization of the nuclear force and specific warheads; while the study is within the provisions of the CTBT, any development of new weapons would violate the provisions.<sup>92</sup> Although the United States has maintained a moratorium on testing, it holds open the possibility that new weapons may be required and tested.<sup>93</sup>

Ratification and adherence for the unofficial nuclear states have been decidedly low. In addition to India and Pakistan, which did not ratify but did conduct tests,<sup>94</sup> several Middle Eastern states appear to

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89. See, e.g., Congressional Research Service report, Jonathan Medalia, *Nuclear Testing and Comprehensive Test Ban: Chronology Starting September 1992*, Order Code 97-1007 F (June 9, 2005).

90. See Perkovich, *supra* note 88.

91. Leaks from Nuclear Posture Review indicates that “new capabilities must be developed to defeat emerging threats such as hard and deeply buried targets to find and attack mobile and relocatable targets, to defeat chemical or biological agents, and to improve accuracy and limit collateral damage.” For reports on the leaked report, see David Ruppe, *U.S. Seeks Range of New Nuclear Capabilities, Leaked Document Indicates*, GLOBAL SECURITY NEWSWIRE, Mar. 14, 2002, <http://www.globalsecurity.org/org/news/2002/020314-nuke01.htm>. For the official briefing on the report, see, e.g., Defense Department News Transcript, *Special Briefing on the Nuclear Posture Review*, (Jan. 9, 2002), [http://www.defenselink.mil/transcripts/2002/t01092002\\_t0109npr.html](http://www.defenselink.mil/transcripts/2002/t01092002_t0109npr.html); Congressional Research Service, Amy F. Woolf, *The Nuclear Posture Review: Overview and Emerging Issues*, Order Code RS21133 (Jan. 31, 2002).

92. Though Congressional support has been limited, the Congress did fund Department of Energy and Defense research for “bunker buster” weapons. For a thorough discussion of the NPR and follow-on policies, see PUBLIC BROADCASTING SERVICE, TRACKING NUCLEAR PROLIFERATION, <http://www.pbs.org/newshour/bb/international/proliferation/countries/us.html>.

93. The Pentagon, in its press release for the Nuclear Posture Review (NPR) indicated its continuing opposition to the CTBT but also its continuing support for the moratorium on testing. Transcript of Press Release available at [http://www.defenselink.mil/transcripts/2002/t01092002\\_t0109npr.html](http://www.defenselink.mil/transcripts/2002/t01092002_t0109npr.html) (last visited Mar. 9, 2006) [hereinafter Pentagon Press Release].

94. The Acronym Institute, which monitors nonproliferation, cites that three states—India, Pakistan, and North Korea—have not signed the CTBT. See The Acronym Institute, *Pakistan*

be concerned not just with their own ability to develop nuclear weapons but with the inability to verify effectively whether regional competitors are testing weapons that could be used offensively. Adherence is low for the Middle East countries under consideration, as the Egyptian representative to the Conference on Facilitating the Entry into Force of the CTBT noted that the “question of the ratification of the CTBT cannot neglect regional considerations associated with the Middle East[,] [e]specially, Israel’s position vis-à-vis the ratification of the treaty, and her stances on nuclear non-proliferation in general.”<sup>95</sup> Israel signed the treaty in 1996, but claims not to have ratified because of concerns with verification.<sup>96</sup> To this end, it has offered to participate in the development of the verification regime, as well as commit resources to the monitoring technology for the region.<sup>97</sup> While agreeing to build monitoring stations in Israel is more likely an indicator of Israel’s interest in promoting its own security rather than a sign of commitment to the treaty regime itself, Israel has vigorously asserted its general support for credible verification as a *sine qua non* for its entry into the regime.<sup>98</sup>

In reading statements from states as to what concerns cause them not to ratify or adhere to the CTBT, a clear pattern emerges. When it comes to nuclear weapons, many states recognize that their own security is directly a function of the activities of other states. In this regard, security gains for one side are considered to be a loss for the other side, creating a security dilemma between or among the competitor states. Fear that an adversary would not adhere to the treaty results in non-adherence in other competitor states. The ways

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*Responds to India’s Nuclear Doctrine*, 41 DISARMAMENT DIPLOMACY (Nov. 1999), <http://www.acronym.org.uk/41pakis.htm>.

95. H.E. Ambassador Mahmoud Mubarak, Assistant Minister for Foreign Affairs of the Arab Republic of Egypt, Statement at the Conference on Facilitating the Entry into Force Of the Comprehensive Nuclear-Test-Ban Treaty (Nov. 11-13, 2001), <http://www.un.org/webcast/ctbt/statements/egyptE.htm> [hereinafter Statement by H.E. Ambassador Mahmoud Mubarak]. Egypt’s statement at the Entry into Force Conference reflects that of other Middle East countries, including Iran, which are concerned with Israel’s nuclear development and its potential to target other countries in the region. *See id.*

96. Pentagon Press Release, *supra* note 93.

97. *Id.*

98. Israel’s position on the CTBT is captured in the national statement by Gideon Frank. *See* Gideon Frank, Director General of the Israel Atomic Energy Commission, Statement at the Conference on Facilitating the Entry into Force of the Comprehensive Nuclear Test Ban Treaty (Nov. 11, 2001), <http://www.un.org/webcast/ctbt/statements/israelE.htm> [hereinafter Statement by Gideon Frank].

in which those fears animate states are manifested as different patterns of behavior.

While China, for example, appears to be concerned about its position of disadvantage if it ratifies, the United States has not. In spite of the oblique language, China is clearly concerned with the United States' decision not to ratify: "It is notable that regrettable voices have been uttered in the process of endeavoring for an early entry into force of the CTBT. The 1st Conference on Facilitating the Entry into Force of the CTBT had barely concluded, a country explicitly refused to ratify the treaty. More recently, it even asserted that it would participate in the work of the PrepCom for CTBTO selectively."<sup>99</sup> China, as previously noted, is also concerned with the United States' and Russia's relative advantage in monitoring and verifying nuclear activity. Not only has the United States not ratified the treaty, it (as well as Russia) also has superior technology for doing reconnaissance on test activities.<sup>100</sup> China is, therefore, not only concerned with the constraints that CTBT ratification would place on it primarily vis-à-vis the United States, but also concerned with its relative deficiency in the ability to monitor test activity. Its position as a rising power and a potential challenger to the United States in the capacity of global hegemon means that it monitors the U.S. behavior and adheres on a level of rough parity with the hegemon.

Concerns with relative security influence, not just the behavior of challenging powers, but also the behavior of regional powers. A close look at the empirical record on ratifications suggests that regional powers ratify, or fail to ratify, in blocs. The three European regional partners—Germany, France, and the U.K.—signed and ratified in the same period.<sup>101</sup> Specifically, the two nuclear powers coordinated on submitting their instruments of ratification on the same day, among the first thirteen states to ratify the treaty.<sup>102</sup>

Brazil and Argentina offer another example in which regional powers—this time regional competitors—have worked in tandem to commit themselves to non-proliferation. Both states engaged in nuclear research in the 1970s, but began negotiating joint non-proliferation agreements that culminated with a bilateral agreement signed in 1991, the signing of the regional non-proliferation

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99. Statement by H. E. Ambassador Shen Guofang, *supra* note 79.

100. Statement by H.E. Ambassador Mahmoud Mubarak, *supra* note 95.

101. See *supra* note 70, at the CTBTO hyperlink for the status of signature and ratification.

102. Statement by Gideon Frank, *supra* note 98.

agreement in 1993-94, and the ratification of the Nuclear Non-Proliferation Treaty several years later.<sup>103</sup> Although Argentina has been the first to ratify each of these previous agreements, Brazil took the lead in signing the CTBT, with Argentina ratifying within months thereafter. For the CTBT and the previous non-proliferation agreements, the regional cooperation must be understood in terms of rapprochement between the two powers. Each country had gradually dismissed long-held nuclear development policies through the process of bilateral negotiations involving transparency and confidence-building measures.<sup>104</sup> The result has been a de-escalation of previous competitive tensions and a joint willingness to conclude their nuclear ambitions.

The Brazil-Argentina example reflects a neoliberal institutional motivation. Although the history between the two states has been tense at times, given their previous nuclear ambitions, both states have concluded that maximizing their own security *and* economic position depends on strong bilateral relations, which are made more efficient with the transparency afforded by the non-proliferation institutions. The gradual commitment to these institutions has been a process of reciprocity, in which both sides have acknowledged the opportunity for mutual gain, sat down at the negotiating table, and offered their cooperation. In the initial phases, Argentina made the overtures by ratifying first, but specifically with the CTBT, Brazil ratified before Argentina, cementing the tit-for-tat process of reciprocity between the two states, consistent with neoliberal institutionalist expectations of cooperation.

Conversely, the motivations by the non-ratifying states in the Middle East—regional adversaries—are consistent with realist concerns with anarchy and relative gains. States appear to react to the perceived threat of Israel, which is thought to have a well-developed nuclear program but has not ratified either the NPT or the

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103. John R. Redick, et. al., *Nuclear Rapprochement: Argentina, Brazil, and the Nonproliferation Regime*, 18 WASH. Q. 107, 110-12 (1995). The agreement of the early 1990s was a pact between Argentina and Brazil and signed by the IAEA and Agência Brasileiro-Argentina de Contabilidade e Contrôlo de Materiais Nucleares (ABACC), an agency designed to account for and control nuclear development in South America. This bilateral agreement allowed for full-scale IAEA safeguards of the nuclear installations in each country. After being signed in 1991, it was finally ratified by Brazil in 1994. Brazil and Argentina both signed the Treaty of Tlatelolco in 1994, creating a regional nuclear free zone of Latin America. See BRAZILIAN-ARGENTINE AGENCY FOR ACCOUNTING AND CONTROL OF NUCLEAR MATERIALS (ABACC), <http://www.abacc.org> (last visited Mar. 3, 2006).

104. Redick et al., *supra* note 103, at 110-12.

CTBT.<sup>105</sup> The Middle East regional powers that have not ratified the CTBT consistently cite Israel as their main reason for not ratifying. Iran, echoing the concerns of Egypt, asserted that the “the Middle East is threatened by the Israeli nuclear program . . . . This policy of terror has . . . created a situation where many disarmament and arms control instruments have failed to receive the full support of regional countries.”<sup>106</sup> These states are unwilling to constrain their own development as long as the regional nuclear threat is unconstrained. Any tests that Israel conducts are thought to compromise the security of the surrounding states; such rationale is clearly a zero sum, realist calculation.

Israel operates out of a similar set of concerns, but their specific concern appears to be with credible verification of other state parties to the treaty. The Israeli government asserts its long-standing support for non-proliferation, but claims that it is not confident in the ability of the verification regime to detect violators.<sup>107</sup> Rather, it questions the regime’s “immunity to abuse” and argues that verifiable adherence by other states in the Middle East is required for Israel to participate more fully in the regime.<sup>108</sup> In short, all states in the Middle East perceive their security to be at particular risk when a rival state chooses not to adhere to the security regime and when compliance cannot be adequately verified. Given these calculations, the Middle Eastern states under consideration have chosen not to ratify.

Concerns with infringement on sovereignty have motivated several states, including China. One of China’s concerns in negotiations has been the use of on-site negotiations as a vehicle for treaty verification.<sup>109</sup> The government was concerned that using human intelligence as a warrant for inspections would legitimize espionage, and that requests for inspections might be vulnerable to

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105. *See id.*

106. H.E. Dr. M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran, Statement at the Conference on Facilitating the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty, New York (Nov. 11-13, 2001), *available at* <http://www.un.org/webcast/ctbt/statements/iranE.htm>; *see also* *Nuclear-Weapon Use by Terrorists, ‘Chain Of Setbacks’ in Disarmament Among Issues Highlighted in Test-Ban-Treaty Conference*, text from the Second Meeting of the Conference on Facilitating the Entry into Force of the CTBT, *available at* [http://www.ctbto.org/reference/article\\_xiv/2001/un\\_pressrelease\\_111101\\_pm.pdf](http://www.ctbto.org/reference/article_xiv/2001/un_pressrelease_111101_pm.pdf) [hereinafter Statement by H.E. Dr. M. Javad Zarif] (last visited Mar. 3, 2006).

107. *See* Statement by Gideon Frank, *supra* note 98.

108. *See id.*

109. Statement by H.E. Dr. M. Javad Zarif, *supra* note 106.

abuses by other state parties.<sup>110</sup> In signing the treaty, China asserted the importance of its sovereignty:

[The Chinese Government] firmly opposes the abuse of verification rights by any country, including the use of espionage or human intelligence, to infringe upon the sovereignty of China and impair its legitimate security interests in violation of universally recognized principles of international law.<sup>111</sup>

In part as a result of China's concerns regarding inspections as well as the sovereignty concerns of the United States, the treaty requires that thirty of the Executive Council's fifty-one members approve any inspection.<sup>112</sup> Maintaining sovereignty and eschewing the transparency generally associated with institutions is a consistent interest of China with regard to this treaty.

Although the United States was the first to sign the CTBT (China was second), the early signature was not an early indicator of its commitment to the treaty. The United States has applauded states that ratified the treaty, as it did with Libya when it ratified in January 2004,<sup>113</sup> but has, nevertheless, slipped away from ratifying the treaty. International reaction to the Senate's vote against the treaty in 1999 does not appear to have changed the American position towards ratification,<sup>114</sup> and in fact, the United States has become even less

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110. *Id.*

111. Statement by the Chinese Government upon Signature of the Comprehensive Test Ban Treaty (CTBT) (Sept. 24, 1996), <http://www.nti.org/db/china/engdocs/ctbtdec.htm>.

112. The so-called "green light" procedure authorizes inspections after thirty of the fifty-one Council members approve a state party's request for inspection. The Executive Council consists of Annex I countries with representation from Africa (ten), Eastern Europe (seven), Latin America and the Caribbean (nine), Middle East and South Asia (seven), North America and Western Europe (ten), and the Pacific (eight). See art. II, the Organization, sec. C of the CTBT. Discussion of the green light procedure may be found at the Nuclear Threat Initiative, <http://www.nti.org/db/china/ctbtorg.htm> (last visited Mar. 9, 2006).

113. In a joint declaration with the European Union, the United States cited the Libyan accession to the CTBT, its cooperation with the IAEA, and its accession to the Chemical Weapons Convention as examples of successful efforts to control proliferation. See Press Release, the White House, Text Of U.S.-EU Declaration On The Non-Proliferation Of Weapons Of Mass Destruction (June 26, 2004), <http://www.whitehouse.gov/news/releases/2004/06/20040626-6.html>.

114. Several countries asserted their disappointment with the U.S. vote, including Japan, China, Canada, Australia, and Ukraine. See, e.g., Country Statements at the Conference on Facilitating the Entry into Force of the Comprehensive Test Ban Treaty and various Embassy statements, including Press Release, U.S. Department of State, Remarks By Secretary Of State, Madeleine K. Albright and Ichita Yamamoto, Japanese State Secretary for Foreign Affairs (Oct. 18, 1999), <http://canberra.usembassy.gov/hyper/WF991018/epf103.htm>. Though U.S. diplomats, particularly under the Clinton administration, continued to express their support for expeditious ratification, the United States has not again submitted the treaty for ratification to the Senate.

supportive of the regime. Several factors impede American support for the treaty.

The first relates to security optimization and the role of nuclear weapons in managing U.S. security interests. The United States has argued that the best way to maintain confidence in its inventory is to conduct periodic nuclear tests, without which the United States would not be able to uncover design, safety, or reliability problems.<sup>115</sup> A treaty that potentially constrains its ability to maintain its arsenal and defend itself properly is unlikely to gain U.S. support. Some experts have argued that the United States can ensure the continuing performance of weapons in its stockpile by testing the non-nuclear components of the weapons—an activity allowed under the CTBT—and that the United States has not traditionally relied on such tests for maintenance.<sup>116</sup> This assessment is potentially useful for assuaging concerns about current stockpiles and is consistent with why the United States has been able to maintain its moratorium on testing. It does not address, however, the possibility that the United States would need to develop new types of weapons, which do require testing.

The second concern of the United States is with regard to verification, in particular, that states could conduct tests below the threshold of detection. The implication is that these states would be able to enhance their nuclear advantage while remaining a ratifying party of the regime. Without a credible guarantee that other nuclear states and states with nuclear ambition will adhere to the provisions of the treaty, those who do adhere would be at a relative disadvantage. Some proliferation specialists have noted that meaningful tests below the level of detection are not plausible, and that only a handful of highly experienced nuclear-weapon states could succeed in conducting clandestine tests, and those tests would yield limited insight.<sup>117</sup> Nonetheless, detection and verification require a full implementation of the International Monitoring System, which

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115. *See supra* note 113.

116. *See* NATIONAL ACADEMY OF SCIENCES, TECHNICAL ISSUES RELATED TO THE COMPREHENSIVE NUCLEAR TEST BAN TREATY 20 (2002).

117. The National Academy of Sciences noted that the United States, Russia, France, China, and the U.K. might be able to succeed in conducting clandestine tests under the threshold of detection. The Committee also noted that such tests would not offer substantial insight compared to what these states already know. *See* NATIONAL ACADEMY OF SCIENCES, *supra* note 116, at 61-78.

requires the participation of other states including those that have not ratified the treaty like China and Israel.

Adherence behavior on the part of the United States appears to be motivated by realist concerns of cooperation and defection under anarchy. Without credible assertion that other rival countries will comply and that non-adherence will be detected and punished, the United States is averse to submitting to adherence. As one opponent of the CTBT has noted, “U.S. ratification would most likely have ended up placing dangerous restrictions on the reliability of the American nuclear arsenal without similarly restricting the capabilities of other nuclear powers, present and future.”<sup>118</sup> Concerns with the relative advantages of states that defect, and the relative advantage of the United States if it enhances its arsenal, have both prohibited the United States from ratifying the CTBT.

3. *Validation of Theories.* In summary, states appear to be motivated by concern for relative security. In the absence of a perfectly credible verification regime—a reality in an anarchic world—states are reluctant to constrain their ability to maintain a stable, reliable arsenal. The effects of anarchy are particularly acute for states that are regional adversaries: India and Pakistan, and Israel, Egypt, and Iran. What Brazil and Argentina—two states that can be considered regional competitors—show, however, is that just as tensions can escalate, making cooperation in the security arena prohibitively difficult, they can also de-escalate, creating conditions for cooperation. Over a period of a couple decades, these two countries engaged in a series of bilateral confidence-building agreements that set the stage for the multilateral regime of the NPT and CTBT. Previous bilateral détente may not be the necessary and sufficient condition for broader cooperation in a multilateral treaty, but it seems to have worked in the case of Brazil and Argentina. The European countries are arguably protected by the U.S. security umbrella, but did in fact sign and ratify in concert, suggesting some awareness of the behavior of other regional players. It appears that the other countries are still too concerned with regional security and their ability to maximize their security, particularly vis-à-vis competitors in the region. This conclusion would seem to validate both the realist and neoliberal hypotheses. While the general

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118. Robert Kagan & William Kristol, *Senate Republicans' Finest Hour*, WEEKLY STANDARD, Oct. 25, 1999, at 11.

behavior of states would seem to support a realist interpretation, the fact that particular states—such as Brazil and Argentina—are able to take advantage of the regime would support a neoliberal understanding of the reciprocal benefits to be gained by participation in the treaty.

## B. The Land Mine Convention

### 1. *Overview of the Treaty Regime.*

*a. Background.* On September 18, 1997, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was signed in Ottawa.<sup>119</sup> This Convention was the result of an unusual series of negotiations. Originally, the United Nations Conference on Disarmament had taken the lead in working toward the conclusion of a convention.<sup>120</sup> In 1996, however, a number of states and non-governmental organizations under the umbrella of the International Campaign to Ban Landmines launched what came to be known as the Ottawa process.<sup>121</sup> Under the leadership of the Canadian Government, this second track moved rapidly toward the conclusion of a Convention the following year. The Convention entered into force on March 1, 1999, and by December 2004, 144 states had become parties.<sup>122</sup> Given that this Convention relates to the use of mines in the conduct of armed conflict, this agreement squarely falls into the area of high politics.

*b. Legal Obligations.* The basic purpose of the Convention was the elimination of the use and production of all anti-personnel landmines. Under Article 1 of the treaty, the parties “undertake never in any circumstances” “to use,” “develop, produce, otherwise

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119. CONVENTION ON THE PROHIBITION OF THE USE, STOCKPILING, PRODUCTION AND TRANSFER OF ANTI-PERSONNEL MINES AND ON THEIR DESTRUCTION, 36 I.L.M. 1507 (1997) [hereinafter Mine Ban Treaty].

120. *Id.*

121. This description of the process draws upon ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAW OF WAR 644-47 (3d ed. 2002). For more background on the Land Mine Convention, see Maxwell A. Cameron, TO WALK WITHOUT FEAR *passim* (Maxwell A. Cameron, et al., eds., 1998); LANDMINES AND HUMAN SECURITY *passim* (Richard A. Matthew, et al., eds., 2004).

122. See INT’L CAMPAIGN TO BAN LANDMINES, available at <http://www.icbl.org/treaty/members> (last visited Mar. 6, 2006) (delineating members, signature dates, and entry-into-force dates).

acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines.”<sup>123</sup>

Following from this general obligation, the parties are required to destroy all anti-personnel mines in their possession or in areas under their jurisdiction and control.<sup>124</sup> In preparation for this destruction, the Convention also requires certain “transparency measures.”<sup>125</sup> In particular, all parties are required to disclose appropriate information relating to the number, location, and types of mines under its control, as well as the status of programs to destroy such mines.<sup>126</sup> The states also agree to take the necessary national implementation measures to ensure adherence with the agreement.

*c. Enforcement Mechanisms.* The Convention establishes a multi-layered approach to facilitate the enforcement of its provisions. First, it authorizes states to file a formal Request for Clarification if such state believes that there may be problems relating to the adherence of another state. This request is initially taken up by the Secretary-General of the United Nations, who shall communicate the request to the requested state.<sup>127</sup> If the requesting state does not receive a satisfactory answer through this process, that requesting state may take the request to a Meeting of the States Parties. At such a meeting, the States Parties may authorize a fact finding mission to the requested states to investigate adherence with the agreement.<sup>128</sup> Under the terms of Article 8, the requested state is legally obligated to “grant access for the fact-finding mission to all areas and installations under its control where facts relevant to the compliance issue could be expected to be collected.”<sup>129</sup> Following this mission, the States Parties “shall consider all relevant information” and “may request the requested State Party to take measures to address the compliance issue within a specified period of time.”<sup>130</sup> The

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123. Mine Ban Treaty, art. 1. An anti-personnel mine is defined as “a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a Vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.” *Id.* art. 2(1).

124. *Id.* arts. 3-4.

125. *Id.* arts. 7.

126. *Id.*

127. *Id.* art. 8.

128. *Id.*

129. *Id.* art. 8(14).

130. *Id.* art. 8(18).

Convention does not, however, provide for any form of binding actions on states that refuse to comply with the recommendations of the States Parties. Accordingly, it would seem that the strength of the verification/enforcement regime established by the Convention could be rated at a “moderate” level.

*d. Effect on Sovereignty.* The most significant effect of the Convention on state autonomy is the requirement that states accept fact-finding missions. While this requirement is not as intrusive as the inspections regimes contained in some other arms control agreements, such as the Chemical Weapons Convention,<sup>131</sup> it is nonetheless a reasonably intrusive measure. It would thus make sense to rate the infringement on sovereignty at the level of “moderate.”

*e. Normativity.* Over the years before and after the Ottawa process began, states have seemed to form a strong consensus regarding the “morally abhorrent” nature of anti-personnel land mines.<sup>132</sup> As will be seen in the statements of states, this perception seems to cut across a wide-variety of states. Accordingly, the normativity of the Land Mine Convention would seem to be “high.”

*2. Adherence Behavior.* Since the Landmine Convention entered into force, there has been a wide disparity in the level of adherence from the target states. Given the indicators of adherence, states can roughly be grouped into four categories: very high, high, medium, and low.

At the highest end of the spectrum are Australia, Canada and Germany. These three states were among the leading advocates of the treaty and moved quickly to fulfill the provisions of the agreement. Canada, in particular, played the most significant role as the convener of the Ottawa Process, and has been a consistent champion of the treaty. Underlying Canadian support for the treaty seems to be a belief that landmines are simply immoral weapons. As the Ottawa Process began in 1996, Canadian Foreign Affairs Minister Lloyd Axworthy explained:

We have all been struck by the dedication and dynamism brought to the discussions by those whose lives have been directly affected

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131. Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, 32 I.L.M. 800 (1993).

132. See *infra* notes 133-81 and accompanying text.

by AP [anti-personnel] mines. They have reminded us that the issue of AP mines is one of human, not military, security. Their compelling stories challenge our sense of collective responsibility to eliminate these terrible weapons.<sup>133</sup>

At the Nairobi Review Conference in 2004, Adrienne Clarkson, the Governor General of Canada, was even more explicit. Using words like “scourge” and “curse” to refer to landmines, she explained that Canada and other states had “decided that we will help each other to put an end to these crude and cruel weapons” at the Ottawa Conference seven years earlier.<sup>134</sup> Clarkson reiterated that these states decided then “that the killing and maiming of about 26,000 people a year was unacceptable.”<sup>135</sup> Australia seemed to express a similar attitude toward the nature of landmines and has given some indication that the supporting the Landmine Treaty was an important part of Australian identity. At the Ottawa Conference signing session, Foreign Minister Alexander Downer explained that “[s]igning the Ottawa Treaty is the quickest, most absolute way for a government to commit itself to this objective, and it is right that Australia, with its strong humanitarian record, should take this high road to a global landmines ban.”<sup>136</sup> He asserted:

The Australian Government in April 1996 committed Australia to support a global ban on anti-personnel landmines and imposed an indefinite suspension on the operational use of these weapons by the Australian Defence Force, even though Australia - like the great majority of the other nations which will sign the Ottawa Treaty today and tomorrow - has had no association with the indiscriminate or irresponsible use of landmines.<sup>137</sup>

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133. News Release, Canadian Department of Foreign Affairs and International Trade, *Canada Offers to Host Treaty Conference to Sign Ban on Anti-Personnel Mines* (Oct. 5, 1996), available at [http://w01.international.gc.ca/minpub/Publication.asp?publication\\_id=376785&Language=E](http://w01.international.gc.ca/minpub/Publication.asp?publication_id=376785&Language=E).

134. Adrienne Clarkson, Canadian Governor General, *Address at the Nairobi Summit on a Mine-Free World: First Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (Dec. 2, 2004) (transcript available at [http://www.mines.gc.ca/summit/GG\\_Landmines\\_Convention\\_Speech-en.asp](http://www.mines.gc.ca/summit/GG_Landmines_Convention_Speech-en.asp)).

135. *Id.*

136. Alexander Downer, Australian Minister for Foreign Affairs, *Address at the Ministerial Treaty Signing Conference for the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Landmines and on their Destruction* (Dec. 3, 1997) (transcript available at [http://www.dfat.gov.au/media/speeches/foreign/1997/lmines\\_4dec97.html](http://www.dfat.gov.au/media/speeches/foreign/1997/lmines_4dec97.html)).

137. *Id.*

In the high range are Argentina, France, Japan, South Africa, and the United Kingdom. All these states have generally fulfilled the provisions of the treaty and have supported the regime. These states have provided a variety of explanations for their adherence to the treaty. In general, they seem to fall into two broad categories; a perception that landmines are so morally repugnant that they must be prohibited and a belief that landmines are a major obstacle to international development.

France, for example, notes both issues. It has described these weapons as “inhumane” and has emphasized the development aspect of the treaty.<sup>138</sup> At the Review Conference in 2004, the delegate from France noted that what brought the parties together was a “common fight against one of the most cruel scourge [sic] that mankind has ever known.”<sup>139</sup> He also went on to indicate that one of the major problems with landmine proliferation was that it “constitute[d] a major factor of destabilization and a hindrance to development.”<sup>140</sup> The Japanese seem to have taken the immoral aspect of the weapons to an even greater level, comparing the nature of landmines to the use of nuclear weapons in Japan during World War II.<sup>141</sup> South Africa also seems especially concerned about the obstructions to development, indicating that a landmine-free Africa is a prerequisite for development in that continent.<sup>142</sup>

More interesting, however, are those states in the medium range: Brazil, Nigeria, Russia, Ukraine, and the United States. Brazil and Nigeria both signed and ratified the treaty but only moderately adhered. Brazil was slow in its involvement with the Ottawa Process

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138. Xavier Darcos, French Minister of State for Cooperation, Development and Francophony, Statement at the Nairobi Summit on a Mine-Free World: First Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction (Dec. 2, 2004), [http://www.reviewconference.org/fileadmin/pdf/review\\_conference/other\\_languages/RC\\_F\\_French/high\\_level/France\\_HLS\\_RC2004\\_fr.pdf](http://www.reviewconference.org/fileadmin/pdf/review_conference/other_languages/RC_F_French/high_level/France_HLS_RC2004_fr.pdf).

139. *Id.*

140. *Id.*

141. Katsuyuki Kawai, Japanese Parliamentary Secretary for Foreign Affairs, Statement at The Nairobi Summit on Mine-Free World: First Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction (Dec. 2, 2004), [http://www.reviewconference.org/fileadmin/pdf/review\\_conference/high\\_level/Japan\\_HLS\\_RC2004.pdf](http://www.reviewconference.org/fileadmin/pdf/review_conference/high_level/Japan_HLS_RC2004.pdf).

142. H.E. Mulecki George, South African Deputy Minister of Defense, Statement at The Nairobi Summit on a Mine-Free World: First Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production, Transfer of Anti-Personnel Mines and on their Destruction (Dec. 2, 2004), [http://www.reviewconference.org/fileadmin/pdf/review\\_conference/high\\_level/South\\_Africa\\_HLS\\_RC2004\\_en.pdf](http://www.reviewconference.org/fileadmin/pdf/review_conference/high_level/South_Africa_HLS_RC2004_en.pdf).

but ultimately did engage.<sup>143</sup> While Brazil destroyed its stockpile of mines in January 2003, it retained 16,545 mines for training purposes—making it the state possessing the most of such mines.<sup>144</sup> Nigeria was also not initially engaged in the Ottawa Process but with the change of regimes in 1999, “Nigeria began making positive statements regarding the Mine Ban Treaty.”<sup>145</sup> While Nigeria has indicated that it destroyed its stockpiles of mines by 2001, there is some evidence to the contrary.<sup>146</sup> Ukraine is behind both Brazil and Nigeria with respect to adherence. It has signed but not ratified the treaty and still has about 6 million mines to destroy.<sup>147</sup> The main hold up seems to be the lack of funding for such destruction operations.<sup>148</sup> In their public statements, all these states seem to be strongly supportive of the treaty regime.

But in this moderate category, Russia and the United States are the most interesting cases. Neither state has signed or ratified the convention, yet they have both exhibited a degree of adherence to the treaty. Why would a state still exhibit some level of adherence to a treaty when it has not signed or ratified the treaty? The United States, for example, has indicated that it did not want to be bound by the treaty and has made it clear that as a matter of policy, it would continue to maintain the right to use “non-persistent”<sup>149</sup> anti-personnel mines indefinitely.<sup>150</sup> In a State Department release from

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143. Landmine Monitor Report 2004, Brazil, *available at* <http://www.icbl.org/lm/2004/brazil>.

144. *Id.*

145. Landmine Monitor Report 2004, Nigeria, *available at* <http://www.icbl.org/lm/2004/nigeria>.

146. In the Landmine Monitor Report 2004, Nigeria states that “slides presented to States Parties in May 2002 indicated Nigeria still had antipersonnel mines in stocks.” *Id.*

147. Landmine Monitor Report 2004, Ukraine, *available at* <http://www.icbl.org/lm/2004/ukraine>.

148. *See id.*

149. Non-persistent mines are those that self-destruct or deactivate after a given time period. *See* Dept. of Defense, Global Message (Mar. 2, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/03/20040302.html> [hereinafter Global Message].

150. Landmine Monitor Report 2004, United States of America, *available at* <http://www.icbl.org/lm/2004/usa>. The Clinton Administration was more favorably disposed toward the treaty. While Clinton did not sign the treaty, his Administration indicated that the United States planned to become a party in 2006 as long as certain alternatives were made available. However, as the Landmine Monitor reported: “Following a two-and-one-half year review, the Bush Administration announced a new landmine policy on 27 February 2004 that abandons the long-held U.S. objective of joining the Mine Ban Treaty eventually and instead allows the military to retain antipersonnel mines indefinitely. This reverses the previous policy announced by the Clinton Administration to join the Mine Ban Treaty by 2006, as long as suitable alternatives to antipersonnel mine had been identified and fielded.” *Id.*

February 2004, the Administration explained that the United States will not join the Treaty “because its terms would have required the U.S. to give up a needed military capability. . . . Landmines still have a valid and essential role protecting United States forces in military operations. . . . No other weapon currently exists that provides all the capabilities provided by landmines.”<sup>151</sup>

In essence, the United States refused to sign the treaty purely for security reasons; it was regarded as limiting the nation’s flexibility to use the military means necessary for its defense. Not surprisingly, the United States was also generally opposed to the Ottawa Process and preferred to work through the Committee on Disarmament in the initial efforts to secure a treaty.<sup>152</sup> Yet despite this initial unwillingness to formally become a party to the treaty and renounce the use and stockpiling of landmines entirely, it seems as though American behavior has changed significantly since the adoption of the treaty. First, the United States made pledges to use *only* non-persistent mines.<sup>153</sup> Second, the United States “cleared its protective minefields at the Guantanamo Bay naval base in Cuba in 1999, and now claims not to maintain minefields anywhere in the world.”<sup>154</sup> According to the Landmine Monitor Report of 2004, “U.S. mine action funding [for demining and other purposes] totaled \$421.4 million between fiscal years 1999 and 2003, the largest total for any government.”<sup>155</sup> Third, the State Department created Office of Humanitarian Demining Programs that subsequently became part of the Office of Weapons Removal and Abatement.<sup>156</sup> If the United

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151. Fact Sheet, U.S. Dep’t of State, Bureau of Political-Military Affairs, New United States Policy on Landmines: Reducing Humanitarian Risk and Saving Lives of United States Soldiers (Feb. 27, 2004), [http://www.acq.osd.mil/ds/sa/lwm/publications/Fact%20Sheet%20\(Landmine%20Policy\).pdf](http://www.acq.osd.mil/ds/sa/lwm/publications/Fact%20Sheet%20(Landmine%20Policy).pdf).

152. *Id.*

153. Global Message, *supra* note 149. In a recent report, the Department of State portrayed the Bush Administration’s policy as demonstrating leadership in this area: “The Administration developed a new landmine policy that commits us to be the first major military power to stop using land mines that are persistent or undetectable to metal detectors. The new policy reinforces the long-standing U.S. leadership role in—and a commitment to—curbing the humanitarian problems caused by indiscriminate use of landmines and opens the door for possible international dialogue on a prohibition on the sale or export of persistent landmines.” Release, U.S. Dep’t of State, Bureau of Arms Control, The Arms Control Philosophy and Accomplishments of the Bush Administration, Bureau of Arms Control, Department of State (Feb. 11, 2005), *available at* <http://www.state.gov/t/ac/rls/or/42200.htm>.

154. Landmine Monitor Report 2004, United States of America, *supra* note 150.

155. *Id.*

156. *Id.* The Landmine Monitor Report noted this development:

States is unwilling to ratify the treaty, why would it then adhere to any extent?

An examination of the public statements of the United States seems to reveal several reasons for supporting the spirit of the treaty. First, although other states have expressed a concern that landmines are an impediment to international development, the United States has indicated that its demining activities are important to advancing that goal. In a report entitled, *To Walk the Earth in Safety*, released by the Bureau of Political-Military Affairs at the State Department in 2004, the United States explained its “commitment to help rid the world of landmines that threaten civilians around the world.”<sup>157</sup> The report noted:

This effort supports the U.S. Strategic Objectives to advance sustainable development and global interests by providing a humanitarian response to the harmful social and economic effects generated by landmines and unexploded ordnance and to advance peace and security by promoting regional stability through the use of mine action as a confidence-building measure. Accordingly, the United States helps to reduce the number of civilian landmine casualties, return refugees and internally displaced persons threatened by landmines to their homes and enhance the political and economic stability of those countries affected by landmines.<sup>158</sup>

It would thus seem that motivations of the United States include a desire to promote international development, a belief that regional stability will be established if states are less likely to have landmines exploding, and a sense that if the United States engages in demining efforts, states might be more likely to cooperate with the United States in general.

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Concurrent with the formation of the Office of Weapons Removal and Abatement, a set of “revitalized goals” for how the U.S. as a donor treats requests for humanitarian mine action assistance from affected countries and the “measurable goals” by which programs are evaluated have been articulated. During the review process leading to the new landmine policy, President Bush directed the State Department to develop a new strategic plan for the U.S. Humanitarian Mine Action Program. The U.S. humanitarian mine action strategic plan will serve to advance humanitarian interests and protect the U.S. by promoting regional security. It uses four factors to determine to whom and to what degree the U.S. provides assistance: humanitarian need, foreign policy interests, efficiency and transparency of the recipient’s national mine action program, and the recipient’s commitment to demining.

*Id.*

157. U.S. Dep’t of State, Bureau of Political-Military Affairs, Office of Weapons Removal & Abatement, *The United States Commitment to Humanitarian Mine Action: To Walk the Earth in Safety* 10 (Aug. 2004), available at <http://www.state.gov/t/pm/rls/rpt/walkearth/2004/37224.htm>.

158. *Id.*

Russia has also demonstrated a moderate level of adherence. Much like the United States, it preferred the efforts undertaken in the Conference on Disarmament to the Ottawa Process, and it continues to maintain the right to use landmines. In November of 2003, the chief Russian diplomat to a review conference on the Convention on Conventional Weapons indicated that “the world without mines remains to be our goal. However, as we repeatedly pointed out, the movement to that noble goal should be realistic, we should proceed stage-by-stage while ensuring the necessary level of stability.”<sup>159</sup> Russia has also in practice used landmines in Chechnya, Dagestan, Tajikistan, and along the Russian-Georgian Border.<sup>160</sup>

Despite its use of mines, Russia also became active in demining work. The Landmine Monitor Report noted that “[i]n 2000, the government formed a Federal Working Group for Mine Action and appointed a special coordinator on humanitarian demining to coordinate activities within various state agencies related to international humanitarian mine clearance.”<sup>161</sup> Subsequently, “[i]n June 2003, it was reported that a new Counter Mine Danger Service had been established under the Russian Federation Engineer Forces to integrate military and civilian mine action-related elements.”<sup>162</sup> The following November, “[a] Russian official stated . . . that a Center of Demining had been established ‘on the basis of the Moscow University of Military Engineers in order to train experts in detecting and clearing of explosive devices.’”<sup>163</sup>

Russia’s unwillingness to become a party to the treaty and to fully adhere to it stems both from a belief in the military value of landmines and a concern regarding the cost of their destruction. As the Landmine Monitor Report of 2004 explained, “[Russia’s] long-held reservations to joining the treaty include its perception of the utility of antipersonnel mines and of the lack of viable alternatives, and its potential inability to meet the financial commitment to destroy the country’s considerable stockpile of antipersonnel mines within

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159. Landmine Monitor Report 2004, Russia, *available at* <http://www.icbl.org/lm/2004/russia> (citing Anatoly Antonov, Russian Ambassador-at-Large, Statement at the Fifth Annual Conference of States Parties to CCW Amended Protocol II (Nov. 20, 2003)).

160. *Id.*

161. Landmine Monitor Report 2004, Russia, *supra* note 159.

162. *Id.*

163. *Id.* (citing a statement issued by Russia at the CCW Amended Protocol II Conference on Nov. 26, 2003).

four years, as required by the treaty.”<sup>164</sup> Thus, this reflects both a realist concern for security but also a simple practical concern that, at times, states simply cannot afford to comply with treaty requirements.

Why, however, would Russia wish to adhere to any aspects of the treaty regime? Based on official statements, Russia seems to be concerned about the horrific nature of mines. In a speech before the United Nations Security Council in November 2003, the Russian delegate explained:

The Russian Federation attaches great importance to the whole range of problems related to mine action. We support United Nations efforts to mobilize the international community to address the issue of the danger posed by mines. Russia is acquainted from bitter experience with the tragedy and suffering caused by the uncontrolled use of mines. Despite the fact that more than a half a century has elapsed since the end of the Second World War, Russia's Ministry of Defence and Ministry for Emergency Situations disarms tens of thousands of pieces of unexploded ordnance every year.<sup>165</sup>

In the low range, which represents states that have done very little to adhere to the agreement, are six states: China, Egypt, India, Iran, Israel, and Pakistan. None of these states have signed or ratified the agreement, and they seem to be quite far from fulfilling the provisions of the treaty. China was one of the largest producers of landmines and had been one of the world's largest exporters of landmines.<sup>166</sup> While there are indications that China has stopped exporting mines and ceased production, the country continues to possess a very large stockpile of the weapons.<sup>167</sup> Egypt reportedly has large stockpiles of landmines and, while it claimed to have ceased export of them in 2000, the Landmine Monitor concluded that Egypt is still producing the weapons.<sup>168</sup> India continues to produce and stockpile landmines and has “laid large numbers of mines along its border with Pakistan between December 2001 and July 2002, in one of the biggest mine-laying operations anywhere in the world.”<sup>169</sup> Iran is in a very similar position. Evidence suggests that Iran continued to produce landmines in 1999 and 2000, and the Landmine Monitor noted that

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164. *Id.*

165. UN SCOR, 58th Sess., 4858th mtg. at 17, U.N. Doc. S/PV.4858 (Nov. 13, 2003) (transcribing the statement of Mr. Konuzin, representing the Russian Federation).

166. Landmine Monitor Report 2004, China, *available at* <http://www.icbl.org/lm/2004/china>.

167. *Id.*

168. Landmine Monitor Report 2004, Egypt, *available at* <http://www.icbl.org/lm/2004/egypt>.

169. Landmine Monitor Report 2004, India, *available at* <http://www.icbl.org/lm/2004/india>.

“Iran is believed to maintain minefields along its borders with Iraq, Afghanistan, and Pakistan.”<sup>170</sup> Israel, likewise, possesses landmines and seems to have a number deployed along various borders.<sup>171</sup> It reportedly ceased production and has “renewed an export moratorium until 2005.”<sup>172</sup> Pakistan continues to be a manufacturer of landmines and has deployed them in a number of cases, including along the Indian border.<sup>173</sup>

The main reason these states continue to refrain from formal participation in the treaty regime is clear. All acknowledge the military utility of landmines. And in all those cases, they have states that are perceived to be hostile or potentially hostile at their borders. This view seems clearly reinforced by statements over the years. Iran, for example, had no hesitation declaring in 2003 that “[l]andmines continue to be the sole effective means to ensure the minimum security requirements of borders in countries with long land borders.”<sup>174</sup> Similarly, Pakistan has consistently stated “that the use of landmines is part of its self-defense strategy and it opposes a ban until viable alternatives are developed.”<sup>175</sup> India, which shares the border with Pakistan, has taken a virtually identical position. They will continue to possess mines for self-defense, until such times when alternative technologies are available.<sup>176</sup> These reasons seem perfect

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170. Landmine Monitor Report 2004, Iran, *available at* <http://www.icbl.org/lm/2004/iran>.

171. Landmine Monitor Report 2004, Israel, *available at* <http://www.icbl.org/lm/2004/israel>.

172. *Id.*

173. Landmine Monitor Report 2004, Pakistan, *available at* <http://www.icbl.org/lm/2004/pakistan>.

174. Landmine Monitor Report 2004, Iran, *supra* note 170 (citing The Islamic Republic of Iran: Draft Resolution L.43 on “Ottawa Convention,” Permanent Mission of Iran to the United Nations, New York, July 2, 2003).

175. Landmine Monitor Report 2004, Pakistan, *supra* note 173, (citing Explanation of Vote on Draft UNGA Resolution A/C.1/57/L.36 (Oct. 23, 2002); Letter from the Joint Staff Headquarters to the Coordinator of the Pakistan Campaign to Ban Landmines (PCBL), Strategic Plan Division, ADCA Directorate, Chaklala Cantonment, (Feb. 14, 2002); Statement by Fouzia Nasreen, Ambassador of Pakistan to Nepal, South Asia LM Meeting, (Jan. 29, 2001); and Letter to ICBL (Stephen Goose) from Amb. Inam ul Haque, Pakistan Mission to UN, New York, (Nov. 15, 1999)).

176. India remains committed to the pursuit of the ultimate objective of a non-discriminatory, universal and global ban on anti-personnel mines in a manner that addresses the legitimate defense requirements of states. India believes that the process of complete elimination of anti-personnel mines will be facilitated by the availability of appropriate militarily-effective, non-lethal and cost-effective alternative technologies. This will enable the legitimate defensive role of anti-personnel landmines for operational requirements to be addressed, thereby furthering our objective. *See* Landmine Monitor Report 2004, India, *supra* note 169 (citing Ambassador Rakesh Sood, Head of Indian Delegation, Statement at the Fifth

examples of structural realism. Because states see landmines as necessary for their security, they will not abandon their use as long as they have some kind of military utility.

But even among these states that exhibit low adherence, some of them have undertaken certain measures that support the treaty regime. India<sup>177</sup> and Pakistan,<sup>178</sup> for example, have participated in demining efforts throughout the world. But of this group, China seems to stand out as the one state that has become much more engaged in the process. As the Landmine Monitor reported, China has taken a number of steps since 2003:

China, together with the China Arms Control and Disarmament Association and the Australian Network of ICBL, hosted the “Humanitarian Mine/UXO Clearance Technology and Cooperation Workshop” at Kunming on 26-28 April 2004. China joined the donors’ Mine Action Support Group. In November 2003, an official stated that China has thus far destroyed over 400,000 old mines that did not meet the technical requirements of CCW Amended Protocol II. China has reiterated its support for “the ultimate goal of a total ban on antipersonnel mines.” In December 2003, the International Committee of the Red Cross, in cooperation with the Red Cross Society of China, established a prosthetic center in Kunming.<sup>179</sup>

China has also made a number of statements in support of a ban on antipersonnel mines. In September of 2003, an official noted that:

[t]he Chinese government attaches great importance to humanitarian issues and supports the efforts by the international community in addressing the humanitarian problems caused by landmines. . . . There is no denying that banning antipersonnel mines (APLs) can be the ultimate way to prevent them from injuring civilians and address the humanitarian concerns arising

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Annual Conference of States Parties to Amended Protocol II to the Convention on Conventional Weapons (Nov. 26, 2003)).

177. “India reports that its Corps of Engineers has over many years assisted with UN-sponsored mine clearance programs in Cambodia, Bosnia, Angola, Ethiopia, Mozambique, Rwanda, Sierra Leone, and Somalia.” *Id.*

178. Pakistan contributed to mine action operations in Afghanistan (1989-91), Kuwait (post-1991 Gulf War), Cambodia (1992-93), Angola (1995-98), Bosnia and Herzegovina, and Western Sahara, mostly as part of the U.N. peacekeeping contingents. In November 2003 Pakistan said that it was assisting with demining operations in Lebanon, Sierra Leone and the Democratic Republic of Congo. Landmine Monitor Report 2004, Pakistan, *supra* note 173.

179. Landmine Monitor Report 2004, China, *supra* note 166.

thereof. To those states that have chosen to do so, we express our respect and appreciation.<sup>180</sup>

And in a statement before the United Nations Security Council, the Chinese representative explained: “Although China has yet to accede to the Ottawa Convention, we identify ourselves with the purposes of the Convention and support the ultimate goal of a total ban on antipersonnel mines.”<sup>181</sup> While it is difficult to draw any conclusions from China’s willingness to express some level of support for the treaty regime, the rhetoric seems to connect to some of the views expressed by other states about the overall nature of these weapons.

3. *Validation of Theories.* In reviewing the motivations for adherence and non-adherence, there are two dominate theoretical explanations: structural realism and constructivism. Realism seems to explain why states would refuse to sign and ratify. States like the United States, Russia, Iran, Pakistan, India, and Israel perceive the treaty to be too constraining on their right to defend themselves. Those states that have signed, ratified, and generally adhered to the legal obligations contained in the treaty seem to be motivated by a belief that these weapons are inhumane. This is linked to the notion that states’ identities would lead them to do away with such weapons. Indeed, even countries like the United States that have not signed and ratified, still adhere to much of the treaty, perhaps because of this same sense of identity. Hegemonic stability theory also seems to be consistent with the behavior of the United States.

## C. The World Trade Organization

### 1. *Overview of the Treaty Regime.*

a. *Background.* The World Trade Organization was established in 1995 following the conclusion of the so-called “Uruguay Round” of the General Agreement on Tariffs and Trade<sup>182</sup>

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180. *Id.* (citing Fu Cong, Deputy Director-General of Arms Control and Disarmament Department, Statement at the Fifth Meeting of States Parties to the Mine Ban Treaty (Sept. 19, 2003)).

181. *Id.* (citing Zhang Yishan, *quoted in* UN Security Council, S/PV.4858, 4858th meeting, “Agenda: The importance of mine action for peacekeeping operations” (Nov. 13, 2003)).

182. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter General Agreement or GATT].

(GATT) negotiations.<sup>183</sup> The Organization was formalized in the Agreement Establishing the World Trade Organization (WTO Charter),<sup>184</sup> which establishes the structure, scope, and functions of the organization. The purpose of the Organization is to provide an institutional framework for the GATT and to expand into a variety of other areas, including services and intellectual property.<sup>185</sup> As a consequence, a number of other agreements set the rule base for the WTO. Of particular importance are the GATT, the General Agreement on Trade in Services (GATS),<sup>186</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>187</sup> Underlying these agreements are the principles of Most-Favored Nation Treatment and National Treatment. These agreements and other related ones set forth detailed procedures for reviewing state trade policies and resolving disputes arising under these arrangements.

Of the treaty regimes explored in this Article, the WTO is unique with respect to its membership. Currently, there are 148 members within the organization. What is unusual is that one of its most powerful members is not a state, but rather the “European Communities,”—as the European Union is referred to in WTO parlance. It participated as a member of the GATT Rounds since 1960 and was a founding member of the WTO.<sup>188</sup> During negotiations, it behaves as a unitary actor and, as will be discussed below, participates in the dispute-settlement mechanism. Of the target states, France, Germany, and the United Kingdom are members of the EU.<sup>189</sup>

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183. On the development of the GATT and the origins of the WTO, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (MIT Press 2d ed. 1997).

184. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

185. See overview of WTO website, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited Mar. 9, 2006).

186. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1168 (1994) [hereinafter GATS].

187. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

188. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 249 n.17 (2004).

189. It is also interesting to note that “Chinese Taipei,” the Republic of China, is also a member of the WTO.

*b. Legal Obligations.* The two main substantive key obligations embodied in the agreements establishing the rule base for the WTO are Most Favored Nation Treatment and National Treatment. Most Favored Nation Treatment, as established in the GATT, GATS, and TRIPS agreements, means that states pledge to treat all other states as well as they treat their best trading partner. The GATT, for example, provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.<sup>190</sup>

Similar provisions are echoed in GATS<sup>191</sup> and TRIPS.<sup>192</sup> The second main substantive obligation is National Treatment. In essence, National Treatment means that the parties must treat non-nationals in the same manner as nationals. The TRIPS notes, with a few established exceptions, “[e]ach Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property[.]”<sup>193</sup>

*c. Enforcement Mechanisms.* In addition to these main substantive obligations, the agreements falling under the umbrella of the WTO also establish extensive procedures with respect to dispute resolution. One of the agreements reached at the Uruguay Round was the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>194</sup> This agreement provides for the establishment of a Dispute Settlement Body (DSB), which oversees complaints about non-adherence made by states. In the first instance,

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190. GATT art. 1.

191. GATS art. 2.

192. TRIPS art. 4.

193. *Id.* art. 3.

194. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1225 (1994) [hereinafter DSU]. On the settlement of disputes under the WTO, see Steinberg, *supra* note 188.

states are to attempt to present their complaints directly to other states during informal consultations. If those consultations fail, the complaining state may request the creation of a panel. Once the panel reaches a conclusion, it files a report that is then submitted to the DSB for adoption. Following the adoption of the panel report, a party to the dispute may take the matter to the Standing Appellate Body for review.

The status of the recommendations of the panel and Appellate Body is somewhat unclear. The DSU does not explicitly state that such recommendations are binding upon states.<sup>195</sup> But, as John Jackson observes, “[w]hen one analyzes the DSU . . . it is possible to find a number of separate clauses that in context seem to strongly imply or ‘add up to’ the obligation to conform to panel/appellate report[s] in violation cases.”<sup>196</sup>

But perhaps one of the most significant enforcement provisions established under the WTO is the allowance for retaliation by an aggrieved state. Under Article 22 of the DSU, if a state fails to comply with a decision brought through the dispute settlement procedures, the complaining state “may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”<sup>197</sup> In other words, the state has the right to effectively engage in a “reprisal” against the non-compliant state. Given these extensive procedures for the enforcement of the regime, the strength of the verification/enforcement arrangement established by the WTO can be rated at a “high” level.

*d. Effect on Sovereignty.* The World Trade Organization and its related agreements have had a profound effect on the autonomy of states. Because of the complex linkages in trade, services, and intellectual property, the Organization connects every state and makes it very difficult for them to behave outside the treaty regime without suffering repercussions. In particular, because complaining states have the right to ask to revoke concessions or other obligations

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195. John Jackson explains the difficulty: “One interesting question arising in the context of the DSU is whether a party that has been the subject of a complaint for a violation case has an international legal obligation to follow the recommendations or determinations of the panel report or appellate report that results from the process. Unlike other international tribunal proceedings, such as the World Court, the DSU does not make this entirely explicit.” JACKSON, *supra* note 183, at 126.

196. *Id.*

197. DSU art. 22.

they may have granted to a violating state, reciprocal enforcement can take place in the absence of a formal centralized enforcement body. As a consequence, the infringement of the regime on the sovereignty of states can be rated as “high.”

*e. Normativity.* It is very difficult to evaluate the normativity of the WTO regime. Even though certain norms such as “free trade,” “most favored nation” status, and “national treatment” underlie the legal obligations of the regime, there is no clear evidence that these principles enjoy any kind of moral efficacy. In fact, indications seem to suggest that the WTO was established under the strong influence of the United States and the European Union, acting to promote their own interests.<sup>198</sup> While it could be argued that the authoritativeness of the regime is high inasmuch as the WTO principles were those found in the GATT of 1947 and had thus been a part of international law, the difficulty of subsequent efforts to incorporate these principles in other areas—such as agriculture—would call into question their authoritativeness. It also seems that there may not be universal agreement about the fairness of the regime. Nonetheless, as noted earlier, the WTO has extensive membership and a number of other states seeking to join the regime, all of which would seem to indicate a widespread level of legitimacy.<sup>199</sup> As a consequence of these conflicting indicators, the normativity of the regime seems uncertain.

2. *Adherence Behavior.* Given the empirical analysis, states fall into three categories: high, medium, and low. Thirteen states fall into the high range: Argentina, Australia, Brazil, Canada, China, Egypt, France, Germany, India, Japan, Nigeria, Pakistan, and the United Kingdom. Two actors fall into the medium range: the European Community and the United States. And three states fall into the low range: Iran, Russia, and Ukraine.<sup>200</sup>

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198. See *infra* note 233 and accompanying text.

199. We are indebted to our colleague Gustavo Adolfo Flores-Macias for noting this factor and assisting in the formulations of this section.

200. These determinations were made based on the parties’ willingness to comply with the provisions of the WTO agreements. The three states in the low range have not yet become parties to the WTO. The EC and the United States are listed in the medium range because in both cases, these two parties have had adverse decisions by the dispute settlement mechanism, have failed to comply with those decisions, and have had sanctions authorized against them. The states in the high range have complied with the provisions of the WTO and have ultimately carried out any decisions by the dispute settlement bodies.

Adherence to the WTO regime has been quite strong among the target states. From the perspective of the most basic indicator of adherence—signature and ratification, only three of the target states—Iran, Russia, and Ukraine—are not parties to the WTO regime. And these states are seeking membership. When a state makes such an application, the first positive step is the establishment of a “working party.” In the case of Iran, however:

[D]iscussions through the period under review made clear that although a large part of the membership continued to be supportive of an early and positive action on this request on the basis of the provisions in Article XII of the WTO Agreement, there was no consensus at this time to accept Iran’s request and to set up a working party for this purpose.<sup>201</sup>

With respect to other indicators of adherence, the WTO has a different type of treaty regime than the others examined. First, as noted above, the WTO is an international organization that imposes certain legal obligations on the parties and provides a comprehensive dispute settlement mechanism for resolving questions relating to adherence with those provisions. Second, the WTO also serves as a framework for on-going trade negotiations seeking to implement the basic free-trade principles of the organization in other substantive areas. Accordingly, adherence to the provisions of the regime needs to be understood both in terms of compliance with existing legal obligations and the willingness to participate in these on-going negotiations.

From the perspective of general adherence, one of the strongest indicators of adherence is the willingness of states to engage and accept the dispute settlement mechanism established by the Organization. Since the WTO was established in 1995, 330 complaints were brought to the dispute settlement body. Not surprisingly, the target states are among the most significant users of the procedure.<sup>202</sup> The most frequent user of the system was the United States, bringing eighty cases and serving as a respondent in eighty-eight. It was followed by the European Communities, bringing sixty-eight cases and responding to fifty-one. Canada was next with twenty-six complaints brought, and thirteen cases as respondent.

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201. WORLD TRADE ORGANIZATION, ANNUAL REPORT (2005), available at [http://www.wto.org/English/res\\_e/booksp\\_e/anrep\\_e/anrep05\\_e.pdf](http://www.wto.org/English/res_e/booksp_e/anrep_e/anrep05_e.pdf) [hereinafter ANNUAL REPORT 2005].

202. See WORLD TRADE ORGANIZATION, CHRONOLOGICAL LIST OF DISPUTES CASES, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (number of cases is as of Nov. 2005) (last visited Mar. 6, 2006).

Brazil brought twenty-two cases and was a respondent in twelve. India brought sixteen cases and was a respondent in seventeen. Japan brought twelve and was a respondent in fourteen. Argentina brought nine cases and was a respondent in fifteen. Australia brought five cases and has been a respondent in seven. The other states have been involved in relatively few cases: China brought one and was a respondent in one; Egypt was a respondent in four; France was a respondent in two; Pakistan brought three cases and was a respondent in one case; South Africa was a respondent in two cases; and Great Britain was a respondent in one case. Given this large number of cases brought before the WTO, compliance has been remarkable. As the 2005 Report notes:

Members have, in general, implemented the recommendations and rulings made by the panels and by the Appellate Body in the 'reasonable period of time' determined under Article 21.3 of the DSU. This is an achievement and a success; the WTO Members believe in the WTO dispute settlement system and respect it.<sup>203</sup>

In the first decade of the WTO's existence, there have been only seven cases in which one of the parties refused to implement the decisions of the panel or Appellate Body, and the Dispute Settlement Body authorized retaliation by the complaining state. Interestingly enough, all of these cases involve one or more of the target states. The first was brought by the United States and Canada against the EC for its ban on meat and meat products, known as the EC-Hormones case.<sup>204</sup> Based on the authorization, both Canada and the United States took retaliatory measures. The second was brought by the United States and Ecuador for a banana regime set up by the EC, known as the EC-Bananas III case.<sup>205</sup> In that case, even though Ecuador was authorized to suspend concessions, the parties were able to resolve the dispute before such action was undertaken. The third case was brought by Canada against Brazil and related to export financing for aircraft, known as the Brazil-Aircraft case.<sup>206</sup> The fourth case was brought by the EC against the United States and related to

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203. ANNUAL REPORT 2005, *supra* note 201, at 145.

204. Arbitrator's Decision, *European Communities - Measures Concerning Meat and Meat Products*, WT/DS26/ARB (July 12, 1999).

205. Appellate Body Report, *European Communities Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *Bananas III*].

206. Panel Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/RW/2 (July 26, 2001) [hereinafter *Brazil Aircraft*].

Foreign Sales Corporations.<sup>207</sup> The fifth case was brought by Brazil against Canada and dealt with export credit and loan guarantees for aircraft. The sixth case was brought by the EC against the United States for the 1916 Anti-Dumping Act. In that case, the EC was concerned that the Anti-Dumping Act<sup>208</sup> violated the obligations of the United States under the WTO. The Bush Administration essentially agreed with this claim and undertook efforts to repeal the Act. But those efforts have, to date, been unsuccessful and the United States remains in violation. Some aspects of the case went on to arbitration and despite a finding for the EC, they have not yet suspended concessions. Finally, the seventh case<sup>209</sup> was brought by Brazil, Canada, Chile, the EC, India, Japan, Korea, and Mexico against the United States because of the U.S.-Offset Act, the so-called Byrd Amendment.<sup>210</sup>

Given the total number of cases brought before the WTO, the rate of compliance seems extraordinarily high. And what is perhaps most significant is that even in those cases where states disagreed with the rules of the Dispute Settlement Body, they still actively engaged the process. In the case of the 1916 Anti-Dumping Act, the executive branch even worked to attempt to secure new legislation that would put the country in compliance with the WTO obligations. What has not been seen at the WTO is the kind of behavior that a structural realist might expect—states have not left the organization or seriously threatened to leave when faced with an adverse decision. Instead, they have worked within the organization to make their case,

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207. Arbitrator's Decision, *United States Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/ARB (Aug. 30, 2002) [hereinafter FSC Article 22.6 Report]; Appellate Body Report, *United States Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW (Jan. 14, 2002).

208. Act of Sept. 8, 1916, ch. 463, tit. VII, §801, 39 Stat. 798-99 (1916) (15 U.S.C. 72) (2000 & Supp. II 2004)) [hereinafter 1916 Act].

209. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, 234/AB/R (Jan. 16, 2003); see Jesse Klaproth, Comment, *Decision by the Arbitrator—United States—Continued Dumping and Subsidy Offset Act of 2000: Payback is for the Byrds; Arbitrator Allows Eight Countries to Sanction the United States for Application of the Byrd Amendment*, 13 TUL. J. INT'L & COMP. L. 401 (2005).

210. Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, 114 Stat. 1549 (2000) (codified at 19 U.S.C. §1675c) (2004) [hereinafter Byrd Amendment]. For a discussion of the Byrd Amendment, see Clarie Hervey, Note, *The Byrd Amendment Battle: American Trade Politics at the WTO*, 27 HASTINGS INT'L & COMP. L. REV. 131 (2004); Meredith Schutzman, Note, *Antidumping and the Continued Dumping and Subsidy Offset Act of 2000: A Renewed Debate*, 11 CARDOZO J. INT'L & COMP. L. 1069 (2004).

challenge rulings, seek time extensions, compromises, and almost always comply at the end of the day.

In addition to this indicator of adherence, another way in which adherence with the WTO regime has been demonstrated is through the participation of member states in the on-going negotiations on a variety of other trade issues. Since the Organization was formally established, there have been five ministerial conferences that have sought to strengthen the WTO regime. The most significant development from these conferences was the adoption of the Doha Development Agenda (DDA) in Doha, Qatar in November of 2001.<sup>211</sup> The DDA set the agenda for subsequent ministerial conferences and the framework for negotiations. Although efforts to fully implement the Doha agenda have been slower than anticipated, the target states have all continued to be actively engaged and invested in the regime.<sup>212</sup> If this adherence behavior seems so strong, why has this been the case? Why have states chosen to follow the requirements of the WTO?

The WTO regime is perhaps the quintessential neoliberal regime. The WTO seeks to create a regime in which all the parties are able to realize their long-term economic interests through a rule-based, transparent system with highly sophisticated enforcement mechanisms. In examining the many statements made by members and observer states about the Organization, this motivation seems to be most consistent among the target states. For example, several statements made at the most recent Ministerial Conference held in Cancún, Mexico in 2003 clearly reflect a neoliberal understanding of the WTO. The Japanese Minister for Foreign Affairs explained:

The WTO accords us with a set of rules which ensures that the benefits of trade liberalization will be shared by all, including developing countries. It also constitutes a rule-based system where the strongest is not necessarily assured of reaping benefits but where a fairer distribution of benefits is secured. This world body provides us with a universal platform that integrates diverse Members and prevents us from falling into the trap of the compartmentalization of world trade through the proliferation of regional trade agreements. What we should aim to achieve through

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211. For an overview of the Doha Development Agenda, *see* WORLD TRADE ORGANIZATION, NEGOTIATIONS, IMPLEMENTATION, AND DEVELOPMENT: THE DOHA AGENDA, [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm) (last visited Feb. 9, 2006).

212. *See* the International Chamber of Commerce's comment on the slow pace of Doha: ICC Secretary General stresses need for progress as trade negotiators meet in Geneva, <http://www.iccwbo.org/iccdcbd/index.html>.

the Doha Development Agenda, is to strengthen this system to expand world trade in a balanced way.<sup>213</sup>

Similarly, the Israeli Vice Prime Minister and Minister of Industry, Trade, Labor and Communications explained that the delegates “must bear in mind and follow the core principles that led the WTO and the multilateral trading system to consistent and progressive liberalization throughout the years namely: a rule-based system; consensus-based decision-making mechanism; non-discrimination; transparency; progressive liberalization; and special and differential treatment for developing countries.”<sup>214</sup> Almost as if he was reading from a neoliberal article on absolute gains, the British Minister for Trade, Investment and Foreign Affairs spoke about a need for “[a] properly functioning, *multilateral* trading system, based on consensus and enforceable rules, provides all countries, large and small, with the potential to pursue those opportunities and increase their prosperity.”<sup>215</sup>

The United States has also echoed a neoliberal understanding of the benefits reaped from the WTO. In a speech delivered in May of 2004, for example, United States Trade Representative Robert Zoellick made it clear that a rule-based system of free trade provided benefits to all states, but was clearly a system of reciprocal sacrifice and benefit. Zoellick explained that “we must seek balanced solutions that involve give and take from everyone.”<sup>216</sup> “We know,” Zoellick continued, “that if we move forward together, all our nations will be better off.”<sup>217</sup> In the spirit of trade-offs, Zoellick acknowledged that the United States has made certain sacrifices in exchange for the benefits of a free-trade regime and other developed countries should do the same.<sup>218</sup> Zoellick explained that “[t]he

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213. H.E. Yoriko Kawaguchi, Statement by Japan at the World Trade Organization Ministerial Conference, Fifth Session Cancún, WT/MIN(03)/ST/23 (Sept. 11, 2003), [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/statements\\_e/st23.pdf](http://www.wto.org/english/thewto_e/minist_e/min03_e/statements_e/st23.pdf).

214. H.E. Ehud Olmert, Statement by Israel at the World Trade Organization Ministerial Conference, Fifth Session Cancún, WT/MIN(03)/ST/45, (Sept. 11, 2003), *available at* [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/statements\\_e/st45.pdf](http://www.wto.org/english/thewto_e/minist_e/min03_e/statements_e/st45.pdf).

215. Mike O'Brien, Statement by United Kingdom at the World Trade Organization Ministerial Conference, Fifth Session Cancún, WT/MIN(03)/ST/11, *available at* [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/statements\\_e/st11.pdf](http://www.wto.org/english/thewto_e/minist_e/min03_e/statements_e/st11.pdf).

216. Robert Zoellick, United States Trade Representative, A Strategic Opportunity for Trade, Address at the Salon de Boffrands du Senat (May 13, 2004), *available at* [http://permanent.access.gpo.gov/websites/www.ustr.gov/Document\\_Library/USTR\\_Zoellick\\_Speeches/2004/A\\_Strategic\\_Opportunity\\_for\\_Trade.html](http://permanent.access.gpo.gov/websites/www.ustr.gov/Document_Library/USTR_Zoellick_Speeches/2004/A_Strategic_Opportunity_for_Trade.html).

217. *Id.*

218. *Id.*

present openness of the United States is reflected, in part, through our \$542 billion current account deficit; with a surplus of imports over exports of that magnitude, our market cannot be too hard to access.”<sup>219</sup> He continued by noting:

President Bush has been clear that the United States will continue to stand for openness, dynamism, and growth. He knows America needs to open new markets to create new jobs for workers at home. He also knows that more open trade is critical to offer developing countries the opportunity to move beyond the dependency of the past. The Doha negotiations remain the central goal of our trade strategy. The President’s strong commitment to the free trade agenda, even in the midst of an election year, should bolster the commitments of those who wonder whether America is serious in its offers to eliminate agricultural export subsidies, slash trade-distorting farm subsidies, cut drastically the tariffs on goods and agriculture, and expand services trade. We mean what we say.<sup>220</sup>

Zoellick then went on to emphasize that “we need more help from other important developed nations, too,”<sup>221</sup> and called upon the European Union<sup>222</sup> and Japan<sup>223</sup> in particular to make certain sacrifices. Hegemonic stability theory may also underlie U.S. and—EC adherence to the regime. When the WTO was being established in 1995, the United States and the EC exerted a tremendous amount of influence vis-à-vis the other participants in the GATT.<sup>224</sup> Both

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* (“[T]he world will depend on Europe remaining an engaged leader in international trade[.]”).

223. *Id.* (“Japan should play a role in Doha more commensurate with the size of its economy and its place in the global trading system.”).

224. Richard Steinberg provided a quick summary of the role played by the U.S. and the EC in the establishment of the WTO:

The European Communities and the United States have dominated GATT/WTO decision making since the 1960s. Their capacity to bring about constitutional change is illustrated by the successful EC-U.S. effort to close the Uruguay Round through a legal-political maneuver that imposed various agreements on weaker powers. Closure was achieved by employing the enormous market power of the European Communities and the United States, whose markets make up about 65 percent of the combined gross domestic product of WTO members. Upon the conclusion of the round, the European Communities and the United States entered into the Agreement Establishing the World Trade Organization, which included the GATT 1994 and its most-favored-nation (MFN) guarantee, and required adherence to all the WTO multilateral agreements, including TRIPS, which most developing countries had previously refused to sign. Shortly thereafter, the European Communities and the United States withdrew from GATT 1947, disengaging from that agreement’s MFN commitment to developing countries. This maneuver, which closed the Uruguay Round by means of a single undertaking, presented the developing countries with a *fait accompli*: either sign on to the entire WTO package or lose the legal basis for continued access to the enormous European and U.S. markets. From the time the

players sought to create a trade regime that would lock in place rules that were seen to be in their interests. As Richard Steinberg notes, the United States was particularly desirous of moving away from the more diplomatic approach to dispute resolution that existed under the GATT and creating a more legalized approach that would affirm important aspects of the American approach to trade:

The switch from GATT DSU to automatic, binding dispute resolution and the establishment of an Appellate Body were seen by the United States as an opportunity to foster compliance with a set of comprehensive substantive commitments that would result from the Uruguay Round. The United States considered it useful to implement a legalized dispute settlement process that could culminate in the authorized withdrawal of concessions for noncompliance because it would legitimize the imposition of retaliatory sanctions in cases of noncompliance that were central to section 301 of the Trade Act of 1974. Thus, the United States was careful to condition its support for legalization of dispute settlement on the establishment of detailed, substantive commitments that it supported.<sup>225</sup>

In short, this could be considered classic hegemonic behavior. A power state—and a powerful non-state—comply with a regime because it embodies rules that promote their interests. A theory that seems conspicuously absent from the discussions surrounding the WTO is constructivism. There is very little in the public statements that would indicate that adherence to the WTO was based on a real sense of identity. While there are references to the importance of promoting a regime of free trade, they seem to be couched in the neoliberal understanding of the reciprocal benefits—even if only in the long term—of such a regime. Strangely, there does seem to be at least one outlier in this regard—Ukraine. As noted earlier, Ukraine is not yet a member of the WTO, but has observer status with the organization. At the 2003 ministerial conference, the Ukrainian First Vice Minister and Minister of Finance argued that “[m]aintaining, strengthening and developing the WTO system are pre-conditions for further stable development of the world economy, which, in turn, will form the basis for the future development of world society.”<sup>226</sup> He

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transatlantic powers agreed to that approach in 1990, the definitively dominated the agenda-setting process, that is, the formulation and drafting of texts that would be difficult to amend.

Steinberg, *supra* note 188, at 265 (internal citations omitted).

225. *Id.* at 250 (internal citations omitted).

226. Nykola Azarov, Statement by Ukraine at the World Trade Organization Ministerial Conference, Fifth Session Cancún, WT/MIN(03)/ST/159 (Sept. 14, 2003) [hereinafter Statement by Nykola Azarov].

explained that “[t]he Doha Round documents stress that liberalization is not an end in itself, but only an instrument to ensure the stable [*sic*] consensual development of society and the enhancement of the well-being of people in all countries of the world.”<sup>227</sup> In summary, therefore, it seems as though adherence to the WTO regime is explained best by a combination of neoliberal institutionalism and hegemonic stability theory.

#### D. The Kyoto Protocol

##### 1. *Overview of the Treaty Regime*

*a. Background*<sup>228</sup>. With the objective of addressing climate change, the negotiators of the Kyoto Protocol<sup>229</sup> sought to create a framework for intergovernmental efforts designed to reduce carbon dioxide and other greenhouse gases thought to create global warming. Despite some initial and continuing disagreement among key parties as to specific emissions targets, enforcement mechanisms, and goals for developing countries, the agreement was negotiated in December 1997, and went into force on 16 February 2005.<sup>230</sup>

*b. Legal Obligations.* Under the provisions of the Kyoto Protocol, Annex I, states that have ratified the Protocol are expected to cap emissions of greenhouse gases at roughly 95% of 1990 levels by

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227. *Id.*

228. For a general discussion of the background of the Kyoto Protocol, see DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* 14 (2001); John F. Temple, Note, *The Kyoto Protocol: Will it Sneak up on the U.S.?*, 28 *BROOK. J. INT'L L.* 213 (2002); see also *Understanding Climate Change: A Beginner's Guide to the U.N. Framework Convention and its Kyoto Protocol*, <http://www.wwnorton.com/college/chemistry/chemconnections/Warming/pages/begconkp.html>.

229. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 *I.L.M.* 32, 40 [hereinafter *Kyoto Protocol*]. The Protocol was thus additional to the Convention, which was concluded in 1992. United Nations Framework Convention on Climate Change, June 20, 1992, 1771 *U.N.T.S.* 164 [hereinafter *Framework Convention*].

230. In order for the Kyoto Protocol to enter into force, it required ratification by countries representing at least fifty-five percent of the total CO<sub>2</sub> emissions for 1990 of the thirty-eight Annex I countries. Annex I countries are the developed countries subject to emissions ceilings. They are established in Annex I to the Framework Convention. It lists the following states and organizations: Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, European Economic Community, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Spain, Sweden, Switzerland, Turkey, Ukraine, Great Britain, Northern Ireland, and United States of America. *Framework Convention*, *supra* note 229, Annex I.

2008-2012.<sup>231</sup> As an intermediate step, each Annex I party was expected, “by 2005, [to] have made demonstrable progress in achieving its commitments under this Protocol.”<sup>232</sup> To facilitate meeting these goals in the aggregate, the agreement proposed the establishment of an emissions trading system in which states under their respective quotas would sell their rights to other states needing additional capacity. Such a system would benefit states like Russia and Ukraine, whose economies collapsed after 1990, and would hurt developing countries that had lower levels of production in 1990 but had begun to develop and required fossil fuels.

*c. Enforcement Mechanisms.* The initial drafting of the Kyoto Protocol did not address compliance and enforcement issues. Article 17 indicated that the first session of the Conferences of the Parties (COP) would “approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance. . . . Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.”<sup>233</sup> Amendments, as indicated in Article 20, would require approval by three-fourths of the parties, and the compliance amendment would only be binding for those states that had ratified the amendment.<sup>234</sup> In other words, compliance enforcement with ‘binding consequences’ would not be a component of Kyoto.

All parties agreed that effective compliance is a *sine qua non* for effectively reducing emissions, but agreeing on compliance mechanisms proved to be a thornier issue. Finally, in 2001, four years after the drafting of the Kyoto Protocol, parties agreed on a “penalty” for non-compliance that increased the percentage by which a country would be required to cut emissions.<sup>235</sup> In spite of the agreement on

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231. Kyoto Protocol, *supra* note 229, art.3(1).

232. *Id.* art. 3(2).

233. *Id.* art. 17.

234. *Id.* art. 20.

235. Report of the Conference of the Parties on its Seventh Session, Held at Marrakesh, Oct. 29-Nov. 10, 2001, *Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol*, 64, FCCC/CP/2001/13/Add.3 (Jan. 21, 2002), available at <http://unfccc.int/resource/docs/cop7/13a03.pdf>; Compliance Under the Kyoto Protocol, COP 7 and the Marrakesh Accords, available at [http://unfccc.int/kyoto\\_mechanisms/compliance/items/3024.php](http://unfccc.int/kyoto_mechanisms/compliance/items/3024.php) (last visited Mar. 8, 2006) (“If, at the end of this period, a Party’s emissions are still greater than its assigned amount, it must make up the difference in the second commitment period, plus a penalty of 30%. It will also be barred from ‘selling’ under emissions trading and, within three months, it must develop a compliance action plan detailing the action it will take to make sure that its target is met in the next commitment period.”).

penalties for non-compliance, there are several problems with the enforcement of these penalties. First, failure to pay the penalty in the second control period (2013-2017) results in a new penalty for the third control period.<sup>236</sup> If the state was unable or unwilling to pay in the first period, it would probably be less able or willing to pay once an additional penalty was levied. Second, the penalty increases the cost of participating in emissions reductions, which makes either withdrawal or failure to ratify an amendment more likely. Lastly, compliance is not legally binding except by amendment; those countries unlikely to comply will also be those unlikely to ratify the amendment.

The compliance regime designed to “facilitate, promote, and enforce adherence to the Protocol’s commitments,” consists of a Facilitative and Enforcement Branch.<sup>237</sup> The former provides advice and assistance intended to help parties meet their commitments, and the latter determines whether an Annex I party has met its emission target. If the Enforcement Branch finds a Party in non-compliance, it will make a public declaration, including reference to any consequences. The Party has a one-hundred-day window to enter into compliance, possibly by trading emissions permits, and take remedial action in the second commitment period.<sup>238</sup> Due to the weakness of this arrangement for verification/enforcement, it can be rated at the “low” level.

*d. Effect on Sovereignty.* Meeting the targets specified in Kyoto requires enormous government commitment and sponsorship, since reductions are set against a baseline year of 1990. For the United States to meet its obligations of a seven percent reduction compared to 1990, it would have to reduce its projected 2008 emissions by twenty to thirty percent, an ambitious endeavor.<sup>239</sup> Such reductions require some sort of domestic intervention, as the trend continues upward. Suggested mechanisms include subsidies for industries to research alternative fuels, for individuals to drive alternative-energy vehicles, or for the government to purchase emissions rights from other countries able to sell theirs. While some of these changes have been suggested for purposes of clean air at the domestic level and

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236. Statement by Nykola Azarov, *supra* note 226.

237. *Id.*

238. *Id.*

239. See Congressional Research Service, Susan R. Fletcher, *Global Climate Change Treaty: The Kyoto Protocol*, Order Code 98-2 (Mar. 6, 2000).

energy independence, the ambitiousness of the reductions well exceeds the pace at which governments would otherwise adopt these measures. The consequence is an infringement on the policies of domestic governments, an infringement of domestic autonomy. States such as Russia and Ukraine, whose emissions levels are already below 1990 levels, would not be required to modify energy practices, meaning that their autonomy is not as impacted by ratification of and adherence to Kyoto. All other states that have ratified must modify domestic practices to be in compliance. It would thus seem that the infringement upon the sovereignty imposed by the regime should be classified as “high.”

*e. Normativity.* Even though there has been a growing international concern about environmental degradation, the normativity of the Kyoto Protocol does not seem to be particularly high. Because there are many differences of opinion about the science relating to climate change, it is difficult to conclude that there is any kind of consensus about the moral value of the regime. Moreover, because developing states are excluded from the requirements of the Protocol, there has been a strong perception by states such as the United States that the regime would operate in an unfair, discriminatory fashion.<sup>240</sup> As a consequence, it would seem that the normativity of the regime should be valued at a “low” level.

2. *Adherence Behavior.* Given this analysis, states seem to fall into three categories: high, medium, and low. Five states fall into the high range: France, Germany, Japan, Ukraine, and the United Kingdom. Three states fall into the medium range: Canada, Russia, and South Africa. Eleven states fall into the low range: Australia, Argentina, Brazil, China, Egypt, India, Iran, Israel, Nigeria, Pakistan, and the United States.<sup>241</sup>

What makes the Kyoto Protocol different from the other treaties is exclusion of some countries considered to be great or regional powers. Annex I countries consist of mainly the European Union, Russia, Japan, Australia, Canada, and the United States. Annex I excludes developing countries, into which the negotiators placed China, India, and Brazil, who are large and ever-increasing producers

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240. See *infra* note 246 and accompanying text.

241. This ranking is based on the authors' examination of the states' fulfillment of provisions, institutional investment and domestic support for the overall provisions of the treaty.

of greenhouse gases.<sup>242</sup> It was the Annex I countries that were required to ratify the treaty for it to enter into force. The EU states, Canada, and Japan represented the early ratifiers of the treaty, all signing it in 2002. Following this early set of ratifications, the treaty stalled, requiring the ratification of either Russia or the United States to enter into force. Russia ratified in November 2004 and the treaty officially entered into force on February 16, 2005. Annex I countries that have not ratified include Australia and the United States.

More interesting than ratification behavior, however, is behavior with respect to other indicators of adherence. Since Kyoto requires emission reductions between 2008 and 2012, it is impossible at this time to assess fulfillment of provisions. It is, however, possible to assess whether countries are on target to fulfill those provisions. Countries that have been most successful in meeting emissions reductions are the former Soviet Republics whose economies collapsed after the 1990 disintegration of the Soviet Union.<sup>243</sup> The less productive economies have consumed less energy, naturally resulting in lower emissions compared to the base year of 1990.<sup>244</sup> Russia in particular, an initial holdout to the treaty, eventually ratified it in December 2004, recognizing that it would benefit from any emissions

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242. These three countries have all ratified the Kyoto Protocol. Since they are not Annex I countries, however, they are not subject to emissions limitations or reductions as are those states in Annex I that have ratified. For a discussion on the Annex I states and exemptions for non-Annex I countries, see United Nations Framework Convention on Climate Change, [http://unfccc.int/parties\\_and\\_observers/items/2704.php](http://unfccc.int/parties_and_observers/items/2704.php) (last visited Mar. 9, 2006). For a discussion of the increasing emissions from developing countries, see Indrajit Basu, *Greenbacks Waft in with Greenhouse Gases*, ASIA TIMES ONLINE, Apr. 7, 2005, [http://www.atimes.com/atimes/South\\_Asia/GD07Df04.html](http://www.atimes.com/atimes/South_Asia/GD07Df04.html).

243. Since fossil fuels are used as the energy base for economic development, there has tended to be a direct relationship between economic development and greenhouse gas emissions. Collapse of an economy would therefore be correlated with a dramatic decrease in emissions, which has been the case for former Soviet republics or satellites. See, e.g., Alexander Golub and Benito Muller, *Kyoto's Future Lies in Putin's Hands*, MOSCOW TIMES, Aug. 5, 2004, at 8; see CONGRESSIONAL BUDGET OFFICE, *THE ECONOMICS OF CLIMATE CHANGE: A PRIMER* 43-45 (2003), <http://www.cbo.gov/ftpdocs/41xx/doc4171/04-25-ClimateChange.pdf>.

244. Estonia, for example has seen reductions of 50.8% since 1990, Latvia a reduction of 58.5%, and Lithuania 66.2%; of the so-called former satellite states, the Czech Republic reduced by 24.3%, Hungary by 31.9%, Poland by 32.1%, and Slovakia by 28.2%. See *Annual European Community Greenhouse Gas Inventory 1990-2001 and Inventory Report 2003, Submission to the UNFCCC Secretariat*, European Environment Agency (May 27, 2005) [hereinafter *Greenhouse Gas Inventory and Inventory Report*].

trading scheme, as it would have credits to sell to other countries requiring higher emissions.<sup>245</sup>

Several other countries under consideration are successfully on track to fulfill the treaty provisions and the country-specific targets of Kyoto. The three big economic and political players of Europe—Britain, France, and Germany—are on a trajectory to meet their targets. Britain's pollution is 13.3% less than the base year, France's is 1.9% less, and Germany's 18.5% less. In the last couple of years, emissions in these three countries have increased, in part because of increases in coal-generated power production. Nonetheless, these countries are on track to meet their 1990 levels.<sup>246</sup>

Not every country that has ratified the treaty has projected a fulfillment of provisions. Canada, which ratified on December 17, 2002, increased its emissions by fifteen percent between 1990-1999. Even with climate change initiatives in place, Canada would still need to reduce emissions by nineteen percent to meet its Kyoto target. The likelihood that Canada will fail to fulfill the treaty provisions is not the result of neglect. Since it agreed to participate in Kyoto, Canada has committed billions of dollars and substantial government energy to develop clean fuel technologies and encourage individuals and industry to reduce emissions.<sup>247</sup> Reducing emissions while undergoing economic and population growth has proven to be an insurmountable challenge for Canada, which nonetheless appears to be committed to the objectives of the treaty.<sup>248</sup>

Australia appears to have recognized the difficulty and economic impracticality of ratifying the treaty and, as a result, has not done so.

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245. Russia is the largest source of emissions credits due to its industrial collapse in the early 1990s. Patrick Brethour and Steven Chase, *Ottawa Eyes Pricey Kyoto Credits*, GLOBE AND MAIL, Feb. 1, 2005, at A1.

246. These countries that are meeting their requirements have been offsetting the higher emissions of EU countries such as Spain, which exceeds its 1990 targets by 40.6%, and Portugal, which is over by 36%. Overall, the EU is still meeting its targets. See European Environment Agency, [http://reports.eea.eu.int/eea\\_report\\_2005\\_8/en/GHG2005.pdf](http://reports.eea.eu.int/eea_report_2005_8/en/GHG2005.pdf) (last visited Mar. 9, 2006).

247. Canada has also invested \$500 million as part of its Action Plan 2000 on Climate Change, which includes investment for new energy sources, adaptation research, and a better understanding of the science underlying climate change. See generally the Canadian Government's website on the Action Plan, Moving Forward on Climate Change: A Plan for Honouring our Kyoto Commitment [http://www.climatechange.gc.ca/kyoto\\_commitments/c2.asp#s4](http://www.climatechange.gc.ca/kyoto_commitments/c2.asp#s4) (last visited Mar. 6, 2006).

248. National efforts to reduce emissions are captured in the state's National Communications submitted to the United Nations Framework Convention on Climate Change. CANADA'S THIRD REPORT ON CLIMATE CHANGE, available at <http://unfccc.int/resource/docs/natc/cannce3.pdf> (last visited Mar. 9, 2006).

Australia, like Canada, has dedicated funding towards limiting and reducing greenhouse gas emissions, but “the Government also decided not to ratify the Kyoto Protocol unless and until it is demonstrated that it is in the national interest to do so.”<sup>249</sup> Its government considered that its reliance on cost-effective energy in the form of fossil fuels, combined with the need to produce energy intensive resources for export, has made substantial emissions reductions counter to the nation’s economic interests. Until cost-effective alternatives can be found, Australia has indicated it will not be in a position to ratify. Nonetheless, Australia is committed to funding research for alternative energy sources.<sup>250</sup>

The United States has also chosen not to ratify Kyoto. Following the 1997 negotiated agreement in Kyoto, several U.S. senators asserted their interest in expeditiously submitting the treaty for ratification, knowing that the treaty would be voted down. President Clinton knew he could not obtain two-thirds majority in the Senate, but signed the treaty in November 1998. The Senate then voted against the treaty, and President Bush sealed Kyoto’s fate by rejecting the Kyoto Protocol in March 2001, later stating that the Protocol would have “wrecked the American economy.”<sup>251</sup> The United States has recognized the problem of climate change and committed resources to better understanding the science behind it as well as alternative energy sources, spending \$1.7 billion on federal research annually and providing \$1 billion in climate change assistance to developing countries over the last five years.<sup>252</sup>

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249. Australia’s Third National Communication on Climate Change parallels that of Canada’s and the other parties to the UNFCCC, laying out the government’s commitment to emissions reductions and enumerating the different ways that the government supports the objectives of the treaty, whether through institutional investment or funding for research. Australia has demonstrated its commitment to the treaty through a wide variety of government-sponsored activities. See AUSTRALIA’S THIRD NATIONAL COMMUNICATION UNDER THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <http://unfccc.int/resource/docs/natc/ausnc3.pdf> [hereinafter AUSTRALIA].

250. *Id.*

251. Though President Bush has recently acknowledged the human contribution to global warming, he continues to criticize the structure of the Kyoto Protocol, preferring technological solutions rather than mandatory reductions, which he maintains would be a detriment to the American economy. See Caroline Daniel & Fiona Harvey, *Bush Admits to Role of Humans in Global Warming*, FIN. TIMES, July 7, 2005, at 8.

252. The United States, one of the few Annex I countries that has not ratified the treaty, has been much maligned for its failure to do so. The government, however, asserts its commitment to the treaty and outlines its policies for reducing emissions. See DEP’T. OF STATE, U.S. CLIMATE THIRD NATIONAL COMMUNICATION UNDER THE UNITED NATIONS FRAMEWORK

State behavior regarding Kyoto and the motivations for that behavior have been variable. Certain adherence behavior is readily explicable. India, Brazil, and China had every reason to ratify the treaty, since doing so made them appear to be good global stewards while not subjecting them to emissions reductions. Russia and Ukraine also have obvious reasons for ratifying and fulfilling the provisions. Since they experienced precipitous economic declines after 1990, the base year used for Kyoto targets, they are in a position to gain from any emissions trading scheme, as they would have extra credits to sell, potentially amounting to \$3 billion as part of an emissions trading system.<sup>253</sup> No institutional investment or domestic embedding is required for these countries to meet their targets. This set of countries is clearly rationalist, receiving the reputation benefits of signing without undergoing any negative economic impacts associated with implementation of alternative energy sources.

Australia and the United States have also made decisions based largely on cost-benefit, realist calculations, but have cited different aspects of the calculations. Australia has argued that its energy export business requires a disproportionately large amount of energy so it can provide energy to other countries with a lower capacity to produce. The government has argued that “[b]y providing the world market with energy-intensive products and less greenhouse-intensive energy sources such as liquefied natural gas (LNG), Australia displaces emissions that would otherwise occur in these markets.”<sup>254</sup> The demand for fossil fuels is compounded by the decision not to use nuclear energy and by insufficient availability of the type of water needed for hydro-electric energy. Given these calculations, Australia has determined that the treaty runs counter to its “national interest,” as defined by economic interest, and will not ratify it.<sup>255</sup>

The United States is also concerned about the impact to its economy, from both an absolute and relative perspective. Given its

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CONVENTION ON CLIMATE CHANGE, <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ResourceCenterPublicationsUSClimateActionReport.html> (last visited Mar. 9, 2006).

253. The EU had realized that Kyoto would only enter into force if either Russia or the United States ratified the treaty. Understanding that the United States was unlikely to sign, the EU enticed Russia with WTO accession, to which it responded positively. WTO membership along with an emissions trading scheme beneficial to Russia ultimately convinced the Russian government that it should ratify Kyoto. For the business side of Kyoto from the perspective of Russian ratification. See John Carey, *Russia's Path to Kyoto*, BUS. WEEK ONLINE, Oct. 1, 2004, [http://www.businessweek.com/bwdaily/dnflash/oct2004/nf2004101\\_3878\\_db039.htm](http://www.businessweek.com/bwdaily/dnflash/oct2004/nf2004101_3878_db039.htm).

254. AUSTRALIA, *supra* note 249, at 2.

255. *Id.*

heavy reliance on fossil fuels, the U.S. government has argued that committing to reduce its energy consumption or to consuming alternative sources would have negative repercussions on the economy. President Bush, in citing Kyoto's flawed emphasis on emissions reductions rather than technology solutions as a basis for his opposition, asserted: "I don't see how you can be president of the United States and agree to an agreement that would have put a lot of people out of work."<sup>256</sup> The U.S. Government has been wary of a treaty associated with potential negative economic consequences.<sup>257</sup>

Any assessment of the absolute effect on America's economy is usually associated with the point that some of the U.S. competitors, at least those in the future, are not also subject to fossil fuel reductions. Specifically, India and China are among the world's largest emitters, but they have been exempted from the Kyoto requirements. Defending the American criticism of Kyoto, President Bush noted, "These and other developing countries that are experiencing rapid growth face challenges in reducing their emissions without harming their economies."<sup>258</sup> Exemption for countries that are among the largest emitters is thought to be unfair, putting a disproportionate share of the responsibility and cost on developed countries. Realist interest in maintaining a strong economy, particularly relative to potential competitors, is clearly at stake.

Implicitly, the U.S. behavior is also explained by the hypotheses laid out by hegemonic stability theory. Adherence to Kyoto, given current U.S. emissions, would require dramatic changes to the domestic energy infrastructure; the perceived inconvenience and cost to meeting emissions reductions is thought to be high, leading the United States to oppose the treaty.<sup>259</sup> Related to the realist

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256. Daniel & Harvey, *supra* note 251, at 14. See also *Bush arrives at Summit Session, Ready to Stand Alone*, N.Y. TIMES, July 7, 2005 at A14.

257. Press Release, President Bush Discusses Global Climate Change (June 2001), <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>

258. *Id.*

259. The United States Department of Energy has evaluated the potential costs of fulfilling its Kyoto obligations. In its section called *Comparing Cost Estimates for the Kyoto Protocol*, the study reports the following: "The estimates of unavoidable (irreducible) losses—income losses that cannot be recovered—for the U.S. economy range from \$32 billion (DRI Case 2) to about \$62 billion (EIA) in 2010. There are many frictions that can increase costs above the irreducible minimum. These include business cycles, international trade and capital constraints, regulation, use of imperfect instruments instead of auction permits, coal subsidies, CAFE standards, exemptions, efficiency losses from taxation, etc." ENERGY INFORMATION ADMINISTRATION, *COMPARING COST ESTIMATES FOR THE KYOTO PROTOCOL*, <http://www.eia.doe.gov/oiaf/kyoto/cost.html> (last visited Mar. 9, 2006) (internal citations omitted).

explanations, the United States is also concerned with maintaining primacy and not being disproportionately constrained compared to possible competitors. Concern with relative power and unrivaled primacy are important U.S. policy objectives. The United States has made it clear that it will develop policies around those objectives, thus ruling out policies that give any advantage to potential rivals.<sup>260</sup>

The treaty status in light of non-ratification of the United States also confirms hegemonic stability predictions that a treaty will be the most effective if it has the sponsorship and backing of the hegemon.<sup>261</sup> While the Kyoto Protocol has technically entered into force because of Russia's ratification, it arguably still lacks teeth. Not only are India and China not subject to the provisions of the treaty, but the United States, which leads in emissions, is not a party. The treaty is substantively less effective without the main emissions contributor, and it is also less diplomatically effective. U.S. ratification would give the Convention more leverage to bring developing countries on board, and it would give the United States an opportunity to use its leadership to that same end. Instead, the United States has withheld its support, an act, which undermines the treaty's effectiveness, but which may ultimately cause the UNFCCC to create a solution that takes U.S. interests into account and that will garner U.S. endorsement.<sup>262</sup>

While realist and hegemonic principles readily explain the previous countries, they are less helpful in explaining the behavior of European states such as Britain, France, and Germany. These

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260. The 2002 National Security Strategy outlines the U.S. foreign policy objectives and strategies that will be used to meet these objectives. The document states that the highest priority is to defend the United States, which it can do best through "unparalleled strength" and the dissuasion of future military competition, and the maintenance of defenses beyond challenge. See *Section IX. Transform America's National Security Institutions to Meet the Challenges and Opportunities of the Twenty-First Century, NSS 2002*, at 30.

261. Gilpin has discussed the influence of the hegemon on international order and stability, using the examples of Britain and the United States to argue that the hegemon creates and enforces international rules. Kindleberger has also written on the importance of a hegemon in promoting international stability. Keohane has argued that the hegemon is important in facilitating the creation of an international regime but may not be as important in the perpetuation of that regime. See KEOHANE, *supra* note 50.

262. At a press conference jointly held with British Prime Minister Tony Blair on July 7, 2005, President Bush noted: "Now is the time to get beyond the Kyoto period and develop a strategy forward that is inclusive not only of the United States, but of the developing nations, and, of course, nations like Great Britain." George Bush, U.S. President, Bush, Blair at G8 Call for Post-Kyoto Strategy on Climate Change, Remarks by President Bush and Prime Minister Blair at the 2005 G8 Summit in a Photo Opportunity (July 7, 2005) (transcript available at <http://usinfo.state.gov/gi/Archive/2005/Jul/08-375773.html>).

countries might be associated with mixed motives, a combination of realist, constructivist, and modified structural realist behavior. The European powers, particularly the United Kingdom, have enjoyed greater energy consumption, increases in use of independent means of transportation, and stronger economic growth, but still have been able to reduce emissions. The difference has been a concerted interest in lowering emissions, and a strong government commitment to greater energy efficiency, pollution control measures in the industrial sector, and a general restructuring of the energy supply sector, with an emphasis on alternative energy sources.<sup>263</sup> These policies have increased the efficiency of energy usage, a positive economic advantage and a positive result according to rationalist cost-benefit calculations.

Adherence behavior, however, appears to be motivated by more than just rationalist calculations. It seems to have an identity component, particularly for the United Kingdom. The British government consistently asserts its engagement in the climate change debate, and its role in leading in international negotiations, and working towards a solution to the global problem.<sup>264</sup> There is a sense that Britain conceives of itself as a global steward, leading in the goal of global sustainable development. During the G8 Summit in July of 2005, hosted by Great Britain in Gleneagles, Scotland, Prime Minister Tony Blair made climate change one of the two major issues on the agenda.<sup>265</sup> Despite the terrorist attacks in London that occurred during the meeting, Blair returned to this issue in his press conference following the Summit.<sup>266</sup> From a constructivist perspective, Britain's

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263. The United Kingdom's Third National Communication under the UNFCCC captures the policy changes responsible for emissions reductions, and the ideological commitment to addressing climate change. U.K.'S THIRD NATIONAL COMMUNICATION UNDER THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, *available at* [http://www.defra.gov.uk/environment/climatechange/pubs/3nc/pdf/climate\\_3nc.pdf](http://www.defra.gov.uk/environment/climatechange/pubs/3nc/pdf/climate_3nc.pdf) (last visited Mar. 9, 2006).

264. *Id.* at 5.

265. The other was aid to Africa.

266. Blair explained:

What I wanted to do therefore at this summit was establish the following, and I believe we have done this. I wanted an agreement that this was indeed a problem, that climate change is a problem, that human activity is contributing to it, and that we have to tackle it; secondly, that we have to tackle it with urgency; thirdly, that in order to do that we have to slow down, stop and then in time reverse the rising greenhouse gas emissions; and finally, we have to put in place a pathway to a new dialogue when Kyoto expires in 2012. And what we have agreed is a dialogue between the G8 countries and others, but most particularly the five that came to Gleneagles yesterday, and that dialogue will be on how we confront and tackle this problem. It is combined, in addition, with a specific plan of action in respect of all the main issues, and that plan

strong adherence to Kyoto may reflect a deep-held belief that being a leader in promoting a greener world may mirror British identity.

Defining itself as a leader for sustainable development may also be the result of modified structural realist constraints. Since the United Kingdom is less powerful compared to its historic position as a world power, and has relied in recent years on U.S. power and security guarantee. It has lost some of its global voice in security affairs, but has found it in other issues dealing with lower politics, including international development and environmental governance. Taking the lead on issues such as climate change has given Britain a voice opportunity that it may not have in the realm of high politics.<sup>267</sup> Britain uses the leadership role it is periodically offered, whether as the rotating President of the EU or the chair of a G8 meeting, to promote social and environmental responsibility. It appears that the United Kingdom has determined that its influence in global affairs is best used in areas of low politics, and that it may relinquish leadership in the security arena to the United States.

3. *Validation of Theories.* In considering a general explanation for patterns of state adherence to Kyoto, no clear theoretical winner emerges. On some level, where a state sits is where it stands. The United States, as the hegemon, seeks to preserve its position and is unwilling to bind itself to a treaty that it considers disproportionately costly compared to potential rivals. It is willing to hold out for a treaty that is more compatible with its interests, in part recognizing that a more effective treaty assumes hegemonic participation. This behavior is also distinctly realist in that states do not want to sacrifice domestic autonomy and are cognizant of relative gains and losses vis-à-vis other states. Australia, in addition to the United States, fits into this category. It should be noted that Australia may be an outlier to

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of action and the dialogue together will then be reported on, first of all at a meeting that will be held here in Britain on 1 November, and then in successive G8 Presidencies. And the President of Russia has kindly agreed to put this on the agenda for next year, and there will then be a full report back for the Japanese Presidency in 2008.

Tony Blair, U.K. Prime Minister, Presidency Press Conference at Gleneagles, (July 8 2005) (transcript available at <http://www.pm.gov.uk/output/Page7891.asp>).

267. Robert Kagan addresses the different responsibilities of Europe compared to the United States, arguing that that Europe's tacit reliance on the U.S. security guarantee has allowed European countries to consider the use of military force less often in favor of diplomacy. One could make a similar argument about Europe's ability to pursue issues of low politics compared to high politics. See Robert Kagan, *Power and Weakness*, 113 POLICY REVIEW 3 (2002), available at <http://www.policyreview.org/JUN02/kagan.html>.

the positional framework laid out in this Article. The positional argument would suggest adherence on the part of Australia. Instead, Australia has chosen not to ratify or adhere in any meaningful way to the provisions of the treaty. While it is difficult to explain Australia's behavior in light of the positional theory, it may be a case where its relationship to the United States has carried over into its actions.

A second category includes states that require little sacrifice and, in fact, gain through emissions trading and are willing to adhere. This category include states such as Russia, Ukraine, and other former Soviet Republics whose economies and emissions collapsed after 1990, and that can meet their targets without changing their domestic status quo energy usage. Structural realism would predict this behavior. The rationale is, since there is no real sacrifice, why not be seen as a good state?

The third category, primarily the three most powerful states in Europe, includes countries that have had to implement domestic energy restructuring in order to cut emissions, and have proceeded to do so. These are countries that have made environmental conservation a priority and have, to some degree, enjoyed voice opportunities that they might not have garnered in the high politics arena. Their behavior is best explained by a combination of modified structural realism and constructivism, that is, identifying themselves as environmental stewards.

#### IV. TOWARD A POSITIONAL THEORY OF ADHERENCE

##### A. Traditional Theories and Adherence: A Failure

As noted previously, both international relations scholars and international legal scholars have debated at length over whether and under what conditions states are likely to cooperate with international regimes and have applied several traditional theories to the issue. Unfortunately, when each of those theories is tested through an examination of state behavior in the four treaty regimes examined here, none seems to be able to predict adherence across states.<sup>268</sup> A realist approach explains some behavior—such as why India and Pakistan would not adhere to the CTBT. But it does not

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268. Professor Jack Snyder has similarly argued that “[t]heories of international relations claim to explain the way international politics works and each of the currently prevailing theories falls well short of that goal.” Jack Snyder, *One World, Rival Theories*, 145 FOREIGN POLICY 52, 62 (2004).

explain other behavior—such as why the U.S. would neither sign nor ratify the CTBT and the Land Mine Treaty, but still adhere to many elements of those regimes. Similarly, a modified structuralist approach might be able to explain why certain European states would seek voice opportunities in some regimes, but not why China would demonstrate any adherence behavior with respect to the CTBT. Neoliberalism would explain general behavior in the WTO, but not why the U.S. would follow some of the provisions of the Land Mine Treaty. Hegemonic stability theory goes a long way in explaining U.S. behavior at the WTO and with respect to Kyoto, but not U.S. actions regarding the Land Mine treaty. Perhaps constructivism could explain all behaviors described above, but that may simply be because constructivism in its current form allows for behavior that realists, modified structuralists, neoliberals, and hegemonic stability theorists would predict. Needless to say, a theory that allows for all such behavior but cannot predict *when* such behavior will take place is quite problematic.

In short, existing theories—as they are currently developed—fail to explain the textured adherence behavior that can be observed in these cases. They may offer fruitful explanations of some state behavior, but cannot explain variances in state adherence behavior within the same treaty, or why the same state will adhere differently across different treaties. As a consequence, a new theory of adherence is required.

#### B. A Positional Theory of Adherence

Our empirical work suggests that states' approaches to international law are determined in part by where they stand in relation to other states in the international system and in part on the basis of other factors associated with each treaty. If some of the insights of the traditional theories are linked to the position of the state, the contours of a new theory seems to emerge—what might be called “a positional theory of adherence.” This theory relates the position of the state to four other factors: (1) the high/low nature of the regime; (2) the extent to which the regime infringes on state sovereignty; (3) the nature of the verification/enforcement arrangement of the regime; and (4) the normativity of the regime. This theory can be summarized for each of the positions that we have identified.

1. *The Hegemon.* The global or regional hegemon is concerned with maintaining its position of primacy. Doing so means not subjecting itself to any unfair disadvantages vis-à-vis challengers, being unfettered in its ability to defend itself, and being able to verify and enforce compliance on the part of other states. It also means leveraging its power to influence institutions and parties in a way that returns benefits to itself. To this end, the hegemon will be more likely to adhere to treaty in the area of low politics, with limited infringement on its autonomy, and with credible mechanisms for verification and enforcement.

*Ceteris paribus*, a hegemon will be unlikely to adhere to a regime when there is weak normativity. If there is no significant consensus behind the regime then it is unlikely that the state would demonstrate any elements of adherence. The United States approach to the Kyoto Protocol seems to fall into this category. Given the questions about the science underlying climate change, perceptions about the unfairness of the regime, and the unwillingness of other states to adhere, it is no surprise that the United States would be reluctant to sign, ratify or demonstrate any other indicators of adherence to the regime. Conversely, if there is a stronger level of normativity, the global hegemon might be expected to demonstrate a greater level of adherence. The Land Mine Treaty and the CTBT illustrate this behavior and are perhaps even more interesting. In both cases, the United States has not ratified, but still adheres to many of the provisions of both treaties and has expressed strong support for the underlying purposes of the treaty regimes. It seems that this behavior may be due to the strong sense of normativity of the regimes. As noted earlier, land mines have come to be seen as “immoral, abhorrent” weapons by virtually all states in the international system. And there has always been a strong revulsion against nuclear weapons since Hiroshima and Nagasaki.<sup>269</sup> In other words, the moral efficacy of the regime would seem to pull the United States toward adherence.

Different states may maintain the position of hegemon for different issue areas. For example, on issues of high politics (security), the United States is clearly the hegemon and approaches international treaties accordingly. On some issues of low politics, specifically in the economic realm, the European Union—whose total

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269. See, e.g., TANNENWALD et al, *supra* note 75, at 433.

economy is about the size of the United States<sup>270</sup>—is a hegemon and approaches international economic institutions accordingly.

*Assessing State Behavior: The Hegemon*

	<b>CTBT</b>	<b>Land Mine</b>	<b>WTO</b>	<b>Kyoto</b>
High/Low Politics	Very High	High	Low	Low
Infringement on Sovereignty	High	Moderate	Medium	High
Verification/ Enforcement	Low	Moderate	High	Low
Normativity	Medium	High	Uncertain	Low
<b><i>Adherence Prediction</i></b>	<b><i>Low</i></b>	<b><i>Medium</i></b>	<b><i>High</i></b>	<b><i>Low</i></b>

2. *The Partner.* Compared to states in other positions, global or regional partners tend to approach international treaties in the most adherent manner, almost irrespective of the issue area. In many cases, they fall under the extended deterrence umbrella of the United States, a mechanism that mitigates the conditions of anarchy and allows them to pursue cooperation, whether in the area of high or low politics. In the area of high politics, these states have been able to relinquish their pursuit of nuclear weapons development and can readily ratify non-proliferation agreements; in addition, their more limited global presence tends to mean that land mines are not a necessary element of their defense posture, making it easier for these states to adhere to the Land Mine Convention.

Since their defense needs have been addressed by the American security guarantee, they may also be in a position to pursue cooperation issues in the area of low politics. With the issues of relative gains mitigated by the security guarantee, they are in a position to harness the benefits of cooperation, including lower transaction costs, greater efficiency, and greater absolute gains across participants. They may also perceive a regime's normativity

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270. For a useful comparison and projection of the European Union's total economy vis-à-vis the United States', see, e.g., ADAM S. POSEN, THE BROOKINGS INST., FLEETING EQUALITY: THE RELATIVE SIZE OF THE U.S. AND EU ECONOMIES TO 2020 (2004), available at <http://www.brook.edu/fp/cuse/analysis/posen20040901.pdf>. If the analysis is correct and the EU's economic power decreases vis-à-vis the United States, our theory would suggest that the EU would tend to approach economic treaties differently since it would no longer occupy a hegemonic position.

differently from the hegemon, seeking to adhere on the basis of a regime's moral imperative (e.g., Kyoto) and perhaps driven less by a concern about relative fairness.

Lastly, states in this category tend to be smaller and less powerful states that choose to exercise their influence through the "voice opportunities" afforded by participation in the treaty. These countries may be able to lead the institution forward in a way that individually would be more difficult, which gives them additional incentive to participate in the treaty regime. In keeping with these incentives for participation, partners—including the European countries, Canada, and Japan—seem generally to adhere to the regimes.

*Assessing State Behavior: The Partner*

	<b>CTBT</b>	<b>Land Mine</b>	<b>WTO</b>	<b>Kyoto</b>
High/Low Politics	Very High	High	Low	Low
Infringement on Sovereignty	High	Low	Low	High
Verification/ Enforcement	Low	Low	High	Low
Normativity	Medium	High	Uncertain	Low
<b><i>Adherence Prediction</i></b>	<b><i>Highest</i></b>	<b><i>Highest</i></b>	<b><i>High</i></b>	<b><i>High</i></b>

3. *The Competitor.* According to the definition suggested earlier, a global or regional competitor harbors rivalries with other states but, depending on circumstances, may be able to reach higher levels of adherence. Sovereignty issues are not as significant to these states as to the hegemon or adversaries, and normativity is less significant than for partners. The key condition for cooperation appears to be confidence-building measures associated with the treaty's objectives. The case of Brazil and Argentina is the most instructive here. Despite being historic competitors, they have realized that there is some utility in a Lockean state of cooperation, but the negotiations that have led to higher levels of adherence have occurred primarily on a bilateral basis outside the regime.

Within the regime, they are interested in enforcement and verification of the other participants, but are also concerned with fairness (normativity) and universalization of the treaties. Presumably, these concerns are driven by the residual competitiveness of the states; they are able to overcome their fear of anarchy but only under the condition that other states—primarily their competitor, but all states—are subject to the same constraints of the treaty. They are willing to accept the terms of absolute gains, but only if other states are playing by those same rules. In short, adherence is more tenuous with competitor states, but the right conditions can elicit cooperation.

*Assessing State Behavior: The Competitor*

	<b>CTBT</b>	<b>Land Mine</b>	<b>WTO</b>	<b>Kyoto</b>
High/Low Politics	Very High	High	Low	Low
Infringement on Sovereignty	High	Low	Low	High
Verification/ Enforcement	Low	Low	High	Low
Normativity	Medium	High	Uncertain	Low
<b><i>Adherence Prediction</i></b>	<b><i>Medium</i></b>	<b><i>Medium</i></b>	<b><i>High</i></b>	<b><i>Medium</i></b>

4. *The Adversary.* Lastly, global or regional adversaries present the most pessimistic prospect for adherence, almost independent of the issue area, credibility of enforcement, and normativity; their goal is to maintain the highest possible degree of autonomy (lowest infringement on sovereignty) in order to defend themselves. These states seem to exist in a Hobbesian world of constant distrust. As a consequence, they will be less inclined to sign, ratify or adhere to the provisions of regimes that touch on issues relating to the rivalry. Thus, Israel and its rival Arab states will not be inclined to adhere to the CTBT due to the belief that this agreement would unduly constrain behavior that might be necessary for their security. The same can be said for India and Pakistan. Almost no amount of negotiation, confidence building, or certainty about enforcement can bring these states out of their constant security dilemma.

Since security is of paramount concern, a regime's high degree of normativity would still exert little adherence pull with regard to these states. They may simply be apathetic towards issues that may distract them from their goal of state survival. Adversaries may be interested in economic cooperation, but only to the extent that it offers some instrumental utility and minimizes disadvantageous trade situations.

*Assessing State Behavior: The Adversary*

	<b>CTBT</b>	<b>Land Mine</b>	<b>WTO</b>	<b>Kyoto</b>
High/Low Politics	Very High	High	Low	Low
Infringement on Sovereignty	High	Low	Low	High
Verification/ Enforcement	Low	Low	High	Low
Normativity	Medium	High	Uncertain	Low
<b><i>Adherence Prediction</i></b>	<b><i>Lowest</i></b>	<b><i>Lowest</i></b>	<b><i>High</i></b>	<b><i>N/A</i></b>

## V. THE IMPLICATIONS OF A POSITIONAL THEORY FOR FOREIGN POLICY

What does this analysis mean for policymakers who design treaty regimes and seek the fullest and broadest adherence from states? How can they go about creating an effective regime that also brings in the hegemon and regional partners or competitors, takes into account principles of fairness, and mitigates concerns about relative gains and the security dilemma?

### A. The Hegemon

First and foremost, the hegemon's support is important to the development and sustainment of the treaty. While not every treaty initiative must originate with the hegemon, obtaining the backing of the hegemon is important for several reasons. First, the hegemon may be disproportionately responsible for the problem that the treaty addresses. In the case of climate change, the United States accounts for 25% of greenhouse emissions. Pragmatically speaking, the transnational problem of climate change requires the large contributors, which certainly includes the United States. Second, the

hegemon has the ability to influence other states into supporting the treaty, both through its actions and through the incentives it offers other states.<sup>271</sup> It may have more leverage than other states in the international system, positioning it to bring other states off the sidelines and into the treaty. Third, the hegemon's abstinence from the regime may at best be benign but at worst could actually undermine the regime. Perhaps one of the most notable examples was America's unwillingness to join the League of Nations following the First World War. Without U.S. participation, the organization was doomed to be an ineffective collective security body.

The hegemon's support may be constructive to the regime, but presents a challenge to the policymakers developing the treaty. On the one hand, it may benefit and preserve hegemonic power to project its influence through institutions, which creates an incentive for participation in the regime.<sup>272</sup> On the other hand, as the accounts of hegemonic activity suggest, the hegemon's desire to maintain primacy may impede its participation in particular regimes. A hegemon that perceives the regime as antithetical to its security or economic interests will be less inclined to ratify, and the international community may not have the power to coerce ratification, as it might with smaller states. Several options exist in this case. The international community could wait for the right composition of domestic political actors.<sup>273</sup> It may do nothing, hoping that the treaty will be sufficiently effective without the U.S. support, which is largely what the UNFCCC has done with regard to Kyoto. The international community may also choose to take the hegemon's reservations into account in a modified treaty, as in the Law of the Sea, where states

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271. Hegemonic international law claims that "in terms of the formation of customary law, such a power can by its abstention prevent the emerging rule from becoming part of custom." Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 847 (2001). A similar case could be made for the hegemon's behavior with respect to treaty law: abstention, or conversely, participation, can influence the broader rejection or acceptance.

272. Some scholars have argued that the United States has created an "institutional bargain" with secondary states, in which the United States provides public goods, largely through institutions, in exchange for acquiescence from potential challengers. In this framework, the participation and leadership in regimes serves to preserve the power and primacy of the hegemon. See G. JOHN IKENBERRY, *AFTER VICTORY passim* (2001).

273. Since the last opportunity for ratification of the CTBT was defeated only by a vote of 51-48, ultimate ratification by a different political composition within the Senate might be plausible. Alternatively, it may also suggest an isolationist undercurrent in U.S. foreign policy in which the United States retrenches rather than engages the international system. See, e.g., Gerard Baker & David Buchan, *American Isolationism Put to the Test: Rejection of the Nuclear Test Ban Treaty Demonstrates How World Issues are Pushed to the Fringe of U.S. Politics*, FIN. TIMES, Oct. 15, 1999, at 23.

recognized that without U.S. support, the treaty would largely be ineffective. Alternatively, the hegemon may circumvent the treaty and create a separate multilateral regime designed to effect similar change, but through different means, as the United States has done with its climate change initiative. Ideally, the hegemon would support in the development, adherence, and enforcement of the regime. In less than ideal situations, the community may find itself resorting to these other policy options.

#### B. Partners, Competitors, and Adversaries

One of the most prominent adherence patterns to emerge throughout this analysis is that countries act in concert with regional partners, competitors, or adversaries. This pattern presents several implications for policymakers hoping to gain the broadest participation. Some regions, such as Europe, appear to have overcome the impediments to effective cooperation. The behavior of those states suggests that they are not driven by relative gains but rather by the absolute gains of cooperation. At least temporarily, they have been able to mitigate the security dilemma and act in concert toward early ratification and continuing adherence behavior. European states benefit individually from absolute gains but also collectively from the voice opportunities they attain from participation in regimes, so their adherence is rational and beneficial to the strength of the regime. That said, European support alone is not the necessary and sufficient condition for global regime strength.

Policymakers should recognize that the condition of anarchy creates challenges for cooperation in most countries, particularly states that are not global great powers, but are regional competitors. Brazil and Argentina have traditionally vied for regional hegemony in South America. Israel, Egypt, and Iran vie for regional hegemony in the Middle East; and India and Pakistan in south Asia. Unless these regional competitions can be addressed, the limits to cooperation—at least in the security arena—will be prohibitively high. As indicated previously, Brazil and Argentina have worked bilaterally to overcome some of those limitations at the multilateral level, but other states are still too steeped in recent competition to benefit from fruitful cooperation. Policymakers must somehow break or at least mitigate the security dilemma of these regions if they intend to improve adherence, particularly in the security arena.

Developing adherence pull is the most difficult with regard to adversarial states. Although institutions are meant to increase

transparency, these states are often bound by the security dilemma to be convinced of any benefits of cooperation. Having said that, one way to build confidence in the regime is to create a more robust transparency, verification, and enforcement regime, which might help mitigate the security dilemma by exposing the motivations and activities of their adversaries. Israel has maintained that its non-adherence to regimes such as the CTBT stems from its skepticism in the transparency of other states' behavior and in the enforcement regime in general. One way to build confidence in the enforcement might be to continue to fortify the IMS, which would require additional funds for international monitoring stations, but might increase the credibility of the regime's transparency and regime.

Another option for addressing the regional security dilemma is through hegemonic leadership, which presupposes hegemonic support for the regime itself. If the United States were to support the CTBT, for example, it might use its leverage and influence to create separate side payments in exchange for the ratification by India and Pakistan. Offering its satellite reconnaissance as a confidence building measure, creating economic incentives, and tying adherence to resource transfers might be effective ways of gaining participation from these states and perhaps breaking the adherence deadlock within the region.<sup>274</sup>

In sum, different states' positions will create different challenges for policymakers hoping to gain the broadest levels of adherence. Thus understanding a state's position and motivations may help inform efforts to draft a treaty likely to elicit adherence. In this sense, the fairness principle is very much linked to the way positions motivate state behavior. States' conceptions of fairness will be based in part on how they perceive the treaty to affect others vis-à-vis themselves. In other words, fairness is relative, assessed by one state relative to its partners, competitors, or adversaries. A treaty that disproportionately impacts Pakistan compared to India may be perceived by India to be unfair even if at the same time the treaty favors Brazil, which would have no impact on India's influence in

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274. In the recent agreement on civil nuclear cooperation between India and the United States, the United States acknowledged India's status as a nuclear weapons power and agreed to transfer nuclear technology to India in exchange for India agreeing to accept additional inspections and tighter nuclear controls. If the U.S. itself were more committed to the CTBT, it could easily have tacked the CTBT onto the bilateral exchange, and worked in parallel with Pakistan to gain their commitment to the regime. See, e.g., Caroline Daniel & Demetri Sevastopulo, *Nuclear Deal with India Spells Division in Washington*, FIN. TIMES, July 27, 2005, at 10.

south Asia. Similarly, the United States' concern with China's global position suggests that the United States will consider fairness and its own adherence in part vis-à-vis China's behavior. Fairness as judged from the vantage point of a state's position in the international or regional system is indeed a real concern for states evaluating their adherence policies and must fall squarely on the agenda of policymakers constructing international treaty regimes.

### CONCLUSION

As noted at the outset, the purpose of this Article has been to explore the motivations of global and regional powers regarding their adherence behavior toward four major treaty regimes. We believe that this examination has demonstrated that a new theory, what we have called a "positional theory of adherence," provides a more textured explanation of state behavior than the traditional theories of international relations and international law. In particular, we believe that this study leads to several conclusions.

First, state adherence is not an either/or proposition. Rather, there is a spectrum along which adherence takes place. Even some states that do not sign or ratify an international agreement may nonetheless demonstrate various levels of adherence to the treaty regime. This is a fact that much of the "compliance" literature seems to miss.

Second, while there is no scientific method for determining the precise level of adherence, there do seem to be a number of factors that can be used to evaluate the nature of adherence. These factors include the extent to which the state follows the provisions of the agreement, the degree of institutional investment, the domestic embedding of the treaty provision, the willingness to accept dispute settlement procedures, and the extent of participation in any conferences or negotiations that relate to the agreement.

Third, even though all traditional theories of international law and international relations are able to explain some state behavior some of the time, none succeed in explaining state behavior across all four treaty regimes examined in this article. A positional theory hypothesizes that adherence behavior can be understood by examining the position of a state in the global or regional system as it relates to the nature of the regime, the degree to which the regime infringes on sovereignty, the verification/enforcement arrangements of the regime, and the normativity of the regime. While this theory is

not perfect<sup>275</sup> and still requires further development, we believe that it offers a great advance over previous approaches to compliance.

Fourth, a positional theory has important implications for policymakers. With an understanding of what motivates states in different positions, policymakers will be better equipped to determine which diplomatic levers to pull if they seek to secure state adherence to a particular regime.

Fifth, by selecting treaties in the area of high and low politics, with higher and lower levels of infringement on sovereignty, verifiability, and normativity, we believe we have represented the different types of treaties in the international system. As such, we suggest that the methodology used herein can readily be applied to other treaties to better understand the motivations and propensity for different states' adherence behavior. This analysis therefore provides a methodological framework that may be applied beyond the four treaties examined in this article, offering an analytical tool for both international relations and legal scholars. It is our hope that scholars in both disciplines will be able to develop this theory further as they apply it to different treaty regimes and even customary international law.

Finally, we believe that using official statements of policymakers has provided a useful method for understanding state motivation. The next step for subsequent research should involve the use of a variety of techniques to measure the motives for adherence. While we have focused on public statements by decision-making elites, other scholars may have access to declassified materials, interviews of participants, and other sources to assess state motives. As indicated earlier, while no method will be able to provide a perfect view into the minds of policymakers, the more lenses that a scholar uses, the more likely it is that a better picture of state motivation will be developed.

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275. As noted earlier, Australia does not behave as the theory would predict with respect to the Kyoto Protocol. As with any attempt to develop a theory of state behavior regarding international legal regimes, the more cases that are examined using this approach, the more the theory can be refined. For a more detailed discussion of methodology and the refinement of theory, *see* GARY KING, ROBERT O. KEOHANE, & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY* 25 (Princeton Univ. Press 1994).