The United States and International Environmental Law: Living with an Elephant

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Abstract

For many observers, the US decision in 2001 to abandon the Kyoto Protocol to the United Nations Framework Convention on Climate Change encapsulates an alarming trend in American attitudes towards international environmental law. This article explores recent trends in US approaches. It begins by canvassing the trajectory of US practice since around the time of the 1992 Earth Summit in Rio. This review suggests that some shifts in legal avenues for shaping relevant policy agendas have indeed occurred, but that it would be a mistake to treat one event — the US withdrawal from Kyoto — as representative of the nature of these shifts. It then examines a range of possible explanations for the changing US approach to international environmental law. These include factors related to the growth of treaty regimes and institutional structures, factors related to American power, domestic politics and attitudes towards international law, and factors specifically related to the administration of George W. Bush. Both the review of US practice and the assessment of factors that might account for American policy suggest that the international environmental law community must carefully distinguish short-term developments from longer-term trends.

> Living next to you is in some ways like sleeping with an elephant.
> No matter how friendly and even-tempered is the beast, if I can call it that,
> one is affected by every twitch and grunt.
> Pierre Elliott Trudeau[1]

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[1] Pierre Elliott Trudeau, then Prime Minister of Canada, addressing the National Press Club in Washington, D.C., on US-Canada relations, 26 March 1969. Quotation No. 384, available at http://www.bartleby.com/63/84/384.html (accessed 25 January 2004).

Our country, the United States is the world's largest emitter of manmade greenhouse gases. We account for almost 20 percent of the world's man-made greenhouse emissions. We also account for about one-quarter of the world's economic output. We recognize the responsibility to reduce our emissions. We also recognize the other part of the story — that the rest of the world emits 80 percent of all greenhouse gases. And many of those emissions come from developing countries. This is a challenge that requires a 100 percent effort; ours, and the rest of the world's. The world's second-largest emitter of greenhouse gases is China. Yet, China was entirely exempted of the Kyoto Protocol... India was also exempt from Kyoto. ...

[The] Kyoto [Protocol] is, in many ways, unrealistic. Many countries cannot meet their Kyoto targets. The targets themselves were arbitrary and not based upon science. For America, complying with those mandates would have a negative economic impact, with layoffs of workers and price increases for consumers. And when you evaluate all these flaws, most reasonable people will understand that it's not sound public policy...

Yet, America's unwillingness to embrace a flawed treaty should not be read by our friends and allies as any abdication of responsibility. To the contrary, my administration is committed to a leadership role on the issue of climate change.

President George W. Bush[2]

1 Introduction

When it comes to developing solutions to global environmental concerns, and many other international environmental concerns, the United States is the elephant next door. Its environmental footprint is larger than that of other nations.[3] Its share of global resource consumption is considerably larger than its share of world population.[4] On many issues, US cooperation is therefore indispensable for problem-solving. Its technological and financial resources enable the United States to make decisive contributions to international environmental protection efforts. Its economic and strategic power gives the United States a distinctive ability to influence and shape international environmental law and politics. Thus, US leadership has a unique potential to promote the development of international environmental law. Conversely, when the United States declines to exercise leadership, the impact is significant.

[2] The White House, 'President Bush Discusses Global Climate Change', 11 June 2001, available at http://www.whitehouse.gov/news/releases/2001/06/20010611–2.html (accessed 6 February 2004).

[3] On 1996 data, the United Arab Emirates had a larger ecological footprint. See 'Top 100 Ecological Footprint', available at http://www.nationmaster.com/graph-T/env_eco_foo (accessed 8 February 2004). For a definition of the concept, see Sierra Club, available at http://www.sierraclub.org/footprint/definition.html (accessed 8 February 2004).

[4] At 4.6% of world population (1999), the US global consumption shares are roughly: 24% of energy (1995); 18% of forest products (1996); 28% of materials (1995); and 13% of water (1990). D. Hunter, *Global Environmental Protection in the 21st Century: Looking for U.S. Leadership*, available at http://www.foreignpolicy-infocus.org/papers/environment/leadership.html (accessed 25 January 2004).

For many observers, the US decision in 2001 to abandon the Kyoto Protocol to the United Nations Framework Convention on Climate Change,[5] encapsulates an alarming trend in American attitudes towards international environmental law. Not only is the United States said to be disengaging,[6] and increasingly inclined towards unilateral action.[7] Worse, suggest some, Kyoto stands for the readiness of the current administration to undermine multilateral approaches to global environmental problems.[8] Yet, if President Bush's statement on the Kyoto Protocol is any guide, the United States is not actually abdicating its leadership role. On the contrary, it is exercising leadership precisely by walking away from an agreement that is misguided in its approach. The resistance, then, is not to environmental multilateralism but to multilateralism for multilateralism's sake, and to multilateral efforts that are not likely to produce results.[9]

These conflicting assessments beg the question: Where does US policy on international environmental law in fact stand? In this article, I explore recent trends in US approaches. I begin by canvassing the trajectory of US practice since around the 1992 Earth Summit in Rio. This review suggests that some shifts in US policy have indeed occurred, but that it would be a mistake to treat one event — the US withdrawal from Kyoto — as representative of the nature of these shifts. I then examine a range of possible explanations for the changing US approach to international environmental law. These include factors related to the growth of treaty regimes and institutional structures, factors related to American power, domestic politics and attitudes towards international law, and factors specifically related to the administration of George W. Bush. Both the review of US practice and the assessment of factors that might account for American policy suggest that the international environmental law community must carefully distinguish short-term developments from longer-term trends.

2 The Trajectory of US Engagement in International Environmental Law

The United Nations Conference on Environment and Development, or Earth Summit, in Rio de Janeiro was timed for the 20th anniversary of the 1972 Stockholm Conference on the Human Environment. Carried by a wave of 1980s optimism

[5] United Nations Framework Convention on Climate Change, reprinted in 31 ILM (1992) 849 [hereinafter FCCC]; and Kyoto Protocol to the FCCC, 37 ILM (1998) 22.

[6] See, generally, Caron, 'Between Empire and Community — The United States and Multilateralism 2001–2003: A Mid-Term Assessment', 21 *Berkeley J. Int'l L.* (2003) 395, at 398.

[7] See, e.g., Malone and Foong Khong, 'Unilateralism and U.S. Foreign Policy: International Perspectives', in D. M. Malone and Y. Foong Khong (eds), *Unilateralism and U.S. Foreign Policy: International Perspectives* (2003) 1, at 5.

[8] See Greenberg, 'Does Power Trump Law?', 55 *Stanford L. Rev.* (2003) 1789, at 1815.

[9] See, e.g., Zelikow, 'The Transformation of National Security: Five Redefinitions', *The National Interest* (Spring 2003) 17, at 24–25.

regarding the development of international environmental law and problem-solving through multilateral environmental agreements (MEAs), the Earth Summit had an ambitious agenda. Two global agreements, on biological diversity and on climate change,[10] were opened for signature at the conference, along with a declaration on principles of international environmental law,[11] a statement of principles on forest protection,[12] and an agenda for global environmental policy.[13] However, for all the green enthusiasm of many states and non-governmental organizations, the US administration of George Bush Snr was a reluctant participant in the conference.[14] Since the Rio Conference, the United States seems to have become increasingly wary of international mega-conference diplomacy, multilateral environmental treaty regimes, and efforts to develop customary international environmental law. Thus, although the US Government continues to express a desire to lead on international environmental issues,[15] it appears to be shifting some of its attention from multilateral legal strategies to alternative avenues for shaping relevant policy agendas. The following discussion does not purport to provide an exhaustive assessment of US practice regarding international environmental law. It focuses on key MEAs adopted over the last 10–15 years and highlights key policy themes.

A *Multilateral Environmental Agreements*

1 Existing Assessments of Leadership and Compliance

In an assessment published in 1998, Michael Glennon and Alison Stewart concluded that the United States had exercised leadership in environmental treaty negotiations, and had a good record of compliance with treaties that it had ratified.[16] This assessment was based on a review of one executive agreement, the 1985 International Tropical Timber Agreement,[17] and four MEAs, the 1972 London Convention on Ocean Dumping, the 1973 Convention on International Trade in Endangered Species (CITES), the 1973 World Heritage Convention, and the 1987 Montreal

[10] Convention on Biological Diversity, reprinted in 31 ILM (1992) 818; FCCC, *supra* note 5.

[11] Rio Declaration on Environment and Development, reprinted in 31 ILM (1992) 876.

[12] Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, reprinted in 31 ILM (1992) 881.

[13] Agenda 21, UN Doc. A/CONF.151/26 (Vol. 2) (1992).

[14] See R. N. Gardner, *Negotiating Survival: Four Priorities After Rio* (1992), at 9–14.

[15] J. F. Turner, 'Providing International Leadership: Responsible Environmental Policy', (August 2003), available at http://usinfo.state.gov/journals/itps/0803/ijpe/pj81turner.htm (accessed 21 February 2004).

[16] Glennon and Stewart, 'The United States: Taking Environmental Treaties Seriously', in E. Brown Weiss and H. K. Jacobsen (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998) 173, at 174–175.

[17] International Tropical Timber Agreement, 18 November 1983, 1393 UNTS 67 (entered into force 1 April 1985).

Protocol on Substances that Deplete the Ozone Layer.[18] According to Glennon and Stewart, American leadership was instrumental in initiating and shaping all four of the MEAs.[19] In all four cases, the United States moved quickly to sign and ratify the agreements, and to take legislative and other action for domestic implementation.[20] To the extent that there were any shortfalls in compliance with these agreements, they appear to relate primarily to reporting commitments and funding commitments.[21]

Similar conclusions were reached in a 2002 assessment of US compliance with environmental agreements by the US General Accounting Office (GAO).[22] The assessment reviewed, *inter alia*, compliance with CITES, the Montreal Protocol, the 1992 Climate Change Convention, and the 1994 Desertification Convention.[23] The GAO found that deficiencies in US compliance related largely to reporting and financial assistance commitments.[24] However, in the latter context, it should be noted that the United States also remains the single largest contributor to the Global Environment Facility, the World Bank mechanism through which much international environmental protection funding is provided.[25]

At first glance, these assessments suggest that the United States has been an active and committed participant in international environmental treaty regimes. However, US leadership and its good ratification and implementation record on the reviewed agreements do not permit strong inferences about current US attitudes towards environmental treaty-making. Three of the four treaties reviewed by Glennon and Stewart were part of the first wave of environmental agreements adopted in the early 1970s. At the time, environmental concern in the United States was generally high.[26] Similarly, concern over the thinning of the ozone layer and a range of domestic regulatory efforts preceded, and help explain, US international leadership on ozone

[18] Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 29 December 1972, 1046 UNTS 137 (entered into force 13 March 1975); (CITES), 3 March 1973, 993 UNTS 244 (entered into force 1 July 1975); Convention for the Protection of the World Cultural and National Heritage, 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975); Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, reprinted in 26 ILM (1987) 1550 (entered into force 5 April 1989).

[19] Glennon and Stewart, *supra* note 16, at 175.

[20] *Ibid.*, at 177–196.

[21] *Ibid.*, at 174.

[22] US GAO, 'US Actions to Fulfill Commitments Under Five Key Agreements', Statement for the Record by John B. Stephenson, Director, Natural Resources and Environment' July 2002 (GAO-02–960T) available at http://www.dec.org/pdf_docs/PCAAB033.pdf (accessed 21 February 2004).

[23] CITES, *supra* note 18; Montreal Protocol, *supra* note 18; FCCC, *supra* note 5; Convention to Combat Desertification, reprinted in 33 ILM (1994) 1016.

[24] The US provided over $1.4 billion in assistance to other countries under MEAs, but 25% less than pledged under the Climate Convention and 6% less than pledged under the Montreal Protocol. While the US submitted 'nearly all' 21 MEA reports required between 1997 to mid-2002, about half were 2–8 months late, two were never submitted. See US GAO, *supra* note 22, at 6–11.

[25] See Turner, *supra* note 15.

[26] Glennon and Stewart, *supra* note 16, at 176.

depletion.[27] In addition, commitments under the Montreal Protocol are focused on a discreet set of chemicals, which proved to be relatively easily replaced by alternative substances.[28] In turn, the GAO's assertion of good US overall compliance with commitments under the Climate Change Convention is tempered by the fact that the convention contained no legally binding emission reduction commitments, and that a non-binding commitment to stabilize emissions by the year 2000 was not actually met.[29] Finally, commitments under the Desertification Convention, which it ratified in 2000,[30] are limited to broad obligations to cooperate with other countries through community-level participation, general cooperation and partnerships to uphold the purposes of the convention.[31]

2 *Recent Patterns of Participation and Ratification*

There can be little doubt that the United States takes its treaty commitments seriously. However, its compliance record is only part of the story. For present purposes, the more important angle is American willingness to enter into treaties in the first place.[32] On this score, US enthusiasm for international environmental law appears to have diminished since the Rio Summit. This trend is reflected in the US approach both to the Rio agreements and to other MEAs that were negotiated in the 1990s, which the United States has tended not to ratify.

Although the United States was supportive of the Climate Change Convention, which it had ratified in 1992,[33] the Kyoto Protocol to the convention met with resistance. Under President Clinton, the United States was actively engaged in the negotiation of the protocol and influenced significant parts of the regime, such as its emissions-trading and compliance mechanisms.[34] However, the Clinton administration failed to forge bipartisan support for the protocol.[35] Serious concerns about the implications of the required emission reduction for the United States and about the viability of a protocol without developing country commitments culminated in a

[27] See R.E. Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* (1991), at 6; Glennon and Stewart, *supra* note 16, at 176, 198.

[28] See P. Birnie and A. Boyle, *International Law & the Environment* (2nd ed., 2002), at 519.

[29] According to the GAO report, US greenhouse gas emissions in 2000 were roughly 14% above 1990 levels. See US GAO, *supra* note 22, at 10. See also Brown, 'The U.S. Performance in Achieving Its 1992 Earth Summit Global Warming Commitments', 32 *Envtl. L. Rep.* (2002) 10741 (text accompanying notes 79–120).

[30] See Article 6 of the Desertification Convention, *supra* note 23.

[31] Birnie and Boyle, *supra* note 28, at 632.

[32] This comment applies also to the some of the agreements covered in the Glennon and Stewart assessment. For example, while the United States is a party to the London Convention on Ocean Dumping, and has a good compliance record, it has yet to ratify the 1996 Protocol to the convention, dealing with dumping of hazardous materials at sea. See *infra* notes 55–56 and accompanying text.

[33] The list of signatures and ratifications to the FCCC, *supra* note 5, is accessible at http://unfccc.int/ (accessed 25 January 2004).

[34] Bodansky, 'U.S. Climate Policy After Kyoto: Elements for Success', in Carnegie Endowment for International Peace, 15 *Policy Brief* (April 2002), at 2. See also Roden, 'U.S. Climate Change Policy under President Clinton: A Look Back', 32 *Golden Gate U. L. Rev.* (2002) 415.

[35] See e.g. Agrawala and Andresen, 'US Climate Policy: Evolution and Future Prospects', 12 *Energy & Environment* (2001) 117, at 120–124.

unanimous Senate resolution against the protocol.[36] When President Clinton nonetheless signed the protocol in 1998, he stipulated that he would not recommend ratification unless the protocol was adjusted to address US concerns.[37] The Bush administration rejected the Kyoto Protocol as flawed in 2001.[38] Since that time, the US approach to the international climate change regime has ranged from mere observation of negotiations, to efforts to convince other states (notably developing countries) of the protocol's flaws, to emphasis on domestic approaches to the issue.[39] In the latter context, the Bush administration's action plan on climate change, designed to reduce the 'greenhouse gas intensity' of the American economy and relying on voluntary action, has been widely judged as lacking credibility.[40] The weakness of the Bush administration's policy appears to have prompted several legislative proposals to better deal with climate change, by both Democratic and Republican congressmen.[41] But, for the moment, the most promising domestic climate change policies may be the many regulatory and other initiatives that have sprouted at state and local levels.[42]

The United States is still not a party to the other nearly universal Rio agreement, the Convention on Biological Diversity.[43] The Clinton administration signed the convention in 1993 and made several efforts to obtain the advice and consent of the US Senate.[44] However, the Senate process eventually stalled in the final years of the Clinton administration and there do not appear to be any current efforts to enable ratification of the Biodiversity Convention.[45] Nevertheless, the United States was fully engaged in the negotiations for a protocol on transboundary shipment of genetically modified organisms. As one of the largest producers of biotech crops and other food stuffs or animal feed, the United States was concerned that trade in modified products

[36] Byrd-Hagel Resolution, 143 Cong. Rec. S8113–05 (25 July 1997).

[37] Campbell and Carpenter, 'United States of America', 9 *Yb. Int'l Envtl. L.* (1998) 364, at 367.

[38] See The White House, 'Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts', 13 March 2001, available at http://www.whitehouse.gov/news/releases/2001/03/20010314.html (accessed 29 February 2004).

[39] See Kahn, 'The Fate of the Kyoto Protocol Under the Bush Administration', 21 *Berkeley J. Int'l L.* (2003) 548; Christensen, 'Convergence or Divergence? Status and Prospects for US Climate Strategy', *Fridtjof Nansen Institute Report 6/2003*, at 18, available at www.fni.no/pdf/rapp0603.pdf (accessed 25 January 2004).

[40] See King, 'Climate Change Science: Adapt, Mitigate or Ignore?', 303 *Science* (2004) 176, at 177; Rosencranz, 'Reassessing the 1992 Climate Change Agreement: U.S. Climate Change Policy under G.W. Bush', 32 *Golden Gate U. L. Rev.* (2002) 479, at 488–490; Victor, 'Global Warming Plan Is Full of Hot Air', *Newsday*, 21 February 2002.

[41] See Christensen, *supra* note 39, at 6–7.

[42] See *ibid.*, at 7–9.

[43] *Supra* note 10. As of 25 May 2004, the convention had 188 parties. See http://www.biodiv.org/world/parties.asp (accessed 19 July 2004).

[44] See Blomquist, 'Ratification Resisted: Understanding America's Response to the Convention on Biological Diversity, 1989–2002', 32 *Golden Gate University Law Review* (2002) 493, at 535–536.

[45] *Ibid.*, at 557.

not be unduly restricted.[46] In particular, the United States sought to limit states' ability to restrict the import of biotech products on precautionary grounds. Instead, it sought to ensure that any import restrictions be justified on the basis of risk assessments and scientific evidence.[47] Through alliances with other exporters of biotech products, such as Canada, Australia and Argentina, the United States was indeed able to exert considerable influence on what became the Cartagena Protocol on Biosafety to the Biodiversity Convention.[48] But given that even its ratification of the convention is uncertain, it is currently unlikely that the United States will join the 87 developed and developing country parties to the Biosafety Protocol.[49]

The US ratification record on other major MEAs negotiated since Rio has also been sluggish. For example, the United States declares itself to be a leader in 'efforts to control toxic chemicals around the world'.[50] Yet, due to protracted domestic deliberations, the United States has yet to ratify any of the key chemicals-related treaties: the 1996 Protocol to the London Convention on Ocean Dumping,[51] the Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal,[52] the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, [53] and the Stockholm Convention on Implementing International Action on Certain Persistent Organic Pollutants.[54]

The United States is a party to the London Convention on Ocean Dumping.[55] However, it has not ratified the 1996 protocol to the convention that limits dumping of hazardous materials at sea and that is intended to replace the original convention.[56]

On hazardous wastes, although it signed the Basel Convention in 1989 and the US Senate gave its advice and consent to ratification in 1992, the United States remains the only OECD country not to have ratified the treaty.[57] The convention aims to limit

[46] See Stewart and Johanson, 'A Nexus of Trade and the Environment: The Relationship Between the Cartagena Protocol on Biosafety and the SPS Agreement of the World Trade Organization', 14 *Colo. J. Int'l Envtl. L. & Pol.* (2003) 1, at 11.

[47] See Cosbey and Burgiel, *The Cartagena Protocol on Biosafety: An Analysis of Results* (2000), at 5, available at www.iisd.org/pdf/biosafety.pdf (accessed 26 January 2004).

[48] On negotiating dynamics, see International Centre for Trade and Sustainable Develoment (ICTSD), 'Biosafety Talks Break Down', *BRIDGES Weekly Trade News Digest*, 1 March 1999, available at http://www.ictsd.org/html/story1.01–03–99.htm (accessed 24 February 2004). The Biosafety Protocol is reprinted in 39 ILM (2000) 1027 (entered into force 11 September 2003).

[49] As of 25 May 2004, the protocol had 102 parties; see http://www.biodiv.org/world/parties.asp (accessed 19 July 2004). The vast majority of European countries have ratified the protocol. The main exporters of agricultural biotech products, such as Argentina, Canada, Chile, and the United States, have not.

[50] Turner, *supra* note 15.

[51] Protocol to the London Dumping Convention, reprinted in 36 ILM (1997) 1.

[52] Reprinted in 28 ILM (1989) 657.

[53] Reprinted in 38 ILM (1999) 1.

[54] Reprinted in 40 ILM (2001) 532.

[55] Reprinted in 11 ILM (1972) 1294. See, *supra* note 32, and accompanying text.

[56] Status of ratifications as at 30 June 2004 available at http://www.imo.org/home.asp (accessed 19 July 2004).

[57] The Basel Convention entered into force in 1992 and, as at 12 July 2004, had been ratified by 162 states, see http://www.basel.int/legalmatters/index.html (accessed 19 July 2004).

transboundary movements of hazardous wastes and to ensure the safe transfer and disposal of such wastes. In part modelled on US regulatory approaches, it requires that importing states receive advance written notice of waste shipments and information on the nature of the wastes to be shipped, and requires that importing states provide advance written consent to any shipment.[58] According to some observers, there are only limited incentives for American ratification.[59] While the United States is a significant producer of hazardous wastes, only 1 per cent of that waste is exported, with the bulk going to neighbouring Canada.[60] In addition, ratification would require a series of complex changes in domestic law.[61] Nonetheless, it appears that the US Environmental Protection Agency (EPA) is now beginning to work on the required implementing legislation, partly as a vehicle for legislative changes to provide the EPA with better authority to monitor waste shipments between the United States and Canada, including a recent increase in waste shipments from Canada to the United States.[62]

Under the Rotterdam Convention on Prior Informed Consent,[63] states are obliged to notify and obtain the consent of importing states to shipments of any chemicals or pesticides that those states have banned or severely restricted. The United States signed this convention in 1998. While the currently 61 parties to the convention include most developed countries, several developed countries other than the United States also remain outside the treaty.[64] The Bush administration has introduced implementing legislation and is seeking Senate approval of US ratification of the convention.[65]

The United States has also been supportive of efforts to develop a global regime to eliminate the production and use of certain persistent organic pollutants (POPs). American involvement in the negotiation process began under President George Bush Snr shortly after the Rio Summit and then had the strong support of the Clinton

[58] For an overview, see Mintz, 'Time to Walk the Walk: U.S. Hazardous Waste Management and Sustainable Development', 32 *Envtl. L. Rep.* (2002) 10307.

[59] See Rogus, 'The Basel Convention and the United States', in 2 *New England International and Comparative Law Annual* (1996), available at http://www.nesl.edu/intljournal/vol2/basel.htm (accessed 21 February 2004).

[60] See US Environmental Protection Agency, *International Trade in Hazardous Waste: An Overview — Enforcement and Compliance Assurance 222a (1998)* (EPA-305-K-98–001), at 1; available at http://www.epa.gov/compliance/resources/publications/monitoring/programs/importexport/trade.pdf (accessed 21 February 2004).

[61] See Mintz, *supra* note 58, at notes 100–101.

[62] See Roeder, 'U.S. Administration Drafting Legislation to Implement Treaty on Transport of Waste', 26 *Int'l Env. Rep.* (2003) 782, at 783.

[63] *Supra* note 53.

[64] The convention entered into force on 24 February 2004. As at 29 June 2004, the convention had 73 parties, including most major developed countries; see http://www.pic.int/en/ViewPage.asp?id=265 (accessed 19 July 2004).

[65] See Najor, 'Bill Expected to be Offered in U.S. Senate to Allow Ratification of Two POPs Treaties', 26 *Int'l Env. Rep.* (2003) 780; Phibbs, 'Entry into Force of Two Treaties Spurs Renewed Call for U.S. Congressional Action', 26 *Int'l Env. Rep.* (2003) 1259.

administration.[66] Yet, unlike the majority of other states participating in the negotiations, the United States was reluctant to support 'elimination' of some of the targeted POPs. The United States was also hesitant to make commitments on funding and assistance for developing countries and, again, resisted reliance on the precautionary principle, notably in respect of procedures for the addition of new chemicals to the regime.[67] In this latter context, the United States lobbied successfully to gain support of developing country delegations for a mechanism for the addition of new substances that emphasizes science-based risk assessment. Thus, while the convention contains various references to the precautionary principle, the principle was not included in the provisions on the addition of new chemicals.[68] The Stockholm Convention on Persistent Organic Pollutants was adopted in May 2001 and signed by the United States on that occasion. It currently has 53 parties, excluding several major developed countries and the European Community.[69] In 2002, the Bush administration submitted the convention to the Senate for its advice and consent.[70] However, the mechanism for the addition of new substances has proven to be one of the sticking points in the domestic process as well.[71] The administration favoured case-by-case revision of domestic legislation, whereas a competing proposal operated on the basis of a rebuttable presumption that new chemicals added to the POPs treaty would be regulated domestically.[72] Although ratification of the Stockholm Convention is a declared 'high priority' of the Bush administration,[73] the new chemicals issue remains unresolved.[74]

On the issue of long-range transboundary air pollution, the United States' approach has been selective. After many years of prodding by Canada, the United States agreed in 1991 bilaterally to curb emissions of air pollutants related to the phenomenon of acid rain.[75] It has also been a hesitant participant in multilateral efforts to reduce long-range transboundary air pollution. The United States is a party to the Convention on Long-Range Transboundary Air Pollution, a framework agreement that was adopted under the auspices of the UN Economic Commission for Europe (ECE)

[66] Yoder, 'Lesson from Stockholm: Evaluating the Global Convention on Persistent Organic Pollutants', 10 *Indiana Journal of Global Legal Studies* (2003) 113, at 115, 135.

[67] *Ibid.*, at 136–142.

[68] *Ibid.*, at 145–146.

[69] The convention entered into force on 24 May 2004. As at 17 May 2004 it had 72 parties; see http://www.pops.int/documents/signature/signstatus.htm (accessed 19 July 2004). At the time of writing, developed countries not party to the convention included Belgium, Italy, New Zealand, and the United Kingdom.

[70] Yoder, *supra* note 66, at 149.

[71] See Najor, *supra* note 65.

[72] See Natural Resources Defense Council, *Holding the Line: The Environmental Record of the 107th Congress*, Ch. 5, at 33, available at http://www.nrdc.org/legislation/107congress/107congress.pdf (accessed 21 February 2004).

[73] See Turner, *supra* note 15.

[74] See Najor, *supra* note 65.

[75] See Canada-United States Agreement on Air Quality, 13 March 1991; reprinted in 30 ILM (1991) 676.

in 1979.[76] Since then, eight protocols have been negotiated to address different types of air pollutants and emissions monitoring.[77] The United States has signed all protocols, except two that concern sulphur emissions.[78] However, like other parties to the framework convention, it has joined only some of the protocols. It is a party to the 1984 Geneva Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP), the 1994 Sofia Protocol concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes, and the 1998 Aarhus Protocol on Heavy Metals.[79] The 1998 Aarhus Protocol on Persistent Organic Pollutants bans the production and use of some POPs and stipulates phase-outs and emission reductions for others.[80] It appears that the Bush administration has yet to decide whether or not to seek ratification of this protocol, which the United States signed in 1998. However, it is in the process of securing legislative changes that would permit ratification.[81]

Finally, at the level of procedural approaches to environmental protection, the US participation record is limited. As already noted, the United States is not currently a party to the Rotterdam Convention on Prior Informed Consent. It signed the 1991 Espoo Convention on Environmental Impact Assessment on the occasion of its adoption, but has not yet become a party to the convention. All Western European countries and Canada are parties to this ECE-sponsored convention.[82] The 1998 Aarhus Convention on Public Participation largely reflects US domestic law on access

[76] ECE Convention on Long-Range Transboundary Air Pollution, reprinted in 18 ILM (1979) 1442. As at 9 June 2004, the convention had 49 parties, available at http://www.unece.org/env/lrtap/status/lrtap_st.htm (accessed 19 July 2004).

[77] Full list available at http://www.unece.org/env/lrtap/status/lrtap_s.htm (accessed 21 February 2004).

[78] 1985 Helsinki Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent, reprinted in 27 ILM (1988) 707; and 1994 Oslo Protocol on Further Reduction of Sulphur Emissions, reprinted in 33 ILM (1994) 1542. Signature and ratification status as at 9 June 2004 is available at http://www.unece.org/env/lrtap/status/lrtap_s.htm (accessed 19 July 2004).

[79] 1984 Geneva Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP), reprinted in 24 ILM (1985) 484; 1988 Sofia Protocol concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes, reprinted in 27 ILM (1988) 698; 1998 Aarhus Protocol on Heavy Metals, text available at http://www.unece.org/env/lrtap/hm_h1.htm (accessed 21 February 2004). Signature and ratification status as at 9 June 2004 is available at http://www.unece.org/env/lrtap/status/lrtap_s.htm (accessed 19 July 2004).

[80] 1998 Aarhus Protocol on Persistent Organic Pollutants, reprinted in 37 ILM (1999) 505. Signature and ratification status as at 9 June 2004 is available at http://www.unece.org/env/lrtap/status/lrtap_s.htm (accessed 19 July 2004).

[81] Phibbs, *supra* note 65, at 67.

[82] Espoo Convention, reprinted in 30 ILM (1991) 800. As at 19 July 2004, the convention had 40 parties; see http://www.unece.org/env/eia/convratif.html (accessed 19 July 2004).

to information and public participation.[83] Notwithstanding this fact, the United States is virtually alone among ECE states in not having signed this convention.[84]

B *Customary Environmental Law*

The genesis of one of the cornerstone principles of international environmental law, the prohibition against causation of significant transboundary environmental harm,[85] is closely linked to the United States. One of the sources to which this principle is typically traced back is the arbitral award in the *Trail Smelter* case, which arose between the United States and Canada in the early part of the 20th century.[86] Emissions from the smelter, located just north of the US border in the Canadian province of British Columbia, caused significant environmental and property damage in Washington State.[87] In rendering its award, and formulating the now foundational 'no harm' rule, the tribunal drew strongly on US law on inter-state pollution and concluded almost in passing that international law corresponded to the principles found in American law.[88]

In the *Trail Smelter* arbitration, the United States was likely driven more by the need to resolve a local pollution concern than by a concerted effort to develop international law. Be that as it may, today, the US attitude towards the development of customary environmental law appears to be one of reluctance. This assessment applies in particular to the principles that have been articulated since the 1980s in order to push international environmental law beyond its focus on transboundary and territorial harm, and to recognize the differing circumstances of developed and developing countries. Given space constraints, suffice it to highlight the two most prominent of these principles. The precautionary principle aims to promote environmental protection, notwithstanding the lack of scientific certainty that harm will occur. In the context of risks of serious or irreversible environmental harm, the principle is designed to overcome the fact that the no harm rule imposes obligations only where there is clear evidence of harm causation.[89] In turn, the concept of common but differentiated

[83] Bruch and Pendergrass, 'Type II Partnerships, International Law, and the Commons', 15 *Georgetown Int'l Envtl. L. Rev.* (2003) 855, at 880. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is reprinted in 38 ILM (1999) 517.

[84] However, several of the major western European signatories to the convention, including Germany, the Netherlands, Sweden and the United Kingdom, have yet to ratify it. See http://www.unece.org/env/pp/ctreaty.htm (19 July 2004).

[85] See Principle 21, Stockholm Declaration on the Human Environment, reprinted in 11 ILM (1972) 1420; and Principle 2, Rio Declaration on Environment and Development, *supra* note 11.

[86] *Trail Smelter Arbitration*, 3 R.I.A.A. (1941) 1905.

[87] X. Hanqin, *Transboundary Damage in International Law* (2003), at 115–116.

[88] The Tribunal concluded that US law was 'in conformity with the general rules of international law' and proceeded to rely primarily on American law. The latter was applicable based on the parties' agreement. *Trail Smelter* case, *supra* note 86, at 1908, 1963.

[89] Birnie and Boyle, *supra* note 28, at 115–121.

responsibilities captures the unequal historical contributions of developed and developing countries to many global environmental concerns, and their vastly different capacity to take corrective measures.[90] For example, while all states share the responsibility to address global climate change, the requirements on individual states may differ, depending on their past greenhouse emissions and financial and technical capacity.

Both the precautionary principle and the concept of common but differentiated responsibilities have found expression in the Rio Declaration.[91] Similarly, both concepts are reflected in the design of global MEAs adopted over the last decade or so. Indeed, the Climate Convention, and several other MEAs adopted since Rio, incorporate the two principles.[92] Although the United States was reluctant to do so, and worked to restrict the scope of both principles, it did accept their inclusion in the Rio instruments.[93] However, since the Rio Conference, the United States has sought to contain the influence of the two principles and has consistently denied their status as customary international law.[94]

As mentioned earlier in this article, the United States resisted inclusion of the precautionary principle in MEAs, such as the Biosafety Protocol or POPs Convention.[95] And while, in each case, the principle was eventually included in the agreement, the United States worked to limit inclusion to preambular or other non-operative provisions. In part, US resistance to the principle is rooted in the concern that it might serve as a pretext for other states to restrict the import of US goods. US denial of the precautionary principle's customary status thus straddles the realm of MEAs and the realm of international trade law.[96]

As for the concept of common but differentiated responsibilities, US concerns relate to a number of issues.[97] At one level, the United States is intent on resisting any possible implication that it bears legal responsibility for global environmental problems, such as climate change. Similarly, it is looking to resist arguments that past contributions to a given environmental concern, or current capacity to address it, predetermine MEA commitments and design. Notably, the resistance is to claims that,

[90] *Ibid.*, at 100–104.

[91] See Rio Declaration, *supra* note 11, Principle 7 (common but differentiated responsibilities) and Principle 15 (precautionary principle).

[92] See Article 3 of the FCCC, *supra* note 5. See also P. Sands, *Principles of International Environmental Law* (2nd ed., 2003), at 268–271, 285–289.

[93] See Wiener, 'Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems', 13 *Duke Journal of Comparative and International Law* (2003) 207, at 215; Matsui, 'Some Aspects of the Principle of "Common But Differentiated Responsibilities"', 2 *International Environmental Agreements* (2002) 151.

[94] At the 2002 Johannesburg Summit on Sustainable Development, it was against the strong American objections that endorsements of both principles found their way into the summit instruments. See International Institute for Sustainable Development, *Earth Negotiations Bulletin*, 6 September 2002, at 4–5, available at http://www.iisd.ca/2002/wssd/ (accessed 25 January 2004).

[95] See *supra* notes 47 and 67, and accompanying text.

[96] See Wiener, *supra* note 93, at 218. See also, *infra* notes 184–186 and accompanying text.

[97] See Biniaz, 'Common but Differentiated Responsibility — Remarks', in ASIL, *Proceedings of the Annual Meeting* (2002) 359.

as a general proposition, developed countries must take the lead in assuming MEA obligations, that developing countries' responsibilities are by definition reduced, and that any action by developing countries must be financially and technically supported by developed countries.[98]

In short, while the United States may be supportive of individual MEAs that reflect precautionary approaches to environmental protection and provide for differentiated commitments, it is sceptical of the value of broad customary principles that would require such approaches across the board.[99] Notwithstanding the American position, the precautionary principle is said by many observers to have acquired customary law status.[100] The customary law status of the concept of common but differentiated responsibilities remains more widely contested.[101]

C *Alternative Approaches to International Environmental Law*

US attitudes towards international environmental law are only partially reflected in its approaches to MEAs and customary law. An equally significant part of the picture is the increasing American reliance on alternative legal strategies. Three themes can be discerned in this move to alternatives. First, there are some indications of renewed willingness to take unilateral action to address international environmental concerns. Second, a concerted effort seems to be underway to shape policy outcomes at the regional level. Finally, the United States places increasing emphasis on engaging individuals, corporations and non-governmental organizations (NGOs) in international environmental protection.

1 Unilateral Approaches

Unilateral acts in the name of environmental protection are neither a new phenomenon, nor the exclusive domain of the United States. Nor, for that matter, is environmental unilateralism necessarily illegal.[102] Nonetheless, when the most powerful state in the world resorts to unilateral measures, suspicions and concerns tend to be aroused. Frequently, the suspicion is that US actions are not intended simply to protect the environment, but cater also, or even primarily, to economic or other interests. Another concern is that the United States is using unilateral tactics either to force the development of international law in a particular direction or, even worse, is charting its own course regardless of international law. Two broad types of unilateral approaches can be distinguished, both of which the United States has taken over the last decade.

First, unilateralism may consist in a refusal to join in a multilateral effort to address

[98] These concerns were first raised in relation to Principle 7 of the Rio Declaration. See Matsui, *supra* note 93, at 155 (n. 29).

[99] See Biniaz, *supra* note 97, at 363.

[100] See A. Trouwborst, *The Evolution and Status of the Precautionary Principle in International Law* (2002).

[101] See Birnie and Boyle, *supra* note 28, at 103.

[102] See Boisson de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues', 11 *EJIL* (2000) 315.

a concern that requires collective action.[103] The Bush administration has been accused of this type of unilateralist stance on a number of issues, its withdrawal from the Kyoto Protocol being the most prominent environmental example.[104] In the case of Kyoto, the flashpoint was not merely American unilateralism as such, but its potentially destructive impact on the multilateral effort. The US stance thus raised strong objections, notwithstanding the fact that, strictly as a matter of international law, the decision not to ratify was simply an exercise of sovereign rights.[105]

Second, unilateralism may consist in a range of actions. At one end of the spectrum are go-it-alone policy approaches to issues that require coordinated collective action. The American domestic climate change action plan is one example of such unilateralism.[106] At the other end of the spectrum are unilateral actions that are specifically designed to change the behaviour of other states. The import restrictions imposed by the United States in the *Tuna-Dolphin* and *Shrimp-Turtle* cases were controversial examples of these latter types of actions.[107] The declared goal was to protect migratory, and in the case of the sea turtles, endangered species. In both cases the United States ultimately imposed the domestic regulatory standards applicable to its fishing industry on activities undertaken by other states in their own jurisdictional spheres or in international waters.[108] What raised international ire in each case was a perceived US push for extra-territorial application of its laws, and a failure to work for multilateral agreements on species protection.

However, neither case can be attributed purely to US protectionism of its own fishing industries or blunt flexing of unilateralist muscle. Long policy development processes preceded the adoption of the species protection programmes.[109] And in both cases, the US import restrictions were at least in part prompted by domestic litigation, through which environmental groups compelled full enforcement of American law.[110] Furthermore, in the *Shrimp-Turtle* case, the United States adjusted its regulations to be more responsive to multilateral concerns and these adjustments were upheld by the

[103] See Malone and Foong Khong, *supra* note 7, at 3.

[104] See Caron, *supra* note 6, at 398.

[105] See also *infra* notes 221–234.

[106] For some observers, the go-it-alone approach to climate change is part of a broader policy of exceptionalism, aiming to exempt the United States from standards applicable to others. See Koh, 'On American Exceptionalism', 55 *Stanford L. Rev.* (2003) 1479, at 1485–1486.

[107] See *United States — Restrictions on Imports of Tuna*, Report of the Panel, November 1990 (Tuna-Dolphin I), reprinted in 30 ILM (1991) 1598; *United States — Restrictions on Imports of Tuna*, Report of the Panel, June 1994 (Tuna-Dolphin II), reprinted in 33 ILM (1994) 839. And *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, October 1998, reprinted in 38 ILM (1999) 121.

[108] See Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict', XII *Georgetown Int'l Envtl. L. Rev.* (1999) 1, at 11–57.

[109] On the *Tuna-Dolphin* case, see *ibid.* On the *Shrimp-Turtle* case, see Guruswamy, 'The Annihilation of Sea Turtles: World Trade Organization Intransigence and U.S. Equivocation', 30 *Envtl. L. Rep.* (2000) 10261, at 10262–10263.

[110] On the *Tuna-Dolphin* case, see Murase, 'Perspectives from International Economic Law on Transnational Environmental Issues', in *RdC* (1995) 253, at 324–325. On the *Shrimp-Turtle* case, see Guruswamy, *supra* note 109, at 10265–10266.

WTO.[111] In short, it is not clear that US actions in the *Tuna-Dolphin* and *Shrimp-Turtle* cases are evidence of an increased American inclination towards environmental unilateralism. Nonetheless, the cases have brought about greater elbow room for environmental trade measures.[112]

That said, one recent case in which the United States appears intent on applying domestic law to an entity located outside of US territory may be indicative of an increased willingness to exert unilateral pressure rather than engage internationally.[113] There is some irony in the fact that this potential shift in approach is related to none other than the keystone case of international environmental law — the *Trail Smelter* case. The smelter, now operated by the Canadian company Teck Cominco, has continued to raise transboundary environmental concerns over the last few decades.[114] A particular concern relates to the deposit of mining slag into the upper Columbia River, and to the damage that is alleged to result in waters south of the Canada-US border.[115] In 1999, American Indian tribes located on Lake Roosevelt in Washington State petitioned the US EPA under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to assess hazardous substance contamination along the river.[116] The EPA exerted some pressure on the Canadian company to cooperate on testing water samples, and to accept the relevant process under CERCLA.[117] Teck Cominco offered to pay $US13 million for independent studies, but refused to submit itself to a US regulatory process.[118] In December 2003, the EPA issued an administrative order requiring Teck Cominco to investigate the contamination and explore clean-up options.[119] Teck Cominco has refused to comply with this order and, in January 2004, the Canadian Government issued a diplomatic note in which it registered its concern over the US actions.[120]

What to make of these developments surrounding the Trail Smelter? First, as in the *Tuna-Dolphin* and *Shrimp-Turtle* cases, there appeared to be some domestic pressure for

[111] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 of the Dispute Settlement Understanding by Malaysia, Report of the Appellate Body, October 2001, reprinted in 41 ILM (2002) 149.

[112] See Mann, 'Of Revolution and Results: Trade-and-Environment Law in the Afterglow of the *Shrimp-Turtle* Case', 9 *Yb. Int'l Envtl. L.* (1998) 28.

[113] US courts appear to take a reasonably careful approach to extra-territorial application of environmental statutes. See Kormos *et al.*, 'U.S. Participation in International Environmental Law and Policy', 13 *Georgetown Int'l Envtl. L. Rev.* (2001) 661, at 665–684; Murphy, 'Contemporary Practice of the United States Relating to International Law: Extraterritorial Application of NEPA', 97 *AJIL* (2003) 962.

[114] See Brown, 'A Century of Slag', *Canadian Broadcasting Corporation News*, 15 December 2003, available at http://www.cbc.ca/news/background/environment/ (accessed 29 January 2004).

[115] *Ibid.*

[116] Telephone conversation with Dean Sherratt of the Legal Bureau, Canadian Department of Foreign Affairs; 10 February 2004 (notes on file with author).

[117] See Brown, *supra* note 114.

[118] See Chase and Stueck, 'U.S. Mulls Legal Action against Teck Cominco', *The [Toronto] Globe & Mail*, 6 February 2004, at B4.

[119] US EPA Region 10, *Unilateral Administrative Order for Remedial Investigation/Feasibility Study*, Docket No. CERCLA-10–2004–0018, 11 December 2003.

[120] Chase and Stueck, *supra* note 118.

action. However, unlike in those two cases, there was no litigation that compelled government action, but simply a petition. Second, some arguments can be mustered for the validity of the application of US law under international law. Under the objective territorial principle, it may well be possible to argue that the United States has jurisdiction over pollution that originates abroad but causes harm in American territory.[121] Yet, third, if this type of argument were indeed to be made, it would represent a significant departure from common practice surrounding transboundary pollution issues, both as between Canada and the United States and internationally.[122] That practice has consistently involved resolution of the concern through diplomatic processes or resort to inter-state dispute settlement. The original *Trail Smelter* case is the embodiment of that approach. In the current situation, available avenues for resolution of the issue range from diplomatic engagement to referral of the issue to the US–Canada International Joint Commission. The very task of the commission is to address concerns pertaining to boundary waters between the United States and Canada.[123]

It is too early to tell whether the United States will follow through with the current approach. Nonetheless, the fact that the EPA order was issued in the first place is remarkable. A significant precedent would be set if the United States were indeed to choose enforcement of domestic law over the range of other available options, especially in view of the long history of environmental cooperation between the two countries. There are some indications of disagreement within the US Government as to the best approach to the Trail Smelter. Whereas some indeed seem to see the situation as a test case, including for concerns along the Mexican border,[124] others seem less convinced of the wisdom of such a precedent.[125]

2 Regional Approaches and Environmental Hubs

Greater US reliance on regional environmental diplomacy was first advocated in the early 1990s.[126] A prominent example of this turn to regionalism is the regional environmental hub programme. It was under the Clinton administration that the United States began a concerted effort to 'mainstream' global environmental issues into its broader foreign policy agenda.[127] According to the State Department's 1997 report on *Environmental Diplomacy*, US efforts to promote democracy, free trade and

[121] See *Lotus case*, PCIJ, Series A, No. 10, 1927, at 23, 30. However, in the case of CERCLA, Congress has indicated clear intent to regulate only domestic activities. See George, 'Over the Line — Transboundary Application of CERCLA', 34 *Envtl. L. Rep.* (2004) 10275.

[122] A number of cases were brought to European courts in the 1970s that involved application of the victim state's laws to foreign entities. However, these cases involved legal actions by private actors, rather than state authorities enforcing domestic law against foreign entities.

[123] See Toope and Brunnée, 'Freshwater Regimes: The Mandate of the International Joint Commission', 15 *Arizona J. Int'l & Comp. L.* (1998) 273.

[124] See George, *supra* note 121, at 10275.

[125] See Chase and Stueck, *supra* note 118.

[126] See Powell, 'From Globalism to Regionalism: Keynote Address', in P. M. Cronin (ed.), *From Globalism to Regionalism: New Perspectives on U.S. Foreign and Defense Policies* (1993) 3.

[127] Wadley, 'U.S. and Them: Hubs, Spokes, & Integration with Reference to Transboundary Environment and Resource Issues', 21 *Berkeley J. Int'l L.* (2003) 572, at 583.

global stability will 'fall short unless people have a livable environment'.[128] In her foreword to the report, then Secretary of State Madeleine Albright announced:

> To meet this challenge, the State Department is changing the way we do business.... Our embassies and bureaus are developing regional environmental policies that advance our larger national interests. To help coordinate these policies, we are opening regional environmental hubs...[129]

The United States now operates such regional environmental hubs out of 12 of its embassies around the world.[130] Through these hubs, the United States promotes cooperation on regional environmental or natural resource concerns. Although initially criticized by some observers as undue 'greening' of US foreign policy,[131] the regional hub approach has proven successful. It has provided the United States with opportunities for collation-building, and with relatively greater scope for influencing policy outcomes than might be the case in global or other large multilateral settings.[132] A review of the hub programme conducted in 2002 highlighted the opportunities it provides not just for environmental protection but also for progress on US concerns in the trade, security and political realms.[133]

The Bush administration has embraced the hub approach and appears to utilize it as part of a broadening agenda for promoting US foreign policy interests. After September 11, 2001, regional diplomacy around environmental concerns appears to be one strand in a larger strategy to promote democracy, the rule of law and prosperity, all of which are seen as crucial to the promotion of long-term security interests.[134]

3 Public-Private Partnerships

Both at the Monterrey Summit in March 2002, and at the Johannesburg World Summit on Sustainable Development in August 2002, the United States argued forcefully that sustainable development was most effectively promoted by facilitating trade with, and private sector investment in, developing countries.[135] This policy focus on private sector engagement in sustainable development has a substantive and a financial dimension.

Substantively, the Bush administration argued that the Johannesburg Summit should not focus on the development of further environmental regimes or new commitments, but on better implementation of existing international environmental

[128] United States Department of State, *Environmental Diplomacy: The Environment and US Foreign Policy* (1997), at 2.

[129] *Ibid.*, at 3.

[130] See US Department of State, 'Regional Environmental Hub Program', available at http://www.state.gov/g/oes/hub/ (accessed 21 February 2004).

[131] See Anderson and Grewell, 'It Isn't Easy Being Green: Environmental Policy Implications for Foreign Policy, International Law and Sovereignty', 2 *Chicago J. Int'l L.* (2001) 427.

[132] Wadley, *supra* note 127, at 574–580.

[133] *Ibid.*, at 590–592.

[134] *Ibid.*, at 584–585, 598.

[135] See McFarlane, 'In the Business of Development: Development Policy in the First Two Years of the Bush Administration', 21 *Berkeley J. Int'l L.* (2003) 521, at 537–541.

law. While the United States was not alone in this view,[136] it was one of the strongest advocates of private sector engagement as an alternative to conventional international approaches.[137] Rather than on state-level, or 'Type I', outcomes, the Johannesburg Summit should focus on so-called 'Type II' outcomes: voluntary public-private partnerships that could actually promote results on the ground. The two-pronged approach was endorsed in the preparatory processes for the summit. However, there was considerable debate on whether or not 'Type II' partnerships should be developed in the context of consensus-based international legal frameworks,[138] or should be strictly voluntary 'coalitions of the willing'.[139] Advocates of the former approach were concerned that, unless Type II partnerships were placed within the context of specific commitments, they would not actually assist the better implementation of international environmental law.[140] This concern was amplified by the American resistance to the establishment of an international review process for Type II partnerships.[141] In the end, the Johannesburg Summit affirmed the key role of voluntary public-private partnerships.[142] No review mechanism was agreed upon, but the summit documents emphasize the importance of corporate accountability at various points.[143]

The Bush administration's sustainable development funding initiatives mirror the substantive focus on public-private partnerships. At the Monterrey Summit, the United States declined to join international initiatives or pledges on development assistance and, instead, announced a number of unilateral aid commitments.[144] In particular, American development assistance would now be distributed through the 'Global Development Alliance' initiative, and thus largely through partnerships with NGOs, private foundations and corporations.[145] The underlying goal is to harness the billions of private dollars that circulate the globe, amounts that far outweigh public development assistance.[146] However, so runs the argument, private parties will not

[136] Gupta, 'The Role of Non-State Actors in International Environmental Affairs', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht — Heidelberg Journal of International Law* (2003) 459, at 480–481.

[137] Bruch and Pendergrass, *supra* note 84, at 881.

[138] *Ibid.*, at 865 (n. 33).

[139] *Ibid.*, at 862.

[140] Gupta, *supra* note 136, at 482–482.

[141] Bruch and Pendergrass, *supra* note 84, at 878.

[142] See Beyerlin and Reichard, 'The Johannesburg Summit: Outcome and Overall Assessment', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht — Heidelberg Journal of International Law* (2003) 213, at 228–233.

[143] See Cordonier Segger, 'Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Agenda', 12 *RECIEL* (2003) 295, at 304–306.

[144] McFarlane, *supra* note 135, at 537.

[145] US Agency for International Development (USAID), *The Global Development Alliance: Expanding the Impact of Foreign Assistance through Public-Private Alliances* (2003), available at http://www.usaid.gov/our_work/global_partnerships/gda/pnact008compliant.pdf (accessed 21 February 2004).

[146] Today, 80% of resource flows from the United States to the developing world are private and only 20% are official development assistance. In the 1970s, 70% were public and 30% private. See USAID, 'USAID's Global Development Alliance', available at http://www.usaid.gov/our_work/global_partnerships/gda/ (accessed 28 January 2004).

invest in unstable environments. In order to channel the money to where it is most needed, the groundwork of transparency and rule of law must be in place.[147] Therefore, a central plank of the US sustainable development policy announcements at the Johannesburg Summit was the emphasis on financially supporting countries that have 'a strong commitment to good governance, . . . the health and education of their people, and economic policies that foster enterprise and foster entrepreneurship'.[148] To this end, the United States announced five public-private partnership programmes.[149]

3 Explaining US (Dis)engagement

The previous section has revealed several key themes — and shifts — in US approaches to international environmental law. How can these trends in US policy towards international environmental law be explained? In this section, I explore a range of explanations for the apparent caution *vis-à-vis* multilateral regime-building projects, and the increasing enthusiasm for various alternative approaches.

A *The Growth of MEAs*

Over the last three decades, there has been a significant growth not only in the number of MEAs,[150] but also in the nature and density of the resultant agreements. Of the 41 'core' environmental conventions of global significance identified by the United Nations Environment Programme (UNEP) in a 2001 report, 31 have been adopted since 1985.[151] In discussing this trend, commentators now often speak not of international environmental law but of 'international environmental governance'.[152] Indeed, most of the recent MEAs are not simply treaties, but regimes that generate ongoing law-making activities around various issue areas. The primary approach to global MEA design today is the 'framework-protocol' model, first employed at the global level by the 1985 Vienna Convention for the Protection of the Ozone Layer and

[147] Dobriansky, 'Vision Statement for the World Summit on Sustainable Development', 23 May 2002, available at http://www.state.gov/r/pa/prs/ps/2002/10442.htm (accessed 28 January 2004).

[148] Powell, 'Making Sustainable Development Work: Governance, Finance, and Public-Private Cooperation', Remarks at State Department Conference, Meridian International Center, Washington, D.C., 12 July 2002, available at http://www.state.gov/secretary/rm/2002/11822.htm (accessed 28 January 2004).

[149] 'Partnership Initiatives Announced at Sustainable Development Summit in Johannesburg: Aim at Priority Issues — Water, Energy, Health, Agricultural Production, Biodiversity', ENV/DEV/J/10, 29 August 2002, available at http://www.un.org/events/wssd/summaries/envdevj10.htm (accessed 28 January 2004).

[150] See UNEP, *International Environmental Governance: Multilateral Environmental Agreements (MEAs)*, UN Doc. UNEP/IGM/4/INF/3 (16 November 2001).

[151] *Ibid.*, at 6–7.

[152] *Ibid.*

its 1987 Montreal Protocol.[153] Typically, the initial framework treaty contains only general commitments and establishes information-gathering and decision-making structures. Subsequent protocols to the framework treaty provide binding emission reduction or other environmental protection commitments.

The framework-protocol approach is designed to promote consensus building around the need for and parameters of collective action, to focus binding commitments on priority concerns, and to adapt or expand the regime over time.[154] This regime development is accomplished through regular meetings of the treaty's Conference of the Parties (COP) and its various scientific and political subsidiary bodies.[155] With an institutional core and ongoing regulatory agenda, modern MEAs therefore resemble international organizations in many respects.[156] Treaty parties become participants in rolling information gathering, negotiation and consensus-building processes, and COPs have emerged as forums for much of the international environmental law-making activity.[157] In these ongoing multilateral processes, it is more difficult for individual parties to determine agendas, to resist regime development, and to extricate themselves from regime dynamics.[158] In addition, a range of techniques have evolved that facilitate treaty development by COP decision, reducing reliance on formal amendments and softening consent requirements in various ways.[159]

Even this brief overview of MEA growth suggests a number of reasons why the early pattern of US leadership on treaty development and quick ratification may have abated.[160] First, and most importantly, the ongoing interactions and negotiations among parties to an MEA tend to generate patterns of expectations and normative understandings that guide and constrain subsequent policy choices and legal development within the regime.[161] In addition, these multilateral negotiations provide opportunities for coalition building that enhance the ability of smaller states to influence outcomes and help dilute the influence of more powerful states. Second, the sheer number and the growing complexity of MEAs make multilateral engagement increasingly resource-intensive.[162] Significant human and financial resources are

[153] Vienna Convention for the Protection of the Ozone Layer, reprinted in 26 ILM (1987) 1516; Montreal Protocol, *supra* note 18.

[154] For an overview, see Brunnée, 'Toward Effective International Environmental Law — Trends and Developments', in S. A. Kennett (ed.), *Law and Process in Environmental Management* (1993) 217, at 222–229.

[155] See UNEP, *supra* note 150, at 13–18.

[156] See Churchill and Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *AJIL* (2000) 623.

[157] See Brunnée, 'COPing with Consent: Lawmaking under Multilateral Environmental Agreements', 15 *Leiden J. Int'l L.* (2002) 1.

[158] See Gehring, 'International Environmental Regimes: Dynamic Sectoral Legal Systems', 1 *Yearbook Int'l Envtl L.* (1990) 35.

[159] See Lefeber, 'Creative Legal Engineering', 13 *Leiden J. Int'l L.* (2000) 1.

[160] Of the MEAs examined in the Glennon and Stewart compliance study, *supra* note 26, only the Montreal Protocol was of the more recent framework-protocol variety.

[161] Brunnée, *supra* note 157, at 45.

[162] UNEP, *supra* note 150, at 3–4.

required in the development of MEAs, as well as in the various ongoing multilateral engagements once agreements are adopted. Increasingly, agreements are also tackling complex global issues in which environmental concerns are intertwined with development issues. The environment-development dimension to most global MEAs not only entails protracted negotiation processes. Typically, global environmental governance also requires significant financial and technological transfers from North to South.[163] Finally, the easier agreements have likely been reached already, so that the remaining treaties tend to impose more onerous obligations. Thus, rather than target relatively discrete issues of international concern, MEAs now tackle matters that implicate the domestic spheres of parties to a growing extent, and often require significant adjustments of domestic regulatory standards or approaches.[164]

Most of these factors play out not just for the United States but also for other countries. This fact arguably accounts for the non-ratification of some of the most recent MEAs by other developed countries, including some with strong commitments to environmental protection. Yet, if the proliferation and growing density of MEAs has spawned a degree of 'green fatigue' internationally,[165] the phenomenon is probably amplified in the case of the United States. While the country may have greater human and resources than other participants in international environmental governance, it is also usually called upon to make large contributions to cover the costs of MEAs.[166] This fact, and a growing apprehension of the influence and intrusiveness of international institutions commitments, likely helps explain the rougher rides that MEAs are getting in US domestic processes. I turn first to the features of the relevant domestic processes, and then to other considerations that suggest that the United States is particularly likely to look long and hard before it leaps into international environmental law.

B *Domestic Political and Legal Processes*

The features of the American political process can complicate a treaty's ratification at the best of times. As is well known, ratification of a treaty requires the 'advice and consent' of a two-thirds majority of the US Senate.[167] Environmental agreements can thus become mired in the deliberations of the Senate's Foreign Relations Committee, and are exposed to political lobbying by an array of domestic constituencies. This dynamic is magnified when MEAs require reopening the carefully negotiated compromises that are contained in many US domestic environmental laws.

The current Bush administration is generally said to accord relatively low priority to environmental protection.[168] Yet, even the reasonably enthusiastic Clinton-Gore administration was not able to significantly advance its international environmental

[163] *Ibid.*, at 7–8, 37–41.

[164] Anderson and Grewell, *supra* note 131, at 436.

[165] See VanDeveer, 'Green Fatigue', (Autumn 2003) *Wilson Quarterly* 55.

[166] See *supra* note 25 and accompanying text.

[167] Jacobson, 'Climate Change: Unilateralism, Realism, and Two-Level Games', in S. Patrick and S. Forman (eds), *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (2001) 415, at 427.

[168] See, e.g., Editorial, 'An Environmental Deficit', *The New York Times* (11 February 2004) A28.

agenda through the obstacle course of competing domestic agendas that it inherited in the Senate.[169] For example, in 1992, just prior to the Clinton presidency, some Senators called for US leadership at Rio. At the same time, the Senate Foreign Relations Committee declared that '[t]he President should not support any action or undertake any commitment' regarding international environmental conventions, strategies or action plans at Rio 'which he believes would have an adverse effect on the competitiveness of American industry or that could result in a net long-term loss of American jobs'.[170] As already noted, the Clinton administration subsequently signed the Biodiversity Convention but failed in its efforts to shepherd the Biodiversity Convention through the Senate in 1993–1994; Senate resistance to ratification continues to this date.[171] Another case in point is the 1997 Byrd-Hagel resolution, in which the Senate resolved that the United States should not sign any protocol that created new emission reduction commitments for developed countries without complementary developing country commitments, and that would result in serious harm to the US economy.[172]

The Byrd-Hagel resolution illustrates that the difficulties of the Clinton administration cannot simply be attributed to Republican resistance in Congress. In that case, there was unanimous agreement that the Kyoto Protocol was unacceptable as it stood.[173] It also seems that, at a more general level, bipartisan consensus on internationalism in Congress has given way to greater entrepreneurship by domestically minded members of all political persuasions.[174] In turn, an increasingly 'decentralized, atomized process' in Congress is said to bias foreign policy decisions towards unilateralism.[175] In addition, the dynamics of divided government between the President and Congress appear to be especially prone to producing environmentally conservative outcomes.[176] That said, a 2002 assessment by the Natural Resources Defense Council concluded that Congress was so grid-locked that neither environmental protection initiatives advanced, nor backlash proposals succeeded.[177] In any case, so far it does not appear that the current Bush administration is more successful than its predecessor in working with the legislators, be it to promote

[169] See Dernbach, 'U.S. Adherence to Its Agenda 21 Commitments: A Five Year Review', 27 *Envtl. L. Rep.* (1997) 10504.

[170] Cited in Blomquist, *supra* note 44, at 518.

[171] See *ibid.*, at 534–559.

[172] Byrd-Hagel Resolution, *supra* note 36. On the Clinton administration's signature of the protocol see *supra* note 37, and accompanying text.

[173] The resolution was adopted by a vote of 95–0.

[174] See Patrick, 'Don't Fence Me In: The Perils of Going It Alone', 18 *World Policy Journal* (Fall 2001) 2, at 8.

[175] Zoellick, 'Congress and the Making of US Foreign Policy', 41 *Survival* (Winter 1999–2000) 1, at 27.

[176] See Bodansky, 'Transatlantic Environmental Relations', in J. Peterson and M. A. Pollack (eds), *Europe, America, Bush: Transatlantic Relations in the Twenty-first Century* (2003) 58, at 64.

[177] See Natural Resources Defense Council, *Holding the Line: The Environmental Record of the 107th Congress* (2002), at v, available at http://www.nrdc.org/legislation/107congress/contents.asp (accessed 21 February 2004).

ratification of MEAs, as previously discussed, or to dismantle environmental protection.[178]

Some commentators suggest that the distinctive features of domestic processes also help explain American reluctance *vis-à-vis* the development of customary law. For example, Jonathan Wiener argues that the 'highly legalistic and adversarial' character of its regulatory system is one reason why the United States has resisted acceptance of an internationally binding precautionary principle.[179] Specifically, resort to courts for citizen suits to enforce regulatory standards, or tort actions for compensation, is said to be far more pervasive in the United States than in Europe, where the precautionary principle tends to be treated as customary law.[180] As a result, US negotiators may be more likely than their counterparts to read a negotiated text as domestically enforceable law. By the same token, negotiators may be concerned that Europe will not end up with genuinely equivalent commitments, since enforcement by domestic actors is less likely.[181] This phenomenon, argues Wiener, may further erode the basis for an agreed international statement of the precautionary principle.[182] This concern applies notwithstanding the fact that, according to Wiener, European and American precautionary standards are ultimately much closer than generally assumed.[183]

Domestic legal culture may well be one reason for US resistance to the development of customary law, such as in the case of the precautionary principle. However, in the environmental context, it seems more likely that the primary reasons for the US posture on custom are to be found in international legal processes. Whereas a non-binding precautionary principle may shape international regimes or even influence interpretative processes, a customary rule would be actionable through WTO or other dispute settlement processes.[184] It could qualify the requirement of science-based justification for protective measures, upon which the United States insists internationally as well as in its domestic risk management approaches.[185] Similarly, legally binding common but differentiated responsibilities would significantly alter the structure and processes of international environmental law by

[178] The Bush administration is widely accused of promoting legislative proposals that would undercut environmental protection goals. See *ibid.*

[179] Wiener, *supra* note 93, at 259.

[180] *Ibid.*, at 260–261.

[181] See Jacobson, *supra* note 167, at 425.

[182] Wiener, 'Comparing Precaution in the United States and Europe', 5/4 *Journal of Risk Research* (2002) 317, at 340–341.

[183] *Ibid.*, at 317–322.

[184] See *EC — Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998; and ICTSD, 'US Requests WTO Panel in US-EU Biotech Dispute', *BRIDGES Trade BioRes*, 25 August 2003, available at http://www.ictsd.org/biores/03–08–25/story2.htm (accessed 24 February 2004).

[185] Lofstedt, 'The Precautionary Principle: Risk, Regulation and Politics' (March 2002), available at www.21stcenturytrust.org/precprin.htm (accessed 21 February 2004).

enshrining a basic distribution of global environmental obligations between South and North.[186]

C *American Attitudes towards International Law*

American enthusiasm for grand multilateral projects, such as ambitious MEAs, may be further dampened by the fact that international environmental law has come on the radar screen of those who are concerned about the encroachment of international law on US sovereignty. International institutions such as MEAs and their COPs play increasingly important roles, and international environmental law is seen as having a growing impact on domestic affairs. Therefore, MEAs are liable to become entangled in wider concerns about loss of control by democratically elected and accountable domestic officials.

Direct evidence of these concerns can be found in Senate deliberations on multilateral environmental agreements. For example, some objections to ratification of the Biodiversity Convention were based on the fact that the COP 'will meet after [the] treaty [is] in force to negotiate the details of the treaty', which would contravene the Senate's 'constitutional responsibilities to concur in treaties'.[187] Senator Conrad Burns (R-MT) observed: 'This treaty could give a panel outside the United States the right to dictate what our environmental laws should say. That is wrong.'[188] Senator Jesse Helms, in remarks that show a considerable grasp of the dynamics that can be generated by the framework-protocol model of treaty-making, opined:

> This so-called treaty is scarcely more than a mere preamble, not a treaty. The real treaty — the essential nuts and bolts — is yet to be created at the conference of the parties. If the Senate previously ratifies this preamble falsely described as a treaty, it will have given away one of its major constitutional authorities and will have betrayed the trust of the American people.[189]

One may be inclined to discount this salvo as the extreme view of a notorious, arch-conservative foe of international law. However, while arguably not a majority view,[190] similar concerns are now expressed in many quarters. For example, Curtis Bradley argues that some transfers of authority to international institutions raise constitutional concerns.[191] Terry Anderson and J. Bishop Grewell describe MEAs as 'genuine threats' to American sovereignty,[192] and opine that increasing international environmental regulation 'reduces accountability that comes from a country's internal system of checks and balances, and increases international tension'.[193]

[186] See *supra* note 90, and accompanying text.

[187] Senator Kay Bailey Hutchison (R-TX), cited in Blomquist, *supra* note 44, at 544–545.

[188] Cited *ibid.*, at 545 (n. 199).

[189] Cited *ibid.*, at 546 (n. 203).

[190] For critical views, see e.g. Koh, *supra* note 106; Alvarez, 'Legal Unilateralism', forthcoming in M. Crahan, J. Goering, and T. Weiss (eds), *Wars on Terrorism and Iraq: The U.S. and the World* (2004) (manuscript on file with author; cites to manuscript).

[191] Bradley, 'International Delegations, the Structural Constitution, and Non-Self Execution', 55 *Stanford L. Rev.* (2003) 1557.

[192] Anderson and Grewell, *supra* note 131, at 436.

[193] *Ibid.*, at 435.

Indeed, it appears that reservations regarding international law are now shared across the political spectrum and are embraced by conservative and liberal commentators alike.[194] Jed Rubenfeld, a center-left constitutional law scholar, recently caused a stir arguing that American democratic constitutionalism must lead to the conclusion that 'international law is a threat to democracy and to the hopes of democratic politics around the world'.[195] According to Rubenfeld, as 'the international system became more powerful, and international law diverged from U.S. law, the United States inevitably began to show unilateralist tendencies'.[196] Most chillingly, Rubenfeld argues that:

> Unilateralism does not set its teeth against international cooperation or coalition building. What it does set its teeth against is the shift that occurs when such cooperation takes the form of binding agreements administered, interpreted, and enforced by multilateral bodies — the shift, in other words, from international *cooperation* to international *law*.[197]

In this assessment, Rubenfeld comes surprisingly close to the views of neo-conservative members and supporters of the Bush administration.[198] From the standpoint of international environmental law, Rubenfeld's assessment is also deeply ironic. If it is any yardstick of what to expect from the United States, the more that international environmental law grows and the more successful environmental regime building is, the more resistance it is likely to meet. But the irony does not end here. Even assuming that treaties can cause constitutional difficulties in the United States, it is not clear that MEAs raise these issues as much as other branches of international law. Concerns about democratic control might be raised by the phenomenon of law-making in COPs that was mentioned earlier.[199] To the extent that COP decisions necessitate domestic regulatory or policy activity, their non-binding nature would allow the by-passing of the Senate process. This is precisely the concern raised by Senator Helms and others. However, other concerns, such as the notion that 'foreign panels' would 'dictate' US environmental law, vastly overestimate the reach of MEAs. In any case, it seems that treaties in other areas, notably trade law, have much greater potential to raise constitutional concerns in this regard.[200] Indeed, in his review of potentially problematic transfers of authority to international institutions, Curtis Bradley does not include a single MEA, but focuses on trade agreements and institutions such as the UN Security Council and the World Court.[201] It appears, therefore, that the apprehension *vis-à-vis* MEAs is at least in part coloured by generic concerns about international law, which may or may not apply to MEAs. It is also

[194] See Alvarez, *supra* note 190, at 14.

[195] Rubenfeld, 'The Two World Orders', *Wilson Quarterly* (Autumn 2003) 22, at 34.

[196] *Ibid.*, at 30.

[197] *Ibid.*, at 36 (emphases added).

[198] See Bolton, 'Should We Take Global Governance Seriously', 1 *Chicago J. Int'l L.* (2000) 205. At the more moderate end of the spectrum, see Zelikow, *supra* note 9, at 24.

[199] See Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *AJIL* (1999) 596, at 607–611.

[200] I thank José Alvarez for raising this issue.

[201] See Bradley, *supra* note 191.

likely that these attitudes are reinforced by a broader sense that stronger, more demanding MEAs constrain American freedom of action. It certainly seems to be the case that MEAs now often promote policy approaches that do not fit neatly into US domestic agendas or accord with existing US law, as was the case for some of the early MEAs on which the US led negotiations and then moved quickly to ratification.[202]

Whatever the precise dynamics, the features that have given international environmental lawyers cause to cheer the development of MEAs also place them in the cross-hairs of an apparently growing range of sceptics in the United States. By the same token, the search for alternative approaches to international environmental protection is likely to find increasing support in US international policy circles. This conclusion suggests itself, in particular, in view of the fact that several of the alternative strategies appear to be premised upon widening the circle of those states that share the US outlook on democracy, rule of law and, ultimately, international law.

D *National Security*

The misgivings about international law and multilateral institutions, and the inclination towards alternative approaches, have likely been heightened by the post-September 11 preoccupation with national security.[203] Arguably, this preoccupation has also entailed a shift of public concern and a shift of resources away from environmental issues. At any rate, all indications are that environmental and natural resource issues have become security issues. Some issues have been explicitly cast as matters of national security, as the Bush administration has done with American 'energy security'.[204] But the systematic weaving of environmental concerns into the security agenda preceded the current Bush administration. Already the Clinton administration pushed strongly for a new, broader vision of foreign policy and national security.[205] This push was flanked by a rise of 'environmental security' analysis in the scholarly literature.[206] The initial goals of environmental security rhetoric most certainly included the elevation of environmental degradation on policy and funding agendas. However, after September 11, it appears that many environmental issues have become subordinated to security considerations. The American Under-Secretary of State for Global Affairs, Paula Dobriansky expressed the underlying assumptions as follows:

[202] See *supra* notes 19–20, 27 and accompanying text.

[203] See Steinberg, 'A Public-Private Partnership for Foreign Policy Post-September 11: Too Important to Be Left to Diplomats', Remarks to Reed College 2002 Lecture Series, Portland, Oregon, 24 October 2002, available at http://www.state.gov/s/p/rem/15637.htm (accessed 25 January 2004).

[204] *National Security Strategy of the United States of America* (September 2002), at 19–20 [hereinafter *NSS*].

[205] See *supra* note 127, and accompanying text.

[206] For an overview, see Dalby, 'Security and Ecology in the Age of Globalization', 8 *Environmental Change & Security Report* (2002) 95.

> Many problems that used to be considered individually, such as environmental disputes, health-related issues, migration flows, narcotics trafficking, and trafficking in persons, among others, must now be viewed as integral to national security and stability. We have gone from a world where we assess our safety based on how we handle one large danger to one in which we must handle numerous, individual concerns.[207]

This thinking is also implicit in the Bush administration's 2002 *National Security Strategy*.[208] The document makes reference to environmental concerns only in the context of the need to promote free markets and free trade. Because a strong world economy advances 'prosperity and freedom in the rest of the world', it is said to be inextricably linked to US national security.[209] As part of a 'comprehensive' free trade strategy, the *Security Strategy* highlights the need to '[p]rotect the environment and workers'.[210]

E *American Power, Multilateralism and Unilateralism*

The current American preoccupation with national security intersects with the desire to maintain and enhance US power in the post-Cold War world. At least in part, current policy-makers are driven by the sense that 'in today's world, we still need a sheriff, and that only the United States can play such a role'. [211] In turn, there is a keen sense that a 'realistic sheriff' cannot rely exclusively, or even primarily, on military power to accomplish its goals.[212] Therefore, the United States must harness and develop what Joseph Nye has called 'soft power', which means 'getting others to want what you want', and 'rests on the ability to set the political agenda in a way that shapes the preferences of others'.[213] A critical source of soft power, argues Nye, is the 'ability to establish a set of favorable rules and institutions that govern areas of international activity'.[214] And this seems to be precisely the policy that the Bush administration has been pursuing, whether successfully or not. In a 2002 speech, the State Department's then Director of Policy Planning, Richard Haass, offered the following observations:

> In the 21st century, the principal aim of American foreign policy is to integrate other countries and organizations into arrangements that will sustain a world consistent with U.S. interests and values, and thereby promote peace, prosperity, and justice as widely as possible.. . . We are

[207] Dobriansky, 'Threats to Security in the Western Hemisphere', Remarks at the Inter-American Defense College, Washington, D.C., 20 October 2003, available at http://www.state.gov/g/rls/rm/2003/25564.htm (accessed 21 February 2004).

[208] *NSS*, *supra* note 204.

[209] *Ibid.*, at 17.

[210] *Ibid.*, at 19.

[211] Haass, 'From Reluctant to Resolute: American Foreign Policy after September 11', Remarks to Chicago Council of Foreign Relations, 26 June 2002, available at http://www.state.gov/s/p/rem/11445.htm (accessed 30 January 2004).

[212] *Ibid.*

[213] J. S. Nye Jr., *The Paradox of American Power: Why the World's only Superpower Can't Go it Alone* (2002), at 9.

[214] *Ibid.*, at 10–11.

> doing this by persuading more and more governments and, at a deeper level, people to sign on to certain key ideas as to how the world should operate for our mutual benefit.[215]

The United States, as a 'resourceful sheriff', must be a coalition builder.[216] Depending on the issue at hand, the 'coalitions of the willing' may be broadly multilateral.[217] But, increasingly, they may not be. Both the regional environmental hub approach and the emphasis on public-private partnerships for sustainable development also fit neatly into what Richard Haass has called the 'doctrine of integration'.[218]

From the standpoint of international environmental law, the key question is what this self-declared 'distinctly American internationalism'[219] will mean for MEAs and other efforts to structure global environmental governance. As suggested earlier, it is relatively harder for the United States to shape policy outcomes within multilateral regimes. Thus, regional or country-specific approaches may be seen as more direct and effective ways to project soft power.[220] At another level, they are simply sensible responses to the diffusion of actors and arenas that characterizes globalization, in the environmental as in other fields. In any case, it is to be expected that the United States will continue to promote 'U.S. interests and values' at multiple levels. But all the focus on regional or public-private approaches notwithstanding, multilateral environmental regimes will also remain part of the policy picture. Quite apart from the fact that some environmental problems cannot be solved but through multilateral engagement, it is arguable that the very importance of soft power will keep the United States tied into MEAs and other regimes. Eventually, these facts may even bring the United States back into the climate change regime.

Although the withdrawal from the Kyoto Protocol remains an isolated step in American MEA practice, it is routinely cited, along with the rejection of the International Criminal Court and of certain arms control treaties, as evidence of a broader pattern of not just US selective multilateralism, but of a growing inclination to exempt itself from standards applicable to others.[221] Few observers outside the United States have been swayed by the US claim that it is simply looking to move beyond a flawed treaty. A number of factors explain this phenomenon. Non-participation in Kyoto is not simply a matter of lacking or slow domestic progress towards ratification. The Bush administration took the unusual step of formally declaring its opposition to the protocol.[222] Its blunt dismissal of the protocol came after more than a decade of active involvement in the climate change negotiations, and after considerable success

[215] Haass, 'Defining U.S. Foreign Policy in a Post-Post-Cold War World', The 2002 Arthur Ross Lecture, Remarks to Foreign Policy Association New York, NY 22 April 2002, available at http://www.state.gov/s/p/rem/9632pf.htm (accessed 25 January 2004).

[216] Haass, *supra* note 211. And see *NSS*, *supra* note 204, at 25.

[217] *Ibid.*

[218] Haass, *supra* note 211.

[219] *NSS*, *supra* note 204, at 1.

[220] See also Joffe, 'Of Hubs, Spokes and Public Goods', 69 *The National Interest* (Fall 2002) 7.

[221] See Caron, *supra* note 6, at 398; Greenberg, *supra* note 8; Koh, *supra* note 106.

[222] See *supra* note 38.

in shaping many parts of the regime according to American preferences.[223] But, more than that, given the treaty's entry into force formula, US non-ratification placed significant hurdles in the path of the treaty ever taking effect.[224] In addition, even if the protocol enters into force, it will do so without participation of the largest emitter of global greenhouse gases.[225] The US decision on Kyoto, therefore, concerns not merely its own position *vis-à-vis* the treaty, but has significant effects on the effectiveness or even the existence of the treaty as such.[226]

The perils of American 'à la carte multilateralism', have manifested themselves on many fronts over the last few years.[227] But there are few better illustrations than the US withdrawal from the Kyoto Protocol and the responses that this — perfectly legal — step provoked. Ultimately, soft power rests on credibility.[228] In this context, it matters that the Kyoto withdrawal is widely seen as part of a broader pattern. A country's ability to get others to want what it wants will be diminished if it is perceived as a purely self-interested actor, which is precisely what current US climate change policy invites. In addition, over-reliance on coalitions of the willing, be it in the environmental context or beyond, undermines rather than enhances perception of the United States as a trustworthy, good faith actor.[229] This assessment applies in particular to US relations with European and other states that perceive a duty to cooperate to be at the very heart of the international legal order.[230] Therefore, even the Bush administration will likely have to adjust its approach to international law in view of its inherent limits. However, it is unlikely that such adjustments would have beneficial effects for the climate change regime. American re-engagement, be it in the Kyoto Protocol or in a new treaty,[231] arguably will have to wait for a new American administration.[232] The many state and local climate change initiatives that have been launched in the face of federal inaction may come to play an important role in

[223] See *supra* note 34 and accompanying text.

[224] To enter into force, the protocol must have been ratified by not less than 55 parties to the Climate Change Convention, including parties listed in the convention's Annex I and accounting for at least 55% of the 1990 carbon dioxide emissions for these parties (Article 25.1). The US accounts for 36.1% of these emissions. As of 8 July 2004, 123 states, including Annex I parties representing 44.2% of carbon dioxide emissions in 1990, had joined the Protocol. Available online at http://unfccc.int/resource/convkp.html (accessed 15 July 2004). At the time of writing, entry into force still hinges on ratification by Russia.

[225] The United States is the largest national emitter (22% in 1995). See US EPA, *Total World Emissions of Carbon Dioxide (CO_2)*, available at http://www.epa.gov/reg3artd/globclimate/world.htm (accessed 25 January 2004). After the United Arab Emirates and Kuwait, the US also has the highest per capita emissions in the world. See The Economist, *World in Figures* (2003), at 98.

[226] Although it is projected that the developing country share of global emissions would double to about 50% in the next two decades, the US share is still projected to be at 15%. See US EPA, *supra* note 225.

[227] See Patrick, *supra* note 174.

[228] Nye, *supra* note 213, at 69.

[229] See Koh, *supra* note 106, at 1487, 1499–1501.

[230] See Alvarez, *supra* note 190, at 8–9.

[231] Many commentators now argue that alternative approaches should be considered. See e.g. Bodansky, 'Climate Commitments: Assessing the Options', in Pew Center, ed. *Beyond Kyoto: Advancing the International Effort against Climate Change* (2003) 37.

[232] But see Rosencranz, *supra* note 40, at 490–491.

assisting this move.[233] A recently publicized report commissioned by the Department of Defense, which argues that rapid climate change 'should be elevated beyond a scientific debate to a US national security concern', may also enter into the equation.[234]

F *Willingness to Think Outside the Box*

A final factor to consider in these reflections on US involvement in international environmental law is American readiness to experiment with new approaches and to think outside the box. Climate change, again, provides examples; one illustrating the American potential for generating innovative solutions, the other suggesting that the American approach to international problem-solving is also closely linked to US power and attitudes towards international law.

The US role as an innovator is nicely illustrated through its promotion of international emissions trading and of a 'comprehensive approach', covering several major greenhouse gases and their sources and sinks, to help states meet emission reduction commitments.[235] In the case of emissions trading, it is often assumed that the United States simply advocated an approach that it had employed domestically. However, Jonathan Wiener offers a detailed account of how proposals for international emissions trading were developed by the Department of Justice in response to a request by the first Bush administration for new ideas for US climate policy.[236] While the emissions trading idea did draw inspiration from domestic practice, the approach was carefully adapted to the international setting, so as to promote broad participation and economic efficiency.[237] Ultimately, Wiener agrees that the lack of emission reductions commitments for large developing countries such as China, India, Brazil or Indonesia, is a flaw in the Kyoto Protocol. For the protocol to work in the longer term, he suggests, these countries should have been attracted into the regime by giving them 'head-room' emission allowances that would have permitted them to trade some of their emission rights — as was done for Russia.[238]

It is ironic that the United States walked away from a Kyoto Protocol that contains much of its innovation. Yet, can the decision to withdraw too be put down to American willingness to think outside the box? This is certainly the conclusion that President Bush wanted the world to draw when he cast the American decision to abandon a flawed treaty as an act of leadership.[239] Others have suggested that the silver lining in the American repudiation of Kyoto is an opportunity to acknowledge the treaty's shortcomings and to think afresh and start a new dialogue on

[233] *Supra* note 42.

[234] See Townsend and Harris, 'Now the Pentagon tells Bush: Climate Change will Destroy Us', *The Observer*, 22 February 2004, at 3.

[235] Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law', 27 *Ecology Law Quarterly* (2001) 1295, at 1310–1311.

[236] *Ibid.*

[237] *Ibid.*, at 1320, and 1337–1443.

[238] *Ibid.*, at 1363.

[239] See *supra* note 2.

international approaches to climate change.[240] Be that as it may, given the absence of a constructive alternative proposal by the Bush administration, its assertion of leadership is difficult to take at face value. Nonetheless, sympathetic observers have suggested that the Bush administration 'prefers functional institutions that produce concrete results instead of symbolic measures', adding that '[s]ometimes, as in the case of the Kyoto Protocol, well-meaning but dysfunctional efforts may be worse than useless if they complicate attempts to develop a more effective solution'.[241] Indeed, in policy-making, the Bush administration is said to prefer 'an inductive method that draws ideas from many sources and adapts them to specific conditions', as opposed to deductive strategies that develop abstract principles 'into generic, universal solutions'.[242] It is precisely at this point that innovation, power, and attitudes towards international law and institutions intersect. The focus is on the ends more than the means, leading back to the 'distinctly American internationalism' discussed in the previous section. In other words, under the Bush administration, the American willingness to innovate relates not just to solutions to individual problems, it also appears to animate, and be animated by, the way in which the United States engages with international law.[243]

4 Conclusion

While the high-profile withdrawal of the United States from the Kyoto Protocol may be indicative of broader policy preferences of the current US administration, it is not representative of US policy towards multilateral environmental agreements. American compliance with treaty commitments is generally good. Although the United States has been less likely to lead in the development of international environmental regimes, it remains actively involved in most MEA negotiations and usually works to shape the emerging regimes. But whereas, in the 1970s and into the 1980s, the United States proceeded quickly to join multilateral treaties it had helped negotiate, ratification now tends to take several years, or may be altogether uncertain. That said, due to domestic political processes and other factors, the ratification trajectory of the Bush administration is no worse than that of preceding administrations. The Bush administration has been working towards domestic approval for ratification of several MEAs, notably in the area of chemicals management. Finally, in the case of some of the most recent agreements, the United States finds itself in the company of other developed countries that have yet to join.

[240] See Bodansky, 'Bonn Voyage: Kyoto's Uncertain Revival', *The National Interest* (Fall 2001) 65. See also source cited in *supra* note 231.

[241] Zelikow, *supra* note 9, at 25.

[242] *Ibid.* One might object, of course, that the Bush administration's foreign policy is driven much more by abstract principles and ideology than by assessment of actual developments. I thank Dan Bodansky for this observation.

[243] See also Koh, *supra* note 106, at 1449 (referring to the Bush administration's 'strategic unilateralism and tactical multilateralism').

If the United States has been sluggish in its ratification of MEAs, it has been less enthusiastic about the development of customary international environmental law. Although the United States supports the design of individual international regimes around new concepts, such as the precautionary principle or the common but differentiated responsibilities, it resists claims that they have become customary law.

Increasingly, the United States has sought to identify alternative legal avenues for shaping relevant policy agendas. The United States appears to be exploring unilateral approaches, but is unclear whether or not explicit legal unilateralism will emerge as a major trend in the environmental context. By contrast, it is clear that the United States is shifting significant legal, policy and financial resources into regional arenas and into public-private partnerships, respectively. Although it has been articulated and pursued most forcefully by the Bush administration, this shift in resources and approaches has been underway for at least a decade.

The reasons for this policy pattern are multifaceted. Some, such as the current national security preoccupation or the world view of the Bush administration, may be temporary factors. But, just like the policy pattern itself, many others — such as domestic political processes, attitudes towards international law, or willingness to try alternative approaches — transcend administrations. The trick for international environmental lawyers and policy-makers will be to distinguish the elephant's 'twitch and grunt' from movements that must be taken seriously as longer-term trends.