

# DOMESTIC INSTITUTIONS AND INTERNATIONAL REGULATORY COOPERATION

## Comparative Responses to the Convention on Biological Diversity

By KAL RAUSTIALA\*

INTERNATIONAL regimes develop in three general ways: through coercion, convergence ("harmony"), or mutual state choice. Lasting coercive cooperation is rare.<sup>1</sup> Harmony is of limited interest.<sup>2</sup> In the majority of cases—and those of the greatest theoretical and practical significance—regimes arise through explicit state choices to cooperate. This article explores state choice toward international regulatory regimes for environmental protection. Regulatory regimes are frequently aimed at diffuse private actors and behaviors. International regime rules are commonly transformed into binding domestic rules or standards; regulatory cooperation, and environmental cooperation in particular, is marked by the degree to which this process of implementation relies upon and is shaped by existing domestic institutions and political structures. Because regulatory regimes at the international level are nearly always administrated through regulatory regimes at the domestic level, the latter, in conjunction with the politics new regula-

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<sup>1</sup> Sanctions can be considered a form of coercively induced cooperation. On sanctions in general, see Lisa Martin, *Coercive Cooperation: Explaining Multilateral Economic Sanctions* (Princeton: Princeton University Press, 1992); and idem, "Credibility, Costs, and Institutions: Cooperation on Economic Sanctions," *World Politics* 45 (April 1993).

<sup>2</sup> See Robert Keohane's discussion in which he distinguishes between harmony and cooperation. Keohane, *After Hegemony* (Princeton: Princeton University Press, 1984), 51–54.

tion engenders, are central to understanding state choice. While many analyses have examined the role of domestic politics in international cooperation, I focus on domestic institutions. This article shows how institutions, in conjunction with the interests of key societal actors and the political incentives faced by governments, help to determine the expected political, economic, and legal impact of international commitments. Given that states are collectively the architects of international institutions, and these anticipated effects thus partly endogenous, the domestic regulatory structures of powerful states can also be critical influences on the scope, structure, and terms of international institutions.

To develop these claims, I examine an important recent case of international environmental cooperation, the protection of global biological diversity ("biodiversity"), and analyze the divergent responses of two leading states to the core agreement of the new regime. While the United Kingdom signed and ratified the Convention on Biological Diversity (CBD),<sup>3</sup> negotiated as one of the keystones of the 1992 United Nations Conference on Environment and Development (UNCED), the United States refused to do so. Both states were active participants in the negotiations and shared a host of similarities: the likelihood both of harm from biodiversity loss and of gain from biodiversity protection, positions as economic powers, intensity of biotechnology and pharmaceutical industries, antiregulatory leadership, and positions on critical issues like intellectual property protection. Two theoretical perspectives that examine areas of potential difference are used to explore this divergence in choice toward the CBD. Building on the seemingly central role played by science and scientists in the formation of environmental regimes, Peter Haas and others have developed a prominent knowledge-based account of state behavior in which epistemic influence, built on positive and normative understandings shared by an elite community of experts, explains much of the observed intergovernmental coordination in environmental affairs.<sup>4</sup> An alternative perspective, that I term "regulatory politics," proposes that variations in core domestic institutions critically shape the anticipated impact of regime rules and hence the domestic politics of international cooperation.

Biodiversity provides an important case of environmental cooperation (and one arguably more ecologically significant than higher-profile issues such as climate change). While a focus on epistemic communi-

<sup>3</sup> "Convention on Biological Diversity," June 1992 (hereafter cited as "CBD"), *International Legal Materials*, vol. 31 (Washington, D.C.: American Society of International Law, 1992), 818.

<sup>4</sup> See the special issue of *International Organization* 46, no. 1 (1992), edited by Peter Haas and Emanuel Adler.

ties helps to explain the rise of biodiversity as an international issue, it does not explain the choices made by the U.S. or the U.K. toward the developing regime. These states took differing positions neither because of divergent epistemic influence nor because of divergent power, expected harm, or wealth of biodiversity. Nor did the U.S. provide political "cover" for Britain by crippling the regime: unlike some other global environmental problems, biodiversity loss can be adequately, if imperfectly, addressed without U.S. participation.<sup>5</sup> Rather the need for commitments to be filtered through existing domestic institutions created divergent incentives and led to dissimilar assessments of the treaty's merits and dangers.

As regulatory cooperation rises in salience, the knowledge that domestic politics matters for international cooperation must be buttressed with an understanding of the special demands of such cooperation. This article delineates some precise ways in which domestic institutions, political commitments, and anticipated implementation influence state choice when international cooperation touches upon traditionally domestic areas of policy. It also shows that epistemic theory can fruitfully complement institutional approaches to state behavior and that domestic law can be an important factor in explaining state behavior and international cooperation.

First I describe the "biodiversity problem" and the research design. I then introduce the epistemic and regulatory approaches in brief, present the case history, and use both approaches to analyze the observed British and American behavior. After comparing and contrasting their respective explanatory power, I conclude with some remarks on the scope and import of my arguments for cooperation, law, and international relations theory.

#### BIODIVERSITY, THE U.S., AND THE U.K.

Biodiversity refers to the diversity of species, genetic material, and ecosystems around the globe. The concept reflects an increased awareness and appreciation of both genetic resources and ecosystemic relationships. Proponents cite a number of reasons for biodiversity's importance: Loss of species and habitats can result in unanticipated harm for entire ecosystems. Modern agriculture, pharmaceuticals, and

<sup>5</sup> Biodiversity is distinct from the global climate change case. The U.S. arguably did provide cover for governments in Europe by effectively vitiating that regime's potentially costly emissions commitment. While the biodiversity regime would clearly benefit from U.S. participation, it is not essential. See Kal Raustalia and David G. Victor, "Biodiversity since Rio: The Future of the Convention on Biological Diversity," *Environment* 38 (May 1996).

biotechnology all depend on access to new genetic resources;<sup>6</sup> the possibility of unknown future needs creates "option value" in unexplored biological resources.<sup>7</sup> Finally, normative arguments maintain that large-scale and often irreversible ecological destruction is simply wrong.

Flora-and-fauna treaties have been a mainstay of environmental cooperation throughout the twentieth century. By the late 1980s many wildlife conservation accords existed, focused mainly on the protection of individual species. Few addressed habitats, and none coordinated the disparate efforts.<sup>8</sup> The continuing destruction of fragile ecosystems around the world and accelerating biodiversity loss came to be viewed as an irreversible ecological catastrophe.<sup>9</sup> A comprehensive new umbrella regime, focused explicitly on diversity loss, was considered by many analysts to be the best solution. Such a regime had to be global, because biodiversity was distributed widely but unevenly, and ecosystems and species do not respect national borders. But because much of the earth's biodiversity rests on sovereign territory, action had to be undertaken by national governments. While a single state's actions—or nonactions—could not completely undermine the success of the regime, as is conceivable for problems like stratospheric ozone depletion, an effective response required broad collective action. Moreover, it is difficult to exclude free riders from many of the benefits of preservation, in direct usage and in option value.<sup>10</sup> A conservation epistemic community increasingly sought to publicize biodiversity loss, and the general outlines of what became the CBD were drafted in nongovernmental forums. The desire to create a new global regime dovetailed with an increasing focus on environmental issues in international affairs.<sup>11</sup>

The U.S. and the U.K. are similar in a number of important ways. Both are advanced industrial democracies, hosts to international financial centers and major transnational corporations, and jointly enmeshed in a wide array of international institutions. Both are major centers for the biotech and pharmaceutical industries, and their scientific communities are tightly linked. Each has thriving conservation NGOs and a

<sup>6</sup> Robert Mendelsohn and Michael Ballick, "The Value of Undiscovered Pharmaceuticals in Tropical Forests," *Economic Botany* 49, no. 2 (1995).

<sup>7</sup> David Pearce, *Economic Values and the Natural World* (London: Earthscan, 1993).

<sup>8</sup> Simon Lyster, *International Wildlife Law* (Cambridge: Grotius, 1985).

<sup>9</sup> National Science Board, *Loss of Biological Diversity: A Global Crisis Requiring International Solutions* (Washington, D.C.: NSB, 1989).

<sup>10</sup> For example, it is conceivable that the CBD could mandate that only parties may purchase agricultural strains based on protected resources, but, in practice, this would be unworkable and might clash with international trade norms and rules.

<sup>11</sup> Frank Benjamin Golley, *A History of the Ecosystem Concept in Ecology: More Than the Sum of Its Parts* (New Haven: Yale University Press, 1993).

long tradition of wildlife protection. In the period in question, 1989-92, both the U.S. and the U.K. were ruled by conservative governments often aligned in international forums and generally hostile toward new regulatory initiatives. Finally, the threat from the loss of global biodiversity is essentially the same for both states. Ex ante, neither can expect to lose (or win) more by its destruction, and both are equally likely to enjoy the benefits of preservation. Unlike the potential impact of climate change, which can vary enormously based on a state's latitude, coastal features, and agricultural intensity, the direct impact of biodiversity losses are not especially state-specific.<sup>12</sup> The two governments, however, exhibited markedly different responses and attitudes toward the nascent biodiversity regime. This poses a puzzle: with such broad similarities, why did the U.S. and U.K. take such distinctive stances both in the negotiations and after?

#### TWO PERSPECTIVES ON STATE CHOICE

Epistemic-community analysis emphasizes the ways in which the carriers of ideas and expertise shape state interests and behavior, and reflects a widespread conviction that environmental politics are distinctively influenced by scientific knowledge and those who interpret it.<sup>13</sup> Conversely, the regulatory-politics approach focuses on the domestic institutional structures that shape state (and societal) interests, in particular through expectations about the domestic effects of regimes in operation.

#### EPISTEMIC COMMUNITIES AND COOPERATION

Theories employing epistemic communities stress the roles that authoritative interpretations of complex and uncertain interrelationships play in fostering cooperative policies, especially toward the environment. In the words of one proponent, "International environmental cooperation is generated by the influence wielded by specialists with

<sup>12</sup> For example, the loss of a cancer-fighting plant somewhere in the world will harm Britons and Americans similarly—both will suffer from not having that treatment. The loss of biodiversity and ecosystems within a nation will obviously impact that nation more directly because of the loss of useful ecological functions and amenities. But there is little reason to believe that such loss matters systematically: Would less biodiverse Britain suffer more from the loss of local species, or would biodiverse U.S. have more to lose and hence be hit harder by such loss?

<sup>13</sup> Works that stress the importance of scientific input to environmental cooperation without adopting the epistemic-community approach include Tony Brenton, *The Greening of Macchiavelli* (London: Earthscan, 1994); L. K. Caldwell, *International Environmental Policy*, 2d ed. (Durham, N.C.: Duke University Press, 1990); Richard Benedict, *Ozone Diplomacy* (Cambridge: Harvard University Press, 1991); A. Dan Tarlock, "Environmental Law: The Roles of NGOs in the Development of International Environmental Law," *Chicago-Kent Law Review* 68, no. 1 (1992).

common beliefs, contrary to conventional approaches which stress the role of interstate power."<sup>14</sup> In this view governments seek to reduce uncertainty and solve problems, and these specialists provide influential interpretations and likely solutions. By becoming entrenched in the decision-making processes of states, the specialists solidify their influence. Acting transnationally, a knowledge-based community can create convergence around its preferred policy solutions. Influence in the epistemic model is thus both cognitive and bureaucratic; while epistemic communities help to shape state preferences for cooperation through the knowledge they possess, they also exert influence through the institutionalization of community members into policy-making bureaucracies. The major dynamics in epistemic theory, therefore, are uncertainty, interpretation, and institutionalization.

While focused on the incidence of cooperation, epistemic theory also claims to explain preference formation and policy choice. Epistemic accounts contain a (sometimes implicit) model of state action and state interests, in which governments' chief priority is to foster the public interest and alleviate shared international problems. While epistemic communities can at times "capture" large organizations, the scientific nature of environmental problems and the authoritative position of expert communities generally grant experts considerable influence over policy. Applications of epistemic analysis in environmental settings, such as stratospheric ozone cooperation, have relied heavily on accounts of the actions of community members in governments and in firms.<sup>15</sup> These actors, it is argued, have shaped the interests and choices of states through active efforts at issue framing and policy-making. Variance in state choices reflect differential access by the community of experts rather than differential receptions of the content of the community's proffered policy solution. Variations in access and institutionalization, while not treated systematically, have been hypothesized to result from structural and cultural variables, such as levels of environmental sentiment and/or state porousness.<sup>16</sup>

#### REGULATORY POLITICS

The regulatory-politics approach builds on theories of domestic institutions in international relations and comparative politics and the reg-

<sup>14</sup> Peter Haas, *Saving the Mediterranean: The Politics of International Environmental Cooperation* (New York: Columbia University Press, 1990), xxii.

<sup>15</sup> Peter Haas, "Banning Chloroflourocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone," *International Organization* 46 (Winter 1992).

<sup>16</sup> *Ibid.*, 215-16.

ulatory tradition in law and economics.<sup>17</sup> It comprises three types of variables: institutions; the preferences of societal actors, which are partly determined by institutions; and domestic political commitments.

Many international regulatory regimes entail extensive processes of domestic implementation. Such regimes must resonate, or at least not undermine or clash with, existing political and legal structures at the domestic level.<sup>18</sup> In describing regulatory treaties, Chayes and Chayes note that frequently

the real object of the treaty is not to affect state behavior but to regulate the activities of individuals and private entities . . . the ultimate impact on private behavior depends on a complex series of further steps. It will normally require detailed administrative regulations and vigorous enforcement efforts. In essence, the state will have to establish and enforce a full-blown domestic regime.<sup>19</sup>

In reality, states rarely establish and enforce full-blown domestic regimes *de novo*. They rely on existing regimes and entrenched administrative institutions. How these are structured and supported influences what can be implemented, and often what is negotiated.<sup>20</sup>

I emphasize two core institutional variations—separated powers versus “fused” powers, and federalism versus unitarism—and the regulatory styles and incentives that, in part, flow from these institutional variations. Domestic institutions provide incentives for and constraints on what governments can put into practice. Societal actors—firms, environmental organizations—are interested in international agreements, and they lobby governments accordingly.<sup>21</sup> Their expectations about the

<sup>17</sup> See, e.g., Judith Goldstein, “International Law and Domestic Institutions: Reconciling North American ‘Unfair Trade’ Laws,” *International Organization* 50 (Autumn 1996); Peter Gourevitch, “Squaring the Circle: The Domestic Sources of International Cooperation,” *International Organization* 50 (Spring 1996); Anne-Marie Slaughter, “International Law in a World of Liberal States,” *European Journal of International Law* 6, no. 4 (1995); Peter Katzenstein, ed., *Between Power and Plenty: Foreign Economic Policies of Advanced Industrial States* (Madison: University of Wisconsin Press, 1978); Kent Weaver and Bert Rockman, eds., *Do Institutions Matter?* (Washington, D.C.: Brookings Institution, 1993); Arend Lijphart, *Democracies* (New Haven: Yale University Press, 1984); George Stigler, ed., *Chicago Studies in Political Economy* (Chicago: University of Chicago Press, 1988); Roger Noll, ed., *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985).

<sup>18</sup> As Peter Cowhey has argued, “National politicians have been unlikely to accept any global [regulatory] regime that fails to reinforce the preferred domestic regime.” Cowhey, “International Telecommunications Regime: The Political Roots of Regimes for High Technology,” *International Organization* 44 (Spring 1990), 171. For a very different view of administrative structure and its relation to foreign policy, see Henry Kissinger, “Domestic Structure and Foreign Policy,” *Daedalus* 95 (Spring 1966).

<sup>19</sup> Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Cambridge: Harvard University Press, 1995), 14.

<sup>20</sup> A critical assumption for this argument is that states negotiate in good faith and expect to implement what they negotiate. In other words, states typically expect *ex ante* to comply. For an argument in favor of this assumption, see Chayes and Chayes (fn. 19); and idem, “On Compliance” *International Organization* 47 (Spring 1993).

<sup>21</sup> See, e.g., Helen Milner, *Resisting Protectionism* (Princeton: Princeton University Press, 1988).

impact of regime commitments are also shaped by institutions: variations in the domestic regulatory arrangements, which put international commitments into practice, shape and distinguish the local reality of common global commitments. The electoral pledges of governments are influential because they further structure political costs and benefits. Governments will have different supporting coalitions and favor different policies: some stake out the environment as a defining issue, while others stress the burdens of regulation. In sum, the anticipated “refraction” of common external commitments by domestic institutions helps to determine the impact of international commitments on domestic actors and domestic politics, and political incentives structure the political costs and benefits associated with these regime impacts. What matters most are the likely effects of the political solution, not the impact of the underlying environmental problem.<sup>22</sup> After describing the negotiation of the CBD below, these general claims about state choice are specified and applied to the U.S. and U.K. case history.

Table 1 summarizes the expectations of the epistemic community and regulatory politics approaches.

### NEGOTIATING THE BIODIVERSITY REGIME

With the onset in the 1980s of sustained attention to both the concept and the reality of global biodiversity, the extant international conservation regimes were recognized as unduly limited in scope. A multilateral biodiversity regime was initially promoted by members of several non-governmental organizations: the International Union for the Conservation of Nature (IUCN), the WorldWide Fund for Nature (WWF), and the World Resources Institute (WRI). In the 1980s successive drafts of a future treaty were developed at IUCN.<sup>23</sup> These groups and the United Nations Environment Programme (UNEP) jointly developed an exten-

<sup>22</sup> By contrast, an account of state choice in international environmental policy that emphasizes the domestic impact of environmental problems is developed by Detlef Sprinz and Tapani Vahtoranta. They begin with a rational unitary actor premise and examine ecological vulnerability—the degree to which a state experiences harm—and varying compliance costs. States are categorized based on these factors: “pushers,” “draggers,” etc. States that experience the same level of harm and costs should react identically. While potentially helpful, this perspective offers little explanatory purchase here: the U.S. and the U.K. faced similar degrees of harm and similar costs of compliance in the basic economic sense the authors propose. Sprinz and Vahtoranta, “The Interest-Based Explanation of International Environmental Policy,” *International Organization* 48 (Winter 1994).

<sup>23</sup> Vicente Sanchez and Calestous Juma, eds., *Biodiplomacy* (Nairobi: ACTS Press, 1994); IUCN, “Legal Measures for Supporting the Conservation of Biological Diversity: A Background Document for IUCN Gen. Assembly Workshop 3” (IUCN, n.d.); and Françoise Burhenne-Guilmin and Susan Casey-Lefkowitz, “The Biodiversity Convention,” in Gunther Handl, ed., *Yearbook of International Environmental Law* (Norwell, Mass.: Kluwer Academic Publishers, 1992).

TABLE 1  
STATE CHOICE IN REGULATORY COOPERATION

| <i>Epistemic Community Perspective</i>                                                                                                                                                                                                                                                                                                                                                                       | <i>Regulatory Politics Perspective</i>                                                                                                                                                                                                                                                                                                                                   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Knowledge-based.                                                                                                                                                                                                                                                                                                                                                                                             | Institution-based.                                                                                                                                                                                                                                                                                                                                                       |
| Causal logic: Uncertainty leads governments to seek authoritative advice. Community interpretations and institutionalization shape state choice. Transnational influence leads to cooperation. "The greater the extent to which epistemic communities . . . gain influence . . . the greater is the likelihood that these nation-states will in turn exert power on behalf of [their] values." <sup>24</sup> | Causal logic: Domestic institutions determine government and societal expectations about the impact of implementing regime rules. Political incentives structure the political costs and benefits associated with these regime impacts. In concert, these factors shape state choices by determining the domestic and distributional consequences of shared commitments. |
| Cross-national differences in state behavior are caused by variation in the penetration and institutionalization of expert communities.                                                                                                                                                                                                                                                                      | Cross-national differences in state behavior are caused by diverse domestic institutions, societal preferences, and political commitments.                                                                                                                                                                                                                               |
| Environmental problems are part of a distinctive class of scientific issues. The source of the solution (authoritative experts) is more significant than its content.                                                                                                                                                                                                                                        | Environmental problems are much like other international regulatory issues. The content and impact of the solution is paramount.                                                                                                                                                                                                                                         |

<sup>24</sup> Emanuel Adler and Peter Haas, "Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program," *International Organization* 46 (Winter 1992) 371-72.

sive proposal that offered policy prescriptions oriented around a legally binding treaty. Trained in ecology, economics, and resource management, the individuals involved formed a coherent prolific community dedicated to improved biodiversity protection.

With the IUCN text as background, in 1987 UNEP composed a first draft of the treaty. Formal negotiations began in 1990. While the issue remained in the shadow of the contemporaneous climate change negotiations, its presence in UNCED and the breadth of the underlying problem gave it considerable diplomatic gravity. As the talks proceeded, the scope of the CBD was expanded significantly: conservation, sustainable use and development, access to genetic resources, technology transfer, intellectual property rights (IPR), living-modified organisms (LMO), "biosafety," and finances, all came under negotiation to the dismay of some Western governments. The final negotiating session prior to

UNCED encompassed all of these controversial issues in an inconclusive and at times caustic negotiation marked by significant North-South dispute and distrust. The CBD ultimately addressed three (linked) central concerns: the conservation of biodiversity, the promotion of its sustainable use, and the equitable sharing of its benefits. It is this latter objective, with its clear redistributive implications, that was and remains the cause of much debate. In the limited time available before UNCED, the U.S. announced its formal intention not to sign the treaty, while the U.K., though it expressed concerns about financial aspects, chose to sign.

### REGIME COMMITMENTS

The conservation commitments of the CBD include the monitoring of biodiversity, the establishment of protected areas, and the adoption of local and national conservation incentives. Each party is obligated to develop a national protection program and include considerations of biodiversity in governmental decisions. Resources must be regulated and degraded areas rehabilitated. The treaty is a landmark in its comprehensive, ecosystemic approach to environmental protection.

State sovereignty over biological resources is a core norm of the regime, though biodiversity is proclaimed the "common concern" of all humanity. Parties are to develop laws and policies with the aim of "sharing in a fair and equitable way the results of research and development and benefits arising from commercial and other utilization of genetic resources with the Contracting Party providing such resources."<sup>25</sup> The CBD also commits parties to ensure that IPR rules "are supportive of and do run counter to" the CBD's objectives—among them, the equitable sharing of the benefits of biodiversity. Biological resources are the basis for many pharmaceutical, agricultural, and biotechnological products.<sup>25</sup> The widening extension by industrialized nations of patent protection for genetic inventions has provoked considerable controversy in the developing world. Some industrialized nations, especially the U.S., felt that the developing nations were trying to use this language in the CBD to dilute and counter commitments undertaken in the Trade-Related Intellectual Property talks, part of the Uruguay Round of the GATT.<sup>26</sup> In addition, industrialized nations feared that the CBD might

<sup>24</sup> CBD (fn. 3), Article 16.

<sup>25</sup> Pharmaceutical companies lose an estimated \$6 billion annually from the pirating of patented medicinals. Gareth Porter, "The United States and the Biodiversity Convention: The Case for Participation," *ESS Papers on Environment and Development*, no. 1 (1992), 10.

<sup>26</sup> Anonymous interviews, U.S. government, by the author, Washington, D.C., March 21, 1995.

make access to genetic resources too costly, thereby inhibiting the growth of high-tech, gene-reliant industries.

The CBD's provisions for technology transfer also created serious concern.<sup>27</sup> Industrialized countries attempted to insert language that made access to genetic resources and technology dependent on "mutually agreed terms." The developing nations resisted this language, and the final version is not consistent. The newly emerged issue of "biosafety" contained elements of both the IPR and the technology-transfer debates. Biosafety refers to concerns over dangers arising from the use and testing of biotechnology, specifically genetically modified organisms. An early UNEP report on the linkages between biotech and biodiversity stressed that the chief linkages, though minor, were positive.<sup>28</sup> Developing country delegations disregarded the expert report and called for the inclusion of biotech regulation. From that point on, biosafety was central to the negotiations.<sup>29</sup>

The Global Environment Facility (GEF) of the World Bank, favored by the donor states, was designated the interim financial mechanism of the CBD, in charge of disbursements to developing countries to help defray the costs of implementation. The determination of financial contributions remained in dispute; at UNCED, eighteen industrialized country delegations joined in a declaration emphasizing their right to determine the amount of their contributions.<sup>30</sup>

#### THE U.S. RESPONSE TO THE CBD

The U.S. was instrumental in getting the CBD negotiations started, but as the scope of the negotiations expanded, the Bush administration began to back away.<sup>31</sup> In its view the CBD talks were addressing basic economic and legal issues in a manner antithetical to U.S. ideology, practice, and law. In addition to the treaty's impact on IPR, biotechnology, and the always controversial federal-state structure of land control in the U.S., White House officials stated that the CBD "would make our

<sup>27</sup> One analyst observed that "the treaty might just as appropriately have been designated the 'Convention on Biotechnology Transfer.'" Dan Burk et al., "Biodiversity and Biotechnology," *Science*, June 25, 1993.

<sup>28</sup> Val Giddings and Gabrielle Pertsley, "Biotechnology and Biodiversity," UNEP/Bio.Div./SWG.1/3, October 12, 1990.

<sup>29</sup> While the U.S. was successful in striking a direct call for a biosafety protocol from the CBD, the parties are slated to develop one by 1998.

<sup>30</sup> United Kingdom, *Declaration Made after the Adoption of Agreed Text of the Biodiversity Convention*.  
<sup>31</sup> For a more extensive summary of U.S. and U.K. behavior, see Kal Raustiala, "The Domestic Politics of Biodiversity Protection in the U.S. and U.K.," in Elizabeth Economy and Miranda Schreurs, eds., *The Internationalization of Environmental Protection* (New York: Cambridge University Press, forthcoming).

life 10 times worse" because it would strengthen the Endangered Species Act and ongoing wetlands conservation, efforts that the officials believed should be rolled back or at least contained.<sup>32</sup>

The U.S. attempted to stall the talks in the hope of postponing the conclusion of the negotiations until after UNCED.<sup>33</sup> The death knell for the treaty came when two officials of the Council on Competitiveness, a regulatory watchdog that had monitored the negotiations intensively, argued in an April 1992 memo that

the draft convention is a major problem for the US . . . the [ESA] and the National Environmental Policy Act would need to be greatly expanded . . . it could greatly increase litigation . . . [and] proposes to regulate biotechnology in a manner totally unacceptable to the US. . . . The current draft convention is so extensively flawed that it is highly unlikely that sufficient corrective action could be accomplished at a single negotiating session, and thus, any final convention that might be completed in May would remain seriously flawed.<sup>34</sup>

The final text addressed many of their concerns, but not all.<sup>35</sup> In announcing the U.S. decision to reject the CBD, the State Department cited objections to the language on IPR, biotechnology development, and funding, and emphasized, to great criticism internationally, that "the U.S. does not and cannot sign an agreement that is fundamentally flawed merely for the sake of having that agreement."<sup>36</sup> President Bush stated that while the U.S. had a long history of environmental protection, the CBD clearly threatened American jobs.<sup>37</sup>

In Rio, EPA chief Bill Reilly made an unsuccessful effort to reverse the decision which had made the U.S. the leading villain and created so much publicity that, in late 1992, the head of UNEP (jokingly) thanked a U.S. official for making the CBD such a great success. But at home, many U.S. businesses were openly supportive of the decision to reject. As one biotech firm spokeswoman stated, "[We] agree with the treaty's noble

<sup>32</sup> *BNA Daily Report for Executives*, June 8, 1992.

<sup>33</sup> "Chief U.S. Negotiator Unsure Whether Bush Will Be Able to Sign Pact in Rio," *BNA International Environment Daily*, May 21, 1992; Anonymous interviews, U.S. State Department, by author, Washington, D.C., February 27, 1995, March 16, 1995; Anonymous interviews, U.K. delegates, by author, London, September 29, 1994.

<sup>34</sup> David McIntosh and John Coehresen to Bill Kristol, memo, April 14, 1992. In the words of one administration source, "The biggest thing Interior fought about was endangered species. They don't want any reference to genetic diversity. . . . We are battling to go even as far as U.S. law allows." Gareth Porter, interview by author, Washington, D.C., May 4, 1995.

<sup>35</sup> Porter (fn. 25); Russ Hoyle, "Deep-sixing Biodiversity," *Biotechnology* (August 1992). While the Council played an important role in the formation of U.S. policy, its independent contribution is small. Council members reflected and amplified concerns—over IPR, land use, federalism—that stemmed from deeper sources within the structure of the U.S. political system and the particular societal interests to which the Bush administration was beholden.

<sup>36</sup> UPI, May 30, 1992, BC cycle.

<sup>37</sup> *Ibid.*

goals for protection, but [it] oversteps its boundaries by beginning to tamper with [IPR] and international trade issues."<sup>38</sup> Pharmaceutical and biotechnology trade associations all sent letters urging the president not to sign.<sup>39</sup> Gerald Mossinghoff, president of the pharmaceutical trade association and former head of the U.S. Patent Office under Reagan, wrote to President Bush that the CBD "would undermine the great progress your Administration has made in encouraging other countries . . . to strengthen their patent laws."<sup>40</sup>

Following the 1992 election, in a private initiative, a group of NGOs and interested firms reevaluated the CBD and drew up an influential interpretive statement supportive of U.S. accession. They argued that the U.S. was better off in than out and that the CBD could be implemented through existing legal authority and would require no major changes in the statutory landscape. An internal review agreed with the latter conclusion. In 1993 the Clinton administration reversed the U.S. decision and signed the CBD; several interpretive statements, which have a slender international legal significance but a stronger domestic one, were made addressing U.S. concerns. Four years and another presidential election later, however, the CBD remains unratified and mired in many of the debates of the Bush era.

#### THE U.K. RESPONSE TO THE CBD

With minimal coordination by the European Community, its members were relatively free to formulate independent negotiating positions in the biodiversity talks.<sup>41</sup> The U.K. shared the early enthusiasm of the U.S. for the conservation goals of the CBD. As the negotiations commenced, the U.K. created an advisory group similar in composition to the group formed—privately—in the U.S. after Rio; included were representatives of WWF, Imperial Chemical Industries, the Congress of British Industry, Cambridge Monitoring Center, and Kew Gardens, one of the world's leading storehouses of plant genetic resources.

While the U.K. supported much of the conservation commitments under discussion, it became increasingly concerned about the ramifications of the CBD's financial mechanism and successfully sought its placement in the GEF. In announcing their decision to sign the CBD, the

<sup>38</sup> Lawrence Aragón, "Diversity Collides with Biotech R&D: Intellectual Property Rights Strymic United States Backing of Biological Diversity Treaty," *The Business Journal—San Jose*, June 15, 1992.  
<sup>39</sup> Richard Stone, "The Biodiversity Treaty: Pandora's Box or Fair Deal?" *Science*, June 19, 1992; anonymous interviews, Biotechnology Industry Organization, by author, Washington, D.C., March 3, 1995.  
<sup>40</sup> Burk et al. (fn. 27).  
<sup>41</sup> Anonymous interviews, U.K. government, by author, London, October 13, 1994.

environment minister stressed that the U.K. did not share many of the U.S. concerns over technology transfer, IPR, and biotechnology issues: "When we first looked at the text, we identified some points of difficulty . . . we have now succeeded in finding solutions to these difficulties."<sup>42</sup> Upon signing, the U.K. stated only that

the government of the [U.K. and others] . . . declare their understanding that the decisions to be taken by the Conference of the Parties under paragraph 1 of Article 21 concern "the amount of resources needed" by the financial mechanism, and that nothing in the [CBD] authorizes the Conference of Parties to take decisions concerning the amount, nature, frequency or size of the contributions of the Parties.<sup>43</sup>

By contrast, the interpretation by the U.S. was far more inclusive:

It is deeply regrettable to us that—whether because of the haste with which we have completed our work or the result of substantive disagreement—a number of issues of serious concern in the United States have not been adequately addressed . . . the text is seriously flawed in a number of respects. As a matter of substance, we find particularly unsatisfactory the text's treatment of [IPR]; finances, including, importantly, the role of the [GEF]; technology transfer, and biotechnology. In addition, we are disappointed with the development of issues related to environmental impact assessments, the legal relationship between this Convention and other international agreements, and the scope of obligations with respect to the marine environment.<sup>44</sup>

Ratification by the U.K. was rapid; debate was minimal and quite unlike the process in the U.S. in which senators have raised issues of the treaty's effects on private rights of action, future amendments of legislation, status vis-à-vis American law, future protocols, and so on.<sup>45</sup>

#### EXPLAINING STATE CHOICE: EPISTEMIC COMMUNITIES AND BIODIVERSITY

Defining an epistemic community is always a contestable proposition; a community is an analytic construct imposed by an observer, rarely self-defined or formally organized. But the members of WRI, IUCN, and WWF, who were involved in biodiversity issues and, in particular, in the creation of the influential volume *Global Biodiversity Strategy* (1992)<sup>46</sup>

<sup>42</sup> UPI, June 9, 1992, BC cycle.

<sup>43</sup> UNEP, Declaration of the United Kingdom of Great Britain and Northern Ireland, "Convention on Biological Diversity," Na.92-8314.

<sup>44</sup> UNEP, Declaration of the United States of America, "Convention on Biological Diversity," Na.92-8314.

<sup>45</sup> Senate Committee on Foreign Relations to Senator Mitchell, letter, August 5, 1994; Secretaries Christopher, Babbitt, and Esry to Senator Mitchell, reply, August 16, 1994.

<sup>46</sup> WRI, IUCN, and UNEP, *Global Biodiversity Strategy* (n. p. 1992).

fulfill the standard definition of an epistemic community: "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge with that domain or issue-area."<sup>47</sup> They acted in an entrepreneurial fashion, offering interpretations and analyses of the problem as well as proposing solutions. They were influential agenda setters. Without the perseverance of such conservation experts, a comprehensive regime might only have been proposed much later when the problems of biodiversity loss would be far more intractable.

#### UNCERTAINTY

Biodiversity, like many environmental problems, is plagued by uncertainty. Uncertainty existed over the rate of biodiversity loss, its significance, and the proper policy response. Biologists do not know the order of magnitude of the number of species in existence, nor how rapidly they are disappearing. Nonetheless, there were many scientists very concerned with the rapid rate of habitat destruction—for which there was good evidence—and eager to see a stronger conservation regime in place. These concerns provided a scientific foundation for the emergence of the CBD. A basic building block of epistemic influence was in place.

#### INTERPRETATION AND INSTITUTIONALIZATION

Members of the epistemic community were instrumental in encouraging the onset of negotiations. An IUCN team produced a draft treaty that served as the initial basis of the talks, and some of the proposed principles and commitments survived the negotiations. In this sense, governments, through UN bodies, turned to the epistemic community for advice. These experts provided, as epistemic theory predicts, a causal understanding (interpretation) of the problem and a set of policy prescriptions. But the expert community failed to become successfully institutionalized into national bureaucracies, and its influence proved ephemeral.

The issues about which these experts were primarily concerned, such as an ecosystems approach to conservation and better national biological surveys, were rapidly eclipsed by a penumbra of regulatory and redistributive issues. Interventions by states recast and expanded the contours of the debate.<sup>48</sup> Various national delegations seized upon the

<sup>47</sup> Peter Haas, "Introduction: Epistemic Communities and International Policy Coordination," *International Organization* 46 (Winter 1992), 3.

<sup>48</sup> For a similar account, see M. J. Peterson, "Whalers, Cetologists, Environmentalists, and the International Management of Whaling," *International Organization* 46 (Winter 1992).

attractive opportunities present in the proposed "biodiversity solution."<sup>49</sup> They used the comprehensive, ecosystemic approach championed by the epistemic community to seek broad, tangentially related policy goals, such as wealth redistribution and technology transfer. They used the focus on incentives for conservation to demand changes in the allocation of property rights in biological resources, and they used the focus on biological inputs to technology to demand new restrictions on biotechnological inventions. While these and other issues clearly had relevance to biodiversity loss, they forced a shift away from the central concerns of the epistemic community. Conservation issues became secondary, providing perhaps legitimating reasons for regime commitments but not fundamentally shaping the core path of negotiations, the final regime commitments, or the policy responses of the U.S. and U.K. The community was unable to refocus governmental concern around those issues that they deemed most important and to deflect attention away from controversial sidelights like biosafety.

The influence of the epistemic community was reasserted in the U.S. after UNCED. By working with key individuals in industry and government, the community helped to initiate a reevaluation by critical societal actors and government officials. This reassessment, in conjunction with the change in administration following the 1992 election, allowed the U.S. to sign the treaty with support from diverse sources.<sup>50</sup>

#### DOMESTIC VARIABLES

Previous analysis has identified two domestic factors that affect epistemic influence: governmental porousness and traditions of environmental sentiment.<sup>51</sup> While scholars debate the degree that state porousness holds across all issue-areas, the U.S. is traditionally seen to have the more fragmented and accessible state.<sup>52</sup> Yet there was no discernible difference between the U.S. or U.K. in epistemic influence or institutionalization. There is little evidence that environmental sentiment, at least toward wildlife conservation, varies appreciably between the two states. Both have strong traditions of conservation activism and

<sup>49</sup> On problems and solutions, see the argument in John Kingdon, *Agendas, Alternatives, and Public Politics* (New York: Little, Brown, 1984).

<sup>50</sup> See letter to President Clinton, April 15, 1993, from the directors of Merck, Genetech, WWF, WRI, The Energy and Environment Studies Institute, and Shaman Pharmaceuticals, on file with author. The draft of the interpretative statement was used almost verbatim by the U.S. government.

<sup>51</sup> Haas (fn. 15).

<sup>52</sup> See, e.g., Katzenstein (fn. 17); also G. John Ikenberry, David A. Lake, and Michael Mastanduno, "Introduction: Approaches to Explaining American Foreign Economic Policy," in Ikenberry, Lake, and Mastanduno, eds., *The State and American Foreign Economic Policy* (Ithaca, N.Y.: Cornell University Press, 1988).

similar levels of environmental protection.<sup>53</sup> The domestic variables identified by epistemic theory's proponents do not satisfactorily explain the observed variance in state behavior.

#### EXPLAINING STATE CHOICE: REGULATORY POLITICS AND BIODIVERSITY

The CBD negotiations entrained a wide-ranging set of economic issues that extended well beyond traditional conservation concerns. These had significant ramifications for the internal affairs of potential parties as well as for the profitability of select industries. These ramifications varied based on domestic institutions, societal preferences, and political commitments.

#### INSTITUTIONS

In contrast to the fusion of powers in the British parliamentary system, the American system is, in Richard Neustadt's famous phrase, one of "separated institutions sharing powers."<sup>54</sup> Separation of powers, and with it the possibility of divided government, creates a competitive dynamic between the legislature and the executive. Each has distinct constituencies and capacities, and the need to adjudicate between the two entails and supports a strong independent judiciary. Like federal structure, separation of powers reflects political fragmentation. The British system is one of striking executive (cabinet) dominance and political integration. While Parliament is formally supreme, the executive and legislative powers are fused in the body of the cabinet: the "efficient secret" of British governance.<sup>55</sup> These broad-brush structural characteristics have significant implications for the implementation of regulatory commitments. Implementation under an integrated system of cabinet dominance is easier, and more predictable, than in the competitive and complex American system. The British executive who negotiates and signs international accords is in control of the implementing legislation (and ratification) of those accords.<sup>56</sup> Party discipline is strict, implementing legislation is relatively simple to pass, and there are few points of political access. By contrast the U.S. Congress can readily create major obstacles to implementation and ratification. Political access is wide-

<sup>53</sup> See, in particular, David Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Ithaca, N.Y.: Cornell University Press, 1985).

<sup>54</sup> Richard Neustadt, *Presidential Power and the Modern Presidents* (New York: Free Press, 1990), 29.

<sup>55</sup> R. H. Punnett, *British Government and Politics* (Great Britain: Waveland Press, 1988); Gary Cox, *The Efficient Secret* (New York: Cambridge University Press, 1987); Simon James, *British Cabinet Government* (New York: Routledge, 1992); Wyn Grant, *Business and Politics in Britain* (New York: Macmillan, 1993).

<sup>56</sup> Formally, the power to conclude and ratify international treaties is invested in the Crown, without any need for participation by the Parliament. In practice, the cabinet exercises this power.

spread and decentralized, and rare is the legislation that is not significantly altered in committee, floor, and conference negotiations. The power to interpret international commitments is diffused.<sup>57</sup> The courts, a central part of domestic U.S. environmental legislation, are critical players; it is ultimately domestic rules—and subsequent judicial interpretations and decisions—that transform international commitments into binding national law.<sup>58</sup>

These fundamental institutional characteristics are important for state choice in regulatory cooperation and also help to explain variance in domestic regulatory approaches. As many analysts have extensively documented, the U.S. and the U.K. traditionally had—and, despite a recent trend of convergence, continue to have—different structures and styles of environmental regulation.<sup>59</sup> These differences, which flow logically from the broad structural variations described above, can vary the practical effect of regime obligations.<sup>60</sup>

Brickman and his coauthors observe that "in spite of their shared common-law heritage, Britain and the U.S. seem to hold radically different views about the role of law in implementing public policy."<sup>61</sup> In the U.S. environmental regulation has been marked by adversarial, courtlike, and often litigious rule-making proceedings, formal legal challenges, and extensive citizen group input.<sup>62</sup> The dominant discourse

<sup>57</sup> Once a treaty is made, the Senate has no special authority in relation to it. The President later interprets the treaty for purposes of executing it. Congress—both houses—interprets the treaty for legislative purposes. Courts may interpret it for their purposes. The Supreme Court's interpretation of a treaty made in deciding a case or controversy is authoritative for purposes of [U.S.] law and is binding on all courts as well as on the political branches." Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990).

<sup>58</sup> On the importance of courts in environmental regulation, see, e.g., R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington, D.C.: Brookings Institution, 1983).

<sup>59</sup> One core difference is the role of courts. On the rise in the last twenty years in the comparative power of the British judiciary, see Bernard Schwartz, *Lions over the Throne: The Judicial Revolution in English Administrative Law* (New York: New York University Press, 1987); idem, "Wade's New Edition and Its Relevance for Americans," *Administrative Law Review* 42 (Winter 1990).

<sup>60</sup> Vogel (fn. 53); Ronald Brickman et al., *Chemical Regulation and Cancer: A Cross-National Study of Policy and Politics* (Ithaca, N.Y.: Program on Science, Technology, and Policy, Cornell University, 1982); Sheila Jasanoff, "Cultural Aspects of Risk Assessment in Britain and the U.S.," in Branden B. Johnston and Vincent T. Covello, eds., *The Social and Cultural Construction of Risk: Essays on Risk Selection and Perception* (Boston: D. Reidel, 1987), 359; Cynthia Enloe, *The Politics of Pollution in a Comparative Perspective: Ecology and Power in Four Nations* (New York: McKay, 1975).

<sup>61</sup> Brickman et al. (fn. 60).

<sup>62</sup> See especially Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Atlanta: University of Georgia Press, 1988); R. Shep Melnick, "The Politics of Benefit-Cost Analysis," *Brookings General Series Reprints*, no. 442 (Washington, D.C.: Brookings Institution, 1991); and Richard Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88, no. 7 (1975). On Anglo-American law, see P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (New York: Oxford University Press, 1987); Richard Posner, *Law and Legal Theory in the U.K. and U.S.* (Oxford: Clarendon Press, 1996).

of "rights" entails seemingly limitless litigation over the exercise and bounds of those rights. Environmental statutes often contain congressionally created "private attorneys general" clauses, by which citizen groups can bring suit against violators or even the executive itself for actions that contravene statutes and regulations.<sup>63</sup> Even executive agency inactions can be contested.<sup>64</sup> A separated, checked, balanced system is one with many competing actors and points of access, in which regulatory decisions are always subject to challenge.<sup>65</sup>

The fused, majoritarian, and centralized nature of the Westminster political system encourages a different approach to regulation. Competition between the branches—leading in the U.S. to pervasive legislative oversight, citizen-suit procedures, and the like—is constrained. British regulation is marked by ample and private industry consultation, greater flexibility, a dearth of courtlike proceedings, almost no citizen-suits and comparatively little litigation.<sup>66</sup> The U.K. has relied on regulation in a formal sense much less frequently than the U.S.:

The most important technique for controlling the private sector is through heavy reliance on official discretion to make individualized orders. Typically, Parliament identifies a problem and enacts a general enabling statute conferring broad discretion on defined officials. . . . [A] graphic example is the control of air and water pollution.<sup>67</sup>

Moreover, "in the USA, the substance of regulations and the procedure by which they are made present issues which generate enormous controversy in political, judicial, and academic circles. In Britain, nearly everyone seems satisfied with . . . procedural and substantive aspects of delegated legislation."<sup>68</sup>

In sum, cross-national differences in the structure and process of regulation are and were substantial. The divergent responses of the Bush and Major governments to the CBD's regulatory provisions reflect these differences: the fear of litigation, of new regulatory initiatives, of adverse judicial interpretation, and of statutory impact in the U.S. have

<sup>63</sup> Cass Sunstein, "What's Standing after Lujan? Of Citizen Suits, 'Injuries,' and Article III," *Michigan Law Review* 91, no. 2 (1992); Lettie M. Wenner, "Environmental Policy in the Courts," in Norman Vig and Michael Kraft, eds., *Environmental Policy in the 1990s* (Washington, D.C.: Congressional Quarterly Press, 1994).

<sup>64</sup> *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (Washington, D.C.: Circuit, 1970).

<sup>65</sup> John P. Dwyer, "Contentiousness and Cooperation in Environmental Regulation," *American Journal of Comparative Law* 35 (Fall 1987), 820-23.

<sup>66</sup> A. J. Waite, "An English Perspective on U.S. and U.K. Environmental Regulation," *Natural Resources and Environment* 5 (Summer 1990); Michael Asimow, "Delegated Legislation: United States and United Kingdom," *Oxford Journal of Legal Studies* 3 (Spring 1983); William Wade, *Administrative Law*, 6th ed. (New York: Oxford University Press, 1988); Dwyer (fn. 65).

<sup>67</sup> Asimow (fn. 66), 271.

<sup>68</sup> *Ibid.*, 253.

no parallel in the U.K. And as I describe below, these variations influenced as well the expectations, and therefore the demands, of firms likely to be influenced by the implementation of the CBD.

A second core institutional variation is constitutive structure: federalism versus unitarism.<sup>69</sup> Federalism entails a careful balancing of central-local powers and in the U.S. has spawned considerable and persistent legal and political controversy. The federal-unitary divide is the geographical and "vertical" counterpart to the functional and "horizontal" divide of separated or fused powers. Under the U.S. Constitution, treaties enacted by the federal government are the "supreme law of the land" and supersede inconsistent state law or policy.<sup>70</sup> A major fear of the U.S. was that the CBD could encroach upon the complex, constitutionally mediated structure of state and federal wildlife and land law. In the view of the Bush administration, the CBD might force the extension of "the responsibilities of government beyond our current, extensive federal management of biological resources."<sup>71</sup> For the U.K., as a unitary state,<sup>72</sup> local autonomy was not a major factor in the decision calculus, and concerns over states rights and constitutional barriers to implementation were nonexistent.<sup>73</sup>

### SOCIETAL ACTORS

The societal actors in the U.S. and the U.K. most concerned with the CBD were biotechnology and pharmaceutical industries.<sup>74</sup> While the U.S. is clearly the world leader in biotechnology, biotech and pharmaceuticals are important industries in both states, and controlling for size, systematic economic differences are relatively small.<sup>75</sup> The U.K. pharmaceutical industry is world-class; Britain is home to over three hundred firms engaged in biotechnology, the second-largest pharmaceutical firm in the world (Glaxo), the eighth (SmithKline Beecham), a

<sup>69</sup> For an overview of federalism and international affairs, see Brian Hocking, ed., *Foreign Relations and Federal States* (Leicester, U.K.: Leicester University Press, 1993).

<sup>70</sup> International treaties have allowed the federal government to usurp certain otherwise protected state powers in the past; see *Missouri v. Holland*, 252 U.S. 416 (1921), which in fact related to international wildlife protection.

<sup>71</sup> "White House Memo Warns of Problems with Draft Biodiversity Convention," *BNA Environmental Law Update*, May 8, 1992. See also Henry Miller, "Is the Biodiversity Treaty a Bureaucratic Time-Bomb?" *Hoover Institution Essays in Public Policy* 56 (1995).

<sup>72</sup> While there are salient legal divisions within the U.K. (e.g., Scotland), it remains a unitary state. Arend Lijphart, *Democracies* (New Haven: Yale University Press, 1984).

<sup>73</sup> Bicameral federalism also enhances the difficulty of passing implementing legislation. The need to have agreement in both houses increases the likelihood of obstruction and/or change.

<sup>74</sup> Agribusiness interests have now become involved.

<sup>75</sup> U.S. Congress, Office of Technology Assessment, *Biotechnology in a Global Economy*, OTA-BA-494 (Washington, D.C.: U.S. Government Printing Office, October 1991), 241.

joint U.S.-U.K. firm), as well as many other pharmaceutical enterprises.<sup>76</sup> The U.S. Office of Technology Assessment (OTA) reported in 1991 that in biotech "the [U.K.] most closely parallels the [U.S.], with a strong research base, an emphasis on basic research, and a reluctance on the part of government to articulate a clear . . . industrial policy." Spending in the U.K. for pharmaceutical R and D is the third largest in the industry, after the U.S. and Japan. Yet concerns over biotechnology-related provisions of the CBD were minimal in comparison to those of the U.S.. No patent officials joined the U.K. delegation, in contrast to the U.S. This divergence in view regarding the IPR implications of the CBD existed despite the fact that, according to the OTA biotech study, "United Kingdom intellectual property laws are strict, comprehensive, and rigorously enforced. The government's positions in international forums, such as the World Intellectual Property Organization and the [GATT] talks have been virtually identical to U.S. positions."<sup>77</sup>

Like government views, industry views of the CBD split across the Atlantic. While the heads of American peak associations referred to the treaty as "a lousy deal" favoring the "highway robbery" of biotech firms,<sup>78</sup> the executive director of the U.K. BioIndustry Association (BIA) stated that "having reviewed the convention, we do not share the concerns expressed by the U.S. government."<sup>79</sup> The BIA's position was that the text was ambiguous and therefore posed no threat to the British biotech industry. Within the U.K. government, the Department of Trade and Industry further assured British firms of the nonthreatening nature of the CBD's language.<sup>80</sup>

Other potentially interested societal actors played minor roles. Environmental NGOs were relatively uninvolved at the domestic level in both countries, with IUCN and WRI as obvious exceptions. Within the U.S., more activist NGOs devoted most of their energy to the simultaneous negotiations on climate change. In the U.K., while NGOs were consulted during the negotiations in the private sector meetings discussed above, the predominant focus was also climate change.

For both countries, then, the most prominent actors in the policy process were firms reliant on biological inputs. Yet there were no compelling economic differences that would indicate that British firms

<sup>76</sup> *Ibid.*

<sup>77</sup> U.S. Congress, OTA (fn. 75).

<sup>78</sup> Dick Godown, quoted in Andy Coghlan, "Biodiversity Convention a 'Lousy Deal' Says U.S.," *New Scientist* (July 4, 1992), 9.

<sup>79</sup> *Ibid.*

<sup>80</sup> Executive director, BIA, interview by author, London, June 8, 1994.

should be more favorably disposed than U.S. firms toward the policy obligations of the CBD. Institutional variations explain the difference. Enduring expectations about regulation, stemming from differing historical practice and institutional setting, shaped the responses of key industries to the anticipated treaty-driven regulation.

American firms feared the CBD's impact in the courts and the regulatory process; British firms did not. Judicial intervention loomed large for both firms and executive-branch officials in the U.S.; one U.S. industry official observed, "We had to think in terms of a worst-case interpretation of the [CBD]." The history of contention in American regulation and the possibility of court-mandated compliance—a common feature of U.S. administrative law—induced caution toward CBD commitments "so fuzzy [they] could set a precedent for future disputes in U.S. courts."<sup>81</sup> American firms demanded a "clear domestic signal" about how the CBD would be implemented and interpreted before they could accept the treaty.<sup>82</sup> That signal was ultimately provided by the interpretative statements made at signature. While of limited international legal significance, the act is as a constraint on judicial interpretation of the treaty provisions in the United States.<sup>83</sup> Conversely, the relatively collegial, flexible, nonlitigious, and individuated style of British regulation created few incentives for concern on the part of British firms.<sup>84</sup> U.K. firms exhibited no worry over future litigation or adverse judicial interpretations of the CBD. Whether wholly accurate or not, the view espoused by analysts such as Richard Posner that the depth of parliamentary power in the U.K. has "virtually extinguished the policymaking role of the English judge" was (and remains) a powerful and popular one.<sup>85</sup> Confident in a safe, fair, flexible, and favorable implementation of the regime's rules, British firms lent the CBD their unqualified support.

<sup>81</sup> John Barton, in Stone (fn. 39). See also Robert Paarlberg, *Leadership Abroad Begins at Home: U.S. Foreign Economic Policy after the Cold War* (Washington, D.C.: Brookings Institution, 1995), 41–45, 75–82. Paarlberg notes that "the mere possibility of domestic litigation can discourage U.S. entry into international environmental agreements" (pg. 76).

<sup>82</sup> Anonymous interview, U.S. government, by author, Washington, D.C., March 21, 1995.

<sup>83</sup> See the industry view in "Administration Gets High Marks on Interpretation of Biodiversity Treaty," *Biotechnology News*, December 6, 1993, p. 4.

<sup>84</sup> Despite perceptions that U.K. biotechnology firms are already more highly regulated than American firms, the evidence is mixed. The "regulatory increment" added by the treaty provisions may be greater in the U.S. than in the U.K. if this perception is true. But a recent study by British industry and government officials found no strong evidence for this view. See United Kingdom, Department of Trade and Industry, "Report of an Ostems Missions to Investigate the Regulation, Patenting, and Public Perception of Biotechnology in the U.S." (July 1993).

<sup>85</sup> Richard Posner, *The Federal Courts: Crisis and Reform* (Cambridge: Harvard University Press, 1985), 18–19. Posner continues, "Today in contrast to his American counterparts, he is really a technician, and behaves like a technician."

## PRIOR LEGISLATION

Existing statutes form a central part of the corpus of domestic regulatory systems. Bush administration officials were very concerned about the legal implications of the CBD vis-à-vis core domestic statutory law, in particular the controversial Endangered Species Act and various wetlands protection laws. Conservatives considered the act a costly burden on property owners and an uncompensated regulatory "taking."<sup>86</sup> They feared that the CBD would, at a minimum, inhibit the rollback of the ESA they sought, and, at a maximum, could encourage its further extension. The independent power of the judiciary in the U.S. joined with political concerns over the rights of property owners and the economic costs of environmental regulation to generate potent incentives for domestic opposition to the CBD. No similar fears existed in the U.K.

## POLITICAL COMMITMENTS

The prominence granted by the CBD's inclusion in the UNCED made the CBD a marker for political commitments on the environment. In the U.K. the Tory party had traditionally been a foe of regulatory initiatives. But Margaret Thatcher's well-noted speeches on environmental themes in 1989 and 1990 initiated a shift in emphasis toward greater attention to the environment, an increasingly salient issue in British politics.<sup>87</sup> The Conservatives saw UNCED and the CBD as opportunities to establish themselves as environmentalists of a sensible stripe. In the U.S. while President Bush had once campaigned as "the environmental president," by 1992 the continuing recession, lack of credit for his domestic environmental efforts, and a difficult primary encouraged Bush to return to core Republican themes—economic growth and limited government—and to disavow stronger environmental regulation. Bush's statements at the time portrayed him as an ardent defender of free markets and private property. Specifically, Bush stated that he was not "going to go down there [to UNCED] and forget about people that need jobs in the United States of America."<sup>88</sup> His public domestic commit-

<sup>86</sup> Under the U.S. Constitution no property may be "taken" without compensation. For an overview, see Joseph Sax, "Takings, Private Property, and Public Rights," *Yale Law Journal* 81, no. 3 (1971).

<sup>87</sup> For a discussion of these issues, see Environmental Data Services, "ENDS Report 165," September 1988; and Marc Levy, "The Greening of the United Kingdom" (Paper presented at the annual meeting of the American Political Science Association, Washington, D.C., 1991). The memberships of Greenpeace U.K. and Friends of the Earth U.K. increased by 600 percent between 1985 and 1989; Brenton (fn. 13), 126.

<sup>88</sup> Philip Shabecoff, "Shades of Green in the Presidential Campaign," *Issues in Science and Technology* 9 (Fall 1992).

ments, voiced prominently in an election year, were clear: to resist new, potentially costly regulatory measures.<sup>89</sup>

Thus political commitments reinforced the institutional variables described above. Tory attempts to seize the environmental high ground dovetailed with the considerable comfort exhibited by British firms (and the Tory cabinet) about the impact of the CBD commitments. Conversely, Republican antiregulatory commitments and election-year politics reinforced concerns, shared by both the Bush administration and many U.S. firms, about the potential effect of putting the CBD into practice within the U.S. regulatory system.

## EXPLAINING DIVERGENT RESPONSES TO THE BIODIVERSITY CONVENTION

The U.S. and the U.K. made distinctive choices toward the CBD, despite possessing the same basic interest in the protection of biodiversity—the putative goal of the CBD and the central focus of the epistemic community's efforts. Neither position in the international economy nor the direct impact of the problem itself explains this difference in state choice. Important industries were similar, and general practices toward central issues like IPR, virtually identical. Even many domestic factors, such as degree of public concern and NGO involvement, were roughly similar.

The biodiversity issue contained significant uncertainty. As predicted by epistemic community theory, experts played important roles as catalysts for policy coordination. The actions of this community were critical for the CBD's emergence and early form. Without the work of biologists, ecologists, and lawyers deeply concerned with the exponential growth rate of extinctions, the CBD most likely would not have come into existence. But while the epistemic community was clearly influential in the early stages of regime formation, one of the signal aspects of this case is the expansion of the agenda during negotiations. Once engaged by this issue, the involved states paid only limited attention to the interpretations of the expert community in formulating regime rules and, for the U.S. and U.K., in formulating choices toward the nascent regime and its commitments. Conversely, regulatory politics fails to account for the initiation of the negotiations. Industrialized states expected the new accord to improve substantially international biodiversity protection, but not to require significant new regulation or

<sup>89</sup> On the importance of foreign affairs commitments to voters, see John Aldrich, John Sullivan, and Eugene Borgida, "Foreign Affairs and Issue Voting," *American Political Science Review* (March 1989).

domestic action by them.<sup>90</sup> This was a major source of their support. The result was an opportunity for the epistemic community to pursue the creation of a comprehensive new conservation regime.

The regime that emerged, however, was different. State choices in the CBD negotiations were determined by the suite of factors that comprises the regulatory politics approach. Implementation of the expanded CBD, relatively straightforward in the fixed, integrated U.K. system, was potentially difficult in the competitive, fragmented U.S. system and threatened to disrupt established patterns of federal-state regulation and strengthen disfavored domestic legislation. The divergent responses of the firms similarly stemmed from institutionally derived expectations about future regulation, a process of "anticipated implementation." And while the Bush administration perceived the treaty as a threat best capitalized on through rejection, the Tories saw the CBD as an attractive, easily implemented green gesture.<sup>91</sup> The same language, filtered through different domestic institutions, implied different outcomes in practice.

The two analytic perspectives are complementary. Epistemic analysis helps explain the existence of the negotiations and the contours of the initial debates. But as the negotiations grew far more politicized—reflecting the juxtaposition of environment and development that was the hallmark of the UNCED process—epistemic variables cannot account well for the observed decisions and outcomes. Conversely, regulatory politics tells us little about the inception of negotiations that were perceived initially to be simply an extension of existing conservation efforts. It provides a better understanding of why particular terms and forms of cooperation were demanded than of why cooperation for biodiversity protection was sought at all.<sup>92</sup>

#### CONCLUSIONS: STATE CHOICE AND THE GLOBAL BIODIVERSITY REGIME

The commitments of the biodiversity regime, ostensibly alike for the U.K. and the U.S., had distinct domestic ramifications. Domestic struc-

<sup>90</sup> Anonymous interviews, U.S. government, by the author, Washington, D.C., March 16, 1995, April 3, 1995, and May 4, 1995; anonymous interviews, U.K. government, by the author, London, September 24, 1994, and October 13, 1994.

<sup>91</sup> Political incentives and new understandings of the danger of U.S. nonaccession, e.g., the lack of input into the biosafety talks, help account for change in the U.S. position. While U.S. industry viewed accession to the CBD more favorably over time, the Clinton administration also had pledged to pursue environmental protection vigorously.

<sup>92</sup> But this is not inherent in the approach. See Goldstein (fn. 17), who argues that domestic institutions and politics explain the choice by the U.S. to join an international institution that appeared to run counter to its interests.

ture and regulatory institutions altered their practical significance and thus (in anticipation) domestic preferences toward them. While the biodiversity epistemic community helped set the international agenda, once these governments engaged the issue, it was the probable impact of the institutional solution, rather than of the underlying environmental problem, that was paramount.

This article's focus on domestic variables is not unique and reflects an increasing understanding that international politics cannot be adequately analyzed through international and/or systemic variables alone, whether the effects of the strategic environment (neorealism), dominant social structures (constructivism), or mediating international institutions (neoliberal institutionalism).<sup>93</sup> Domestic politics determines how "preferences are aggregated and national interests constructed."<sup>94</sup> The leading theoretical schools, however, view states as similarly impacted by generally undifferentiated (international) causal variables. While the burgeoning literature on two-level games explicitly ties domestic variables to international outcomes, most studies explore generalized scenarios and tactics that apply across diverse national settings.<sup>95</sup>

My claim is not that domestic institutions, the resulting expectations of societal actors, and political incentives are dominant in explaining all cooperative choices. Rather I have sought to establish the importance of a set of undervalued variables, demonstrate that they are central to understanding British and American behavior toward the biodiversity regime, point out their limitations, and argue that they are likely to matter in other situations where international commitments are complex and impinge on central domestic policy arenas and where "high politics" are not at stake—in short, much of the cooperation of today and, arguably, of tomorrow. In these situations strategic concerns, competitiveness, vulnerability, and even epistemic influence do not wash out but are instead supplemented—and, perhaps as here, dominated—by regulatory politics. Traditional international agreements demanded little that a state could not directly implement. Simple tariff-reduction

<sup>93</sup> On realism, see Kenneth Waltz, *Theory of International Politics* (Reading, Mass.: Addison-Wesley, 1979). On constructivism, see Alexander Wendt, "Constructing International Politics," *International Security* (Winter 1995). On neoliberal institutionalism, see Keohane (fn. 2).

<sup>94</sup> Helen Milner, "International Theories of Cooperation among Nations: Strengths and Weaknesses," *World Politics* 44 (April 1992). For an excellent recent study of domestic politics and international cooperation, see Beth Simmons, *Who Adjusts? Domestic Sources of Foreign Economic Policy during the Interwar Years* (Princeton: Princeton University Press, 1994).

<sup>95</sup> Peter Evans, Harold Jacobson, and Robert Putnam, eds., *Double-Edged Diplomacy: International Bargaining and Domestic Politics* (Berkeley: University of California Press, 1993); see especially Andrew Moravcsik, "Introduction: Integrating International and Domestic Theories of International Bargaining." See also Goldstein (fn. 17).

accords, military alliances, and arms-control agreements typically addressed state actors and state actions. Newer forms of cooperation are marked by the degree to which they require states to engage in extensive and often uncertain domestic regulation (or deregulation) of diffuse private actors and economic activity. They engage and rely on persistent, legitimate, and stable national legal processes and institutions. While environmental accords are characteristic of this trend, accords in other areas, as varied as narcotics and capital adequacy, also commit states to particular forms of private sector regulation.<sup>96</sup> "Deep integration," in which states actively seek to harmonize and coordinate policies "behind the border," is increasingly the subject of academic analysis and policy debate.<sup>97</sup> Domestic politics and institutions are an inescapable part of the process of implementing deep accords.

The regulatory variables identified here can be major explanators of state choice toward cooperation. Moreover, I suggest, they can be major explanators of regime outcomes. While international agreements are the product of protracted debate and compromise within a structure of formal sovereign equality, not all states have an equal voice. The ultimate terms of cooperation in the CBD were dictated primarily by state power, specifically, U.S. power. The U.S. delegation was very successful in determining the final regime terms, despite its ultimate dissatisfaction with them. And as I have shown, U.S. domestic institutions significantly shaped these choices and demands. Other cases of environmental regime formation display a similar pattern: the contemporaneous climate-change treaty, for example, reflects U.S. persistence in fighting the inclusion of binding quantitative targets and timetables for CO<sub>2</sub> emissions reductions;<sup>98</sup> the recent evolution of the whaling and stratospheric ozone regimes present a similar story.<sup>99</sup> After the U.S. Supreme Court upheld the patenting of biological inventions in *Diamond v. Chakrabarty*, the U.S. sought and won similar international

<sup>96</sup> On the implementation of environmental regimes, see David G. Victor, Kal Raustiala, and Eugene Skolnikoff, eds., *The Implementation and Effectiveness of International Environmental Commitments* (Cambridge, MIT Press, forthcoming). On capital adequacy, see Ethan Kapstein, "Between Power and Purpose: Central Bankers and the Politics of Regulatory Convergence," *International Organization* 46 (Winter 1992). The 1988 Convention on Illicit Trafficking in Narcotics commits parties, inter alia, to monitor and regulate the production of chemical precursors and manufacturing equipment.

<sup>97</sup> These phrases come from the recent twenty-one-volume series by the Brookings Institution entitled *Integrating National Economies: Openness, Diversity, and Cohesion*; in particular, see Robert Lawrence, Albert Bressand, and Takatoshi Ito, *A Vision for the World Economy* (Washington, D.C.: Brookings Institution, 1996).

<sup>98</sup> Daniel Bodansky, "The United Nations Framework Convention on Climate Change: A Commentary," *Yale Journal of International Law* 18, no. 2 (1993).

<sup>99</sup> Edward Parson, "Protecting the Ozone Layer" in Peter Haas, Robert Keohane, and Marc Levy, eds., *Institutions for the Earth* (Cambridge: MIT Press, 1993); Richard Benedict, *Ozone Diplomacy* (Cambridge: Harvard University Press, 1991); Peterson (fn. 48).

protections in the TRIPS accords.<sup>100</sup> Cooperative solutions are not distributionally neutral. Powerful states generally choose where on the Pareto frontier the cooperative solution shall rest.<sup>101</sup> Domestic political and institutional variables are important sources of such choices. As a result law—domestic law—emerges as a potentially powerful factor in explaining cooperative outcomes.

Environmental regimes, like nearly all regulatory regimes, must be domestically implemented in an often complex and uncertain legal and political process. When international regimes require parties to engage in such a process, existing domestic institutions are used or adjusted. The implementation of international commitments must mesh reasonably with these institutions, or governments will seek to alter the commitments accordingly.<sup>102</sup> This dynamic is likely to operate most powerfully when implementation is complex and extensive, and political stakes are relatively low. But as regulatory agreements proliferate and the line between domestic and international policy fades, domestic institutions will play an ever more prominent role in determining state choices toward cooperation and, ultimately, in determining international outcomes.

<sup>100</sup> 447 U.S. 303 (1980); see also *In re Hibbard*, 227 U.S. P.Q. 443 (1995).

<sup>101</sup> See Stephen Krasner, "Global Communications and National Power: Life on the Pareto Frontier," *World Politics* 43 (April 1991).

<sup>102</sup> Governments may intentionally use international agreements as levers to circumvent or alter domestic institutions or processes; see, e.g., Goldstein (fn. 17).